



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 656/2013
Reportable

In the matter between:

EXPRESS MODEL TRADING 289 CC

APPELLANT

and

DOLPHIN RIDGE BODY CORPORATE

RESPONDENT

Neutral citation: *Express Model Trading 289 CC v Dolphin Ridge Body Corporate*
(656/13) [2014] ZASCA 17 (26 March 2014)

Bench: Ponnann, Leach, Petse and Saldulker JJA and Mocumie AJA

Heard: 4 March 2014

Delivered: 26 March 2014

Summary: Lapsed appeal – refusal of condonation – winding-up of close corporation – recurrent obligation - whether creditor lost its *locus standi* in consequence of payment of original debt by third party.

ORDER

On appeal from: Western Cape High Court, Cape Town (Dolamo AJ sitting as court of first instance):

- (a) The application for condonation is dismissed with costs.
 - (b) The applicant for condonation is ordered to pay the costs incurred by the respondent in opposing the lapsed appeal.
 - (c) In both instances (a) and (b) the costs shall include the costs of two counsel.
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JUDGMENT

Ponnan JA (Leach, Petse, Saldulker JJA and Mocumie AJA concurring):

[1] After the record had been filed in this matter the appeal lapsed for failure on the part of the appellant (now the applicant) – Express Model Trading 289 CC (Express Model) – to prosecute it by timeously filing its heads of argument. The initial question that is before us is whether the default by Express Model should be condoned and the appeal revived. Before turning to that question, it is necessary to describe how the appeal arose and the circumstances in which it came to lapse.

[2] During February 2010 the respondent, the Dolphin Ridge Body Corporate (the body corporate), a body corporate incorporated as such in terms of s 36 of the Sectional Titles Act 95 of 1986 for a residential sectional title development north of Bloubergstrand known as Dolphin Ridge (Dolphin Ridge), applied to the Western Cape High Court for the winding-up of Express Model. Express Model had been the developer of the development and still owned several units in Dolphin Ridge. In support of that application, Mr Larry Smulowitz, the chairperson of the body corporate, stated:

8. In terms of Section 37(1) of the Sectional Titles Act, the Respondent is liable for payment of monthly levies in respect of the aforementioned Sections owned by Respondent and its undivided share in the common property apportioned to that Section in terms of Section 32 of the Sectional Titles Act.

9. The Respondent has, for a number of years, failed to make payment of levies upon the aforesaid basis when it became due and payable. This problem was compounded by the fact that Respondent, from the date of Applicant's inception, effectively succeeded in controlling the election of trustees and consequent actions by the trustees. In this instance, the Respondent's member, Mr Saliem Mohammed Hassan and persons nominated and elected by him (as a representative of Respondent and other entities controlled by Mr Hassan) effectively controlled the actions of the Body Corporate in their capacity as trustees.

10. The Respondent's voting rights as aforesaid was annually secured by making payment of arrear levies before or at the Annual General Meeting. Due to the substantial amount of such levies (based on Respondent's ownership) such actions were obviously severely prejudicial to Applicant's financial management.

11. At Applicant's most recent Annual General Meeting held on 18 November 2009, Respondent again made payment of arrear levies in securing its voting rights. At this meeting the balance of the Applicant's property owners however secured a majority vote by mobilising members and conducting trustee elections on the applicable participation quota as provided for in Section 32 of the Sectional Titles Act. None of Respondent's or Mr Hassan's nominees or were elected as trustees.

12. The Respondent has failed to make payment of any levies subsequent to the payment referred to hereinabove. Consequently and on 23 December 2009, the Applicant, through its attorneys of record, caused to be served a formal letter of demand to Respondent for payment of arrear levies as at December 2009. Such Letter of Demand was addressed to Respondent at its registered office and transmitted by registered post. This correspondence also serves as a formal notice in terms of Section 69(1) of the [Close Corporations] Act . . .

13. Updated statements as at February 2010, supported by a detailed summary reflecting the current outstanding balance as R137,634.92, is annexed hereto . . .

APPLICABILITY OF SECTION 68 AND 69 OF THE CLOSE CORPORATIONS ACT

14. It is accordingly submitted that the Respondent falls to be wound-up by virtue of the provisions of Section 69 of the Act, in that the Respondent has neglected for 21 (twenty one) days after proper demand was served upon it at its registered office, to pay the outstanding sum or to secure or compound the sum to Applicant's reasonable satisfaction.

15. In addition to the aforesaid it has most recently come to Applicant's knowledge that in addition to the basis stated hereinabove, good cause exists to justify an inference that Respondent is unable to pay its debts. These are the following:

15.1 During a telephone conversation between Applicant's attorney of record and Mr Michael Jennings the attorney of record for Respondent, it was confirmed that Respondent is, in addition to its indebtedness to Applicant, involved in formal legal proceedings in terms whereof the Respondent has incurred substantial financial obligations through an order of court and that Respondent is unable and unwilling to meet such obligations. . . .'

In a confirmatory affidavit, Richard Dixon, the body corporate's attorney of record, stated:

'5. I was telephonically contacted by Mr Michael Jennings Attorney (acting on behalf of Respondent) on 17 February 2010. During the conversation Mr Jennings confirmed Respondent's receipt of Applicant's Notice in terms of Section 69 of the Close Corporations Act.

6. It was further confirmed that Respondent was currently involved in High Court litigation in respect of an Order granted against Respondent during 2009 in terms whereof Respondent will, in compliance with such order incur substantial financial obligations. Respondent is unable or unwilling to do so at this stage.

7. It was also confirmed that the Respondent is, at this stage, indebted to the City of Cape Town in a substantial sum which it is neither in a position to pay.

8. Despite my confirmation that Applicant intends to proceed in the current manner, payment or an undertaking to pay was not forthcoming.'

[3] The response that those allegations elicited from Mr Mohammed Hassan, the sole member and controlling mind of Express Model, was:

'11.2 Applicant has instituted these proceedings against Respondent and has a liquidated claim as set out in its papers. Respondent avers that the amount is not due and payable as Respondent has a *bona fide* defence to and a Counterclaim against Applicant's claim. Respondent will aver that Applicant has failed to perform its duties and responsibilities in accordance with the Sectional Titles Act 95 of 1986 and as a result of this failure Respondent shall assert that it is not liable for these levies;

11.3 Respondent is able to pay its debts in the ordinary course of business;

11.4 Respondent is able to provide a guarantee for the due payment of any obligations which this Honourable Court may find is due and payable to Applicant by Respondent;

11.5 Respondent has sufficient assets which it could liquidate, if necessary, to satisfy any indebtedness to Applicant, which process would not leave Respondent unable to continue operating profitably.

11.6 Respondent's Assets are sufficient to cover all of its liabilities, whether to Applicant or any other creditor.

11.7 Applicant's letter in accordance with s 69(1) of the Close Corporations Act 60 of 1984 . . . is incorrect and fatally flawed.

. . .

24. Respondent however denies that its late payment of levies in any manner prejudiced Applicant's financial management, and Respondent avers that Applicant has at all times had funds in its account for due performance of its duties.

. . .

31. Accordingly I deny that the amount of R 77 156,00 was due and payable at the time Applicant sent out the material letter. In fact at most, and in accordance with Applicant's statements, Respondent would have been in arrears for one month at this time, subject to its defence and Counterclaim, which alleged arrears would have been in the amount of R 40 878,00 at the time.'

Significantly, Mr Hassan did not dispute that all of the levies had not been timeously paid or that some of it was in arrears as alleged. In fact Mr Hassan admitted that R40 878 was then due and payable. Nor, was it disputed that the body corporate's demand in terms of s 69(1)(a) of the Close Corporations Act 69 of 1984 had been served on Express Model's registered address and that no part of the outstanding amount claimed had been secured or compounded to the satisfaction of the former. Mr Dixon's affidavit did not elicit a response from Mr Jennings.

[4] The issues raised by Mr Hassan were dealt with in a detailed replying affidavit deposed to by Mr Smulowitz. It was pointed out in that reply, *inter alia*, that Express Model was a purely property holding enterprise with no other income aside from the rentals it received from some of the units that were let to tenants; and that in any event its rental income was insufficient to cover the monthly mortgage bond payments, levies, municipal rates and taxes and other expenses attributable to that enterprise. It was also pointed out that Express Model's assets, which Mr Hassan had somewhat laconically asserted were worth R55 million, were not readily realisable. It was further asserted that Express Model's indebtedness to the body corporate had in the meantime increased to R413 671.84. The body corporate moreover complained that because Express Model's monthly levy obligations to it comprised some 38 per cent of the total levy obligation for Dolphin Ridge, the former's refusal to pay the levies impacted substantially on the body corporate's ability to properly maintain Dolphin Ridge.

[5] The matter came before Fortuin J, who on 31 August 2010 ordered that Express Model be placed under a provisional order of winding-up returnable on 6 October 2010. On 1 October 2010 the sum of R337 390.12 being the arrear levies was paid by an undisclosed third party to the provisional liquidator, Mr Christian Bester. The matter was thereafter postponed on several occasions at the behest of Express Model. It was agreed between the parties that in the interim additional affidavits would be filed by them and that in view of the payment of the arrear levies that had been made by an undisclosed third party, Mr Bester would file a preliminary report on the financial position of Express Model with the court.

[6] The matter ultimately served before Dolamo AJ, who, on 22 February 2012, placed Express Model under a final order of winding-up. On 15 August 2012 the learned judge dismissed with costs an application by Model Express for leave to appeal against that order. However, on 27 November 2012 and pursuant to a petition addressed to this court, Bosielo et Tshiqi JJA granted leave to Express Model to appeal to this court against the order of Dolamo AJ. In respect of costs, the order granting leave to appeal stated: 'The costs order of the court a quo in dismissing the application for leave to appeal is set aside'. Counsel were agreed, however, that it should in addition also have read: 'The costs of the application for leave to appeal in this court are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs' - that being the usual order that issues by this court in an instance such as this. It follows that the order granting leave to appeal to this court should accordingly be amended by the incorporation of the latter order.

[7] Pursuant to the grant of leave to appeal, the record of appeal was filed with the registrar of this court on 9 May 2013 and in terms of SCA rule 10(1)(a) Express Model had six weeks (namely until 20 June 2013) within which to file its heads of argument. However, it only came to file its heads of argument on 16 August 2013. SCA rule 10(2A)(a) of this court makes it plain that '[i]f the appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse'. Express Model accordingly sought condonation for its failure to timeously file its heads of argument with the registrar of this court. That application was opposed by the body corporate.

[8] As it was recently put in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited* [2013] 2 All SA 251 (SCA):

‘[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Company Limited and another v McKenzie* 1969 (3) SA 360 (A) at 362F-G). . .

[12] In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at paragraph 6 this Court stated:

“One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

[13] What calls for some acceptable explanation is not only the delay in the filing of the heads of argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay (*Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H).’

[9] I shall assume in Express Holding’s favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to this court. In respect of the remaining factors, however, it is difficult to be as charitable to it. Mr Barry Michael Jones, Express Holding’s Bloemfontein attorney, who deposed to the affidavit in support of the application for condonation stated:

‘10.

During or about **May 2013**, Adv Paul Zietsman SC in BLOEMFONTEIN was approached in order to ascertain as to his availability to argue the appeal on behalf of the Applicant / Appellant. He agreed to represent the Applicant / Appellant. Further arrangements were made by the member of the Applicant / Appellant in order to secure the necessary funding. However, the date on which the heads of argument were to be filed by, was not initially mentioned to Adv Paul Zietsman SC.

11.

After receiving instructions from Messrs Michael Jennings Attorneys, I formally proceeded to brief Adv Paul Zietsman SC as well as Adv Stelios Tsangarakis during the month of **June 2012** from the Bloemfontein Bar to attend to the drafting of the heads of arguments on behalf of the Applicant / Appellant.

12.

I did not realise however, that Adv. Paul Zietsman SC was called upon to act as an Acting Judge of the High Court in the Free State, BLOEMFONTEIN for the month of **June 2013**, and that he was therefor unable to compile the said heads of arguments before the **20th June 2013**.

13.

Furthermore, Adv. Stelios Tsangarakis indicated to Michael Jennings and I that he was involved in an arbitration matter before retired Justice **van Dijkhorst** for the first three weeks in **July 2012** in PRETORIA. Consequently this matter would not enjoy his attention as he was involved in preparation for such arbitration.'

[10] But as Mr Herman Anton Botes, the body corporate's attorney, who deposed to the answering affidavit in opposition to the application for condonation, was quick to point out, Express Model had failed on an earlier occasion to comply with the rules of this court. He stated:

'10. Express Model Trading was required to file the record of appeal by 25 April 2013 in terms of Rule 8(1) of the Supreme Court of Appeal Rules ("the Rules").

11. Although a record of appeal was filed by Express Model Trading on 25 April 2013, a copy of which was also delivered to me as Dolphin Ridge BC's attorney, it transpired that the Court Registrar rejected the record on 25 April 2013 due to deficiencies in it, and afforded Express Model Trading ten days to rectify the deficiencies. In doing so the Registrar was presumably acting in terms of Rule 8(2)(b) of the Rules.

12. I was unaware that the record had been rejected. I accordingly expected Applicant's heads of argument to be lodged within six weeks after 25 April 2013 in terms of Rule 10(1)(a) of the Rules.

13. When no heads of argument were lodged, I made enquiries of the Registrar. I was then informed for the first time that the record had been rejected, but that Express Model Trading had been afforded an additional ten days to rectify the deficiencies. I was informed by the Registrar that an improved record was filed on 9 May 2013 and that the date for the filing of Express Model Trading's heads of argument was therefore extended to 20 June

2013. This was later confirmed to me in correspondence from my local attorney of record (Mcintyre and Van der Post), a copy of which is annexed as “HB1”.

Moreover, according to Mr Botes, there were significant gaps in Express Model’s explanation. In that regard he observed

’17. The date when Adv Zietsman was ostensibly approached for the first time “*during or about May 2013*” is not stated. There is moreover no explanation why Adv Zietsman was not approached earlier in April when Express Model Trading’s attorney must have known that heads of argument would be due within six weeks from the date of the filing of the record and when it was anticipated that the record would be filed by 25 April 2013.

18. Jones does not explain why the date for the filing of heads of argument was not mentioned to Zietsman. It is incomprehensible that counsel was requested to indicate his availability to compile heads of argument, when counsel was ostensibly not informed when the heads of argument would be due.

19. Jones says that “*further arrangements were made by the member of [Express Model Trading] to secure the necessary funding*”. He is careful not to reveal when this was done, or why it was evidently done at such a late stage. It is not clear whether this statement was included to suggest that the obtaining of funding was an additional factor that gave rise to the delay, but if it was, entirely inadequate details have been furnished to demonstrate sufficient cause for that reason.

20. There is, further, no explanation by Jones why Advocates Zietsman and Tsangarakis were only briefed during June 2012, and he is careful not to indicate exactly when in June 2012 they were briefed.

21. There is also no explanation why Adv Tsangarakis was not contacted earlier to ensure that he was available to compile the heads of argument.

22. There is no explanation why Adv Zietsman failed to mention when he was approached in May that he was called upon to act as an Acting Judge of the High Court for the month of June, when it must have been obvious that heads of argument would be due imminently.

23. Although Adv Tsangarakis was purportedly not available for the first three weeks in July 2013, there is no indication why Adv Tsangarakis was not in a position to compile the heads of argument in June, when he clearly was available.

24. Finally, if the unavailability of counsel had any bearing on the failure timeously to file heads of argument, there is no explanation for why alternative counsel were not engaged.

25. In summary, in the circumstances described in these paragraphs of Jones’ affidavit, the unavailability of counsel to attend to compiling the heads of argument falls significantly

short of an explanation evidencing good or sufficient cause for the purposes of condonation in this case.'

[11] Faced with some explanation, albeit one on the face of it that appears to be deliberately opaque and far from adequate, counsel was directed to address the merits of the appeal so as to enable us to assess Express Model's prospects of success and to weigh that together with the other relevant factors in this case. The thrust of the argument advanced on behalf of Express Holdings, as I understood it, was that although the high court could not be faulted for granting a provisional winding-up order, the same did not hold true in respect of its conclusion that a final order was warranted. In support of that contention three submissions were advanced: first, that the body corporate had lost its *locus standi* because of the payment of the outstanding levies by the third party on 1 October 2010; second, that Express Model was able to pay its debts; and, third, that in any event, and if necessary, Express Model had sufficient assets that it could liquidate to cover all of its liabilities.

As to the first:

[12] The body corporate contended it had not lost its *locus standi* in consequence of the payment from the third party inasmuch as: (a) that payment did not have the effect of settling Express Model's entire indebtedness to it; and (b) the levies and other charges were an ongoing payment obligation, which Express Model through a long pattern of non or late payment had demonstrated a persistent inability to pay. In that regard, Mr Smulowitz stated:

'17. It is common cause that the Respondent's indebtedness to Applicant in the sum of R338 000.69 was paid in October 2010. As indicated above, that payment did not include outstanding amounts for accumulated interest for September and October 2010. As at the date of payment, therefore, Respondent still remained indebted to Applicant in the respect of accumulated interest for the latter 2 months, being R18 061.95.'

Moreover, as Mr Bester noted in his interim report:

'5.1 Shortly after the provisional order of liquidation was granted by the Honourable Court, the total amount of the Dolphin Ridge BC's claim (as at 1 October 2010) in the amount of R337 390.12 was settled by third parties as follows:

5.1.1 R250 000.00 was paid by Billmont 104 CC on 1 October 2010 . . .

5.1.2 R87 390.12 was paid by Class A Trading 480 CC on 1 October 2010 . . .;

5.2 Since 1 October 2010 to 31 March 2011 the Dolphin Ridge BC's monthly recurring levies again accumulated to R504 932.84 . . . The Dolphin Ridge BC's monthly levies are administration costs (in provisional liquidation) and needs to be paid by the provisional liquidator if funds are available to do so.

5.3 The amount owing, due and payable for levies for the month of April 2011 is R55 472-50.

5.4 It remains however a contingent creditor of the corporation as contemplated in Section 346(1)(b) of the Companies Act.'

[13] Tellingly, Mr Hassan's response to those allegations was:

'46. As a matter of fact the Respondent avers that the levies were paid until the end of October 2010. As a consequence, the levies are outstanding from 01 November 2010 to end of March 2011 should have been paid by the provisional liquidator. The Respondent avers that the duty to pay the levies while the corporation is under provisional liquidation, herein, derives from the provisional liquidator's duties and functions to preserve the status quo in accordance with the Act.'

But, as Mr Smulowitz pointed out:

'46. Payment of levies in the circumstances of this case would certainly fall within the provisional liquidator's obligations. In this case the provisional liquidator has made payment in respect of levies to the extent that funds were available from the income of the Respondent to do so. Significantly, however, the Respondent's income is insufficient to cover the levy payments and all other costs of administration of the assets required for each month, and the Respondent's again, inter alia, fell in arrears with the payment of levies after the provisional liquidation order was granted. I refer the Honourable Court to the supplementary affidavit of the provisional liquidator, Bester, filed simultaneously herewith.'

[14] Thus even if the payment by the third party had wiped the slate clean, as one is dealing with a relationship between the body corporate as creditor and Express Model as debtor in relation to a recurrent debt in the form of monthly levies and charges, for as long as the latter continued to own properties in Dolphin Ridge, the body corporate (as Mr Bester correctly observed) remained a prospective creditor of Express Model. That legal relationship is established by the provisions of the Sectional Titles Act. In *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 528 Trengove J defined a prospective creditor as 'one who by reason of some existing *vinculum juris* has a claim against a company

which may ripen into an enforceable debt on the happening of some future event or on some future date'. And as to what is meant by the term *vinculum juris*, Nestadt J observed in *Holzman NO v Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 787E-F that 'there must I consider be a legal obligation which creates a right enforceable in a court of law. It can arise either from contract or delict' Nestadt J added (at 787G): 'It is clear therefore that the claim of the "creditor" need not be due or payable at the date of the presentation of the application for winding-up . . . But it is essential that there actually exists a *vinculum juris* with the company. It does not suffice that it will probably arise in the future'.

Counsel for Express Model was thus constrained to concede that he had some difficulty in persisting with the submission that the body corporate had lost its *locus standi* after payment of the sum upon which the application was originally founded.

As to the second

[15] According to Mr Bester, as against Express Model's monthly rental income of R171 505, it had the following monthly obligations:

4.2.1	Dolphin Ridge Body Corporate	=	R 52 779.50
4.2.2	S A Home Loans:		
	monthly bond instalment	=	R 31 685.92
4.2.3	Nedbank:		
	monthly bond instalment	=	R 94 740.95
4.2.4	City of Cape Town (monthly rates		
	and taxes) (see 4.3.4 herein under)	=	R 9 689.19'

Those monthly obligations were not disputed by Mr Hassan. There were as well other expenses that were placed in dispute by Mr Hassan. Those I leave out of the reckoning. Thus on the undisputed figures, Express Model's inability to pay its debts as and when they fell due have been adequately and convincingly demonstrated on the papers. In those circumstances the following observation by Innes CJ in *De Waard v Andrews & Thienhaus, Ltd* 1907 TS 727 at 733 would appear apt:

'Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, "I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities." To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.'

[16] As a further string to his bow, counsel called in aid the following dictum from *Helderberg Laboratories CC v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C) para 16 (Fourie J, Davis and Goliath JJ concurring):

‘I respectfully disagree with the finding of the court a quo, that the fact that the payment of the admitted indebtedness was made by a third party on behalf of first to fourth appellants, justifies the inference that the said appellants were unable to pay their debts. In my view, the ability of a company or close corporation to pay its debts may be demonstrated by itself making payment or by its ability to obtain the necessary finance from an exterior source. In the latter instance the creditworthiness of the debtor would normally enable it to raise the necessary funds. As submitted by Mr *Brusser*, the emphasis in determining the ability of a company or close corporation to pay its debts should be on the fact of payment and not on the source of the payment.’

To the extent that the full court held that the mere fact that a debt is paid by a third party did not *per se* justify the inference that a debtor is unable to pay the debt - that may as a general proposition be unobjectionable. But, the last sentence of the quoted passage appears to me to state the position rather too widely. An enquiry of this kind, I do believe, is fact-based. Thus as important as the fact of payment, may well be the source of payment. A debtor’s ability to raise a loan from a third party may indeed be a demonstration of its creditworthiness. On the other hand, it could conceivably demonstrate the exact opposite, where (as here) it amounts to no more than borrowing from Peter to pay Paul. Unlike in *Helderberg*, where the funds appear to have been borrowed pursuant to an arm’s length transaction from an unrelated entity, here, Express Model’s benefactor initially remained undisclosed. It subsequently emerged that assistance was obtained from corporate entities, namely Billmont and Class A Trading, who as part of Mr Hassan’s stable of corporate entities, enjoyed a fraternal relationship with Express Model. Mr Bester explains:

‘The Corporation is surety for the debts of Billmont No. 104 CC to Rand Merchant Bank (“RMB”). Billmont is a “subsidiary” of the corporation. RMB registered surety bonds over the remaining units of the corporation in liquidation, which surety bonds were registered in the capital amount of R18 000 000.00 (excluding the additional amounts). The current outstanding amount owing by Billmont to RMB amounts to R25 300 000.00 (see “A3”). The full suretyship obligation forms a contingent liability in the books of the corporation and must be taken into consideration in its liability statement. RMB has submitted two requisitions in the provisional liquidation of the corporation (see “K1” and “K2”), and I have established that Billmont is currently in arrears with its payments to RMB.’

It follows that no inferences favourable to Express Model's creditworthiness or its ability to raise arm's length funding can accordingly be drawn.

As to the third

[17] Objectively assessed, Express Model's liabilities fairly valued do indeed appear to exceed its assets fairly valued. In that regard Mr Bester records:

'Due to the conflicting values placed on the properties by the different parties I requested Claremart Auctioneers to do a valuation of the properties to establish the fair value thereof for purposes of this report. Enclosed hereto and marked annexure "H" is a copy of the valuation(s) prepared by Claremart Auctioneers, indicating that the combined value of the properties amount to R25 640 000.00.

The combined value of the immovable properties of the close corporation, fairly valued, therefore amounts to R26 990 000.00 (inclusive of "E").

3.2 Note to assets

3.2.1 The other assets listed by the corporation in its management financial statements ("A3") is stock (R102 363), accounts receivable (R674 362) and cash in trust R137 636);

3.2.2 I cannot comment on the accuracy of these claims or averments at this stage;

3.2.3 The only other asset which the corporation lists is goodwill. As the corporation is solely a property holding (and leasing) enterprise, no value can be placed on any goodwill;

...

Having due regard to the enclosed documentation the liabilities of the corporation can be summarized as follows:

3.3.1 Mortgagee: (Nedbank – as at 23 August 2010)	=	R 7 055 355.53
3.3.2 Mortgagee: (SA Home Loans – as at 23 Aug. 2010)	=	R 3 206 380.40
3.3.3 Loan from member (see 3.4.3 herein under)	=	R10 836 727.00
3.3.4 Rand Merchant Bank (suretyship obligation for Billmont 104 CC) (See 3.4.2 herein under)	=	R18 000 000.00
3.3.5 SARS (owing by corporation according to financial statements)	=	R 646 454.00
3.3.6 SARS (additional interest payable as per "I") (see 3.4.6)	=	R 97 020.10
3.3.7 City of Cape Town	=	R 217 570.08
3.3.8 Accounts payable	=	R 439 864.00
TOTAL		R40 499 371.11

3.4 Notes to liabilities

3.4.1 The outstanding amounts reflected on the mortgage bond loans as at 23 August 2010. I do not know if the monthly bond instalments on these separate bonds have been paid by third parties since the aforesaid date.

...

3.4.3 According to the corporation's financial statements, Hassan's loan to the corporation amounted to R15 175 493.00 in 2008 (see "A1"). The loan was reduced to R10 836 727.00 by 31 August 2010 (see "A3"). It follows that the difference of R4 338 766.00 represents repayments to Hassan during the aforesaid period. The repayment appears to have been made by the corporation by raising loans from the bank against the security of mortgage bonds registered against the corporation's properties.

3.4.4 The amount owing to the City of Cape Town was determined from the invoices submitted by the City to the managing agent of the Dolphin Ridge BC. I note that Hassan disputes this liability. However, he reflects the rates and taxes as monthly expenses in the corporation's financial statements;

That led Mr Bester to conclude that 'the corporation's current liabilities (fairly valued) exceed its current assets (fairly valued), and it follows that the corporation is currently insolvent'. A conclusion that, I daresay, cannot be assailed.

[18] One final aspect merits mention. Once the winding-up order issued, Express Model's position 'crystallised' and 'the hand of law' was laid upon its estate (*Walker v Syfret NO* 1911 AD 141 at 166). The liquidator then entered upon the winding-up of Express Model. And as it was wound up *inter alia* on the ground that it was unable to pay its debts, the operation of the order remained in force despite the appeal (*Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 (2) SA 768 (W)). A period in excess of three years has since elapsed. The winding-up has progressed apace. In those circumstances it may indeed prove impossible to turn back the clock. It may thus be arguable that this appeal has become academic. But it is perhaps not necessary to go that far. It suffices for present purposes to record that since the winding-up order issued Express Model's position appears to have become even more dire. That much emerges from Mr Botes' affidavit, where he states:

'39. On 1 August 2013 I addressed further correspondence to Express Model Trading's attorney in which I conveyed to him that the liquidators were proceeding with the winding-up of Express Model Trading. A copy of the correspondence is annexed hereto marked "HB4". No reply was received thereto.

40. To date R38 522 206.11 worth of claims have been proved in the liquidation of Express Model Trading. That includes Rand Merchant Bank's claims against Express Model Trading in the sum of R25 370 114.30 arising out of the mortgage bonds registered over certain of Express Model Trading's Dolphin Ridge units as security for the bank's loans to Billmont 104 A CC, which have in the meantime been called up by Rand Merchant Bank due to Billmont's failure to service the monthly loan installments.

41. In addition, the following amounts are owed by Express Model Trading:

41.1 The debit balance on Nedbank account number 8849003600101 is R596 716.86;

41.2 The debit balance on Nedbank account number 8966217619001 is R1 025 902.02;

41.3 The debit balance on Nedbank account number 8966217619901 is R1 060 643.08;

41.4 The debit balance on Nedbank account number 8157809570901 is R 1258 466.45;

41.5 A judgment was obtained by Leopard Rock Home Owners Association in the amount of R84 000.00;

41.6 The loan account of Express Model Trading's sole member, Mr Hassan, is reflected in financial statements as R10 836 727.00;

41.7 Tax due to the Receiver of Revenue is R743 474.10;

41.8 Further accounts payable, as reflected in the financial statements, amount to R439 864.00;

41.9 Arrears rates and taxes to the City of Cape Town of approximately R1 million.

42. The total of the aforesaid additional liabilities is in excess of R17 million and therefore, Express Model Trading's total liabilities at this stage exceeds R55 567 000.00.'

[19] It appears from all of this that the applicant at all material times has been in a position in which it is unable to pay its debts and it thus has no prospects of success on appeal. It follows that the lack of attention to detail in the application for condonation - particularly in respect of matters that obviously called for an explanation - taken together with the non-existent prospects of success on appeal renders it impossible to justify the grant of condonation.

[20] In the result:

- (a) The application for condonation is dismissed with costs.
- (b) The applicant for condonation is ordered to pay the costs incurred by the respondent in opposing the lapsed appeal.
- (c) In both instances (a) and (b) the costs shall include the costs of two counsel.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

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Instructed by:

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