

SOUTH AFRICA / JUDGMENT

Ansafon (Pty) Ltd v Diamond Core Resources (Pty) Ltd and Others (318/2010)

[2010] ZANCHC 23 (18 June 2010)

[2010] ZANCHC 23

COURT

Northern Cape High Court, Kimberley

BEFORE

Majiedt

CASE / FILE NUMBER

318/2010

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IN THE HIGH COURT OF
SOUTH AFRICA(Northern Cape High Court,
Kimberley)

Case no: 318/2010

Date heard: 2010-06-09

Date delivered: 2010-06-18

In the application of:

ANSAFON (PTY) LTD

.....APPLICANT

AND

DIAMOND CORE RESOURCES
(PTY) LTD(IN LIQUIDATION)

.....FIRST

RESPONDENT

BRIAN ST CLAIRE COOPER

NO

JOHAN ENGELBRECHT NO

GARY BOTHA NO

.....SECOND

RESPONDENT

RIVER CORPORATE

FINANCE (TPY) LTDTHIRD

RESPONDENT

Coram: MAJIEDT

J

JUDGMENT

MAJIEDT J:

This is an application, brought ex parte and without notice, for a rule nisi calling on interested parties to show cause why the winding-up of the first respondent (“the company”) should not be set aside in terms of s 354(1) of the Companies Act, 61 of 1973 (“the Act”). The basis for the application is that it falls to be set aside by reason of subsequent events.¹

Briefly stated, it is the applicant’s case that it desires to take the company out of liquidation, to pay its creditors, to re-employ the former employees and to restore the company to profitability. I may add at this stage that it is common cause that the company is not factually insolvent, inasmuch as its assets far exceed its liabilities.

The second respondent is the joint liquidators, Mr. Brian Cooper NO and Mr. Johan Engelbrecht NO. The third joint liquidator, Mr. Gary Botha NO, resigned as a joint liquidator under circumstances which are not relevant at this stage. The third respondent is a creditor of the company, namely River Corporate Finance (Pty) Ltd., at whose behest the company had been finally liquidated in this Court on 8 July 2009. The third respondent initially joined the second respondent in opposing this application, but after a settlement had been concluded between the applicant and the third respondent in terms of a written option agreement whereby the third respondent’s claim against the insolvent estate was settled, it switched sides and now supports the application.

The joint liquidators have raised a number of grounds on the papers as to why the application should be dismissed at this stage. For reasons that will become apparent, I do not intend dealing with these issues, except for two of them, namely the applicant’s locus standi and its bringing of the application without notice on an ex parte basis. Given the conclusion that I have come to, it seems to me prudent and advisable not to traverse the numerous issues raised,

since they will be more appropriately have to be dealt with on the return day of the rule nisi which I intend inssuing. For reasons which are self-evident, I will limit this judgment to the bare essentials on the two issues referred to above.

The company was placed in final liquidation due to commercial insolvency, i.e. its inability at the time of its liquidation to pay its creditors. The company experienced severe cash flow problems, the reasons for which are not relevant at this time. It will suffice to state that on the papers and as conceded by the applicant, the fact of its commercial insolvency was clearly established. This inability to pay its creditors also coincided with a period of severe global economic downturn, which seriously affected the company’s operations in the diamond mining industry. The Master has raised a number of queries, most of which coincide with the issues raised by the joint liquidators in their opposing papers. I turn now to discuss the issues of locus standi and the ex

parte proceedings.

Section 354 of the Act reads as follow:

“(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

- (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.”

It is common cause that the applicant is neither a liquidator nor a member. It relies for its standing to bring this application on the fact that it is a proven creditor. In its founding papers the applicant avers that it had acquired shares in the company from its parent company, BRC Diamond Core Limited (“BRC”), a Canadian company listed on the Toronto Stock Exchange and also on the JSE. It acquired these shares with effect from 1 October 2009, but the joint liquidators declined to sanction the transfer of shares as is required in terms of s 341(1) of the Act. The applicant further avers that “(it) has also either acquired or obtained the support of the majority of creditors who proved claims at the first meeting of creditors of Diamond Core”. It attaches a schedule of these claims in the founding affidavit.

The joint liquidators stated in their opposing affidavit, deposed to by Engelbrecht, that they do not oppose the application in the traditional sense, but merely seek to place factual information before the Court to enable the Court to come to a decision. The joint liquidators’ case is that the applicant has no locus standi to bring the application and also that the bringing of the application on an ex parte basis constitutes an abuse of the process of court. As I have stated, it raises numerous other issues which will more appropriately have to be considered on the return day of the rule nisi. In respect of locus standi the joint liquidators aver that the applicant had not attached any cession in terms of which it obtained rights against the company

from its existing creditors. It objects to the fact that the bald allegation in the founding affidavit was substantiated only in the replying affidavit. The joint liquidators also relied on the provisions of s 52 of the Insolvency Act, 24 of 1936. The joint liquidators’ contention is that, even if it is accepted that the applicant has acquired the claims of proven creditors as it alleges, it does not make the applicant a creditor with voting rights, but only a claimant in the insolvent estate of the company.

I am not persuaded by these contentions that the applicant has no locus standi. The applicant had to satisfy this Court that it has the necessary locus standi on a balance of probabilities. In this regard the standard of proof is no different than the normal standard of proof of facts required to persuade a Court that a winding-up order ought to be set aside (I am mindful of the fact that in instances where an applicant seeks to have a winding-up order set aside in terms of s 354(1) of the Act on the grounds that the winding-up order should never have been granted in the first

place, exceptional circumstances have to be shown). That the normal standard of proof is also applicable to an applicant's locus standi in a s 354-application, was authoritatively laid down in the matter of *Ex parte Strip Mining (Pty) Ltd: In Re Natal Coal Exploration Co Ltd* (in liquidation).² In the opposing papers the joint liquidators do not unequivocally dispute the allegation made by the applicant in its founding

affidavit that claims no 52 to 70 as it appears on the list of creditors attached to the papers, have been acquired by the

applicant. Moreover, the applicant relies specifically on the cession of a claim of one of those creditors, namely Scallan Project

Facilitators (Pty) Ltd and attaches proof thereof. On the facts therefore the applicant's contentions must be upheld. The

joint liquidators' reliance on the provisions contained in s 52 of the Insolvency Act is misconceived. The provisions of s 54(4), which is applicable in the present circumstances, reads as follows:

"(4) A creditor may not vote in respect of any claim which was ceded to him after the commencement of the proceedings by which the estate was sequestrated."

As was correctly pointed out on behalf of the applicant in argument, a creditor is not defined in the Act. It bears its ordinary dictionary meaning, namely someone to whom a sum of money is owed. Section 52(4) in my view simply provides that a cessionary, to whom a claim of a proven creditor in an insolvent estate has been ceded, is a non-voting creditor. It is still, however, a creditor for purposes of s 354 of the Act. It is well to remember that a creditor in the Act also includes a contingent and prospective creditor.³ I am therefore of the view that the applicant has the requisite locus standi to bring the application under s 354 of the Act, since it is a non-voting creditor for purposes of that section.

I now turn to consider the joint liquidators' objection in respect of the form in which the proceedings was brought by the applicant. The Master also raised this pertinently in his queries to which I have alluded before. I initially shared this sense of disquiet concerning the fact that the application was brought without notice to at least the Master and the joint liquidators. It is suggested by the Master and in fact alleged by the joint liquidators that this is a stratagem of subterfuge employed by the applicant to procure an order by stealth. The applicant explained in the papers and in argument that the employment of an *ex parte* procedure to obtain a rule nisi, without seeking any interim relief, was merely to obtain directions from the Court as to notice and service of the papers on all interested parties. It was pointed out that since no interim relief was sought, there could be no possible prejudice accruing to any creditor, the joint liquidators or the Master. I think that submission is sound. An analogy was drawn between these proceedings and that of substituted service or edictal citation.⁴ While it is true that no possible prejudice can ensue since no interim relief was sought, the rule nisi procedure is not strictly necessary.⁵ Even though no interim relief was sought, the applicant should nevertheless in my view have given

notice of the present application

to the Master and the joint liquidators, even though this may amount to an abundance of caution. Be that as it may, my finding that there is no prejudice to any interested party, is really the end of the matter. In any event, the contention by the joint liquidators that a rule nisi would stymie the liquidation process, is effectively trounced by a letter from the Master to the joint liquidators dated 17 May 2010 advising that the joint liquidators' right to sell movable and immovable property in the present liquidation process is temporarily withdrawn, by reason of the fact that there is a directive from the Director General of the Department of Justice and Constitutional Development that the sale of diamonds and diamond mines are not to be effected until further notice. To conclude and in summary I find that although unwise, there is no legal impediment to the form in which the applicant has brought this application, namely *ex parte* and without notice.

Taking into account the above findings, it seems to me that the main application in terms of s 354 of the Act should therefore be set in motion so that all interested parties may be granted an opportunity to show cause on the return day why the order should not be granted in final form. The applicant's stated objective is to bring the company out of liquidation, to settle its debts, fund its operations and to restore it to profitability. In this regard it has taken tangible steps to pay some of the proved creditors, to provide security for the payment of others and to provide security for the joint liquidators' administration costs as determined by the Master. I say no more about the prospects of the applicant succeeding with the present application, nor do I traverse the serious issues raised by the joint liquidators and the Master. This, as I have stated, should properly be considered on the return day.

At the commencement of the proceedings the applicant handed up an amended Notice of Motion which removes any references to the third respondent (who as I have stated now supports the application) and makes provision for service on a Mr. Fortein who belatedly filed an affidavit in which it is averred that he represents a number of the company's ex-employees who wish to participate in the further proceedings herein. The amended Notice of Motion also allows for security for the claims of two of the alleged creditors in the insolvent estate whose claims are disputed on the papers by the applicant, namely those of Messrs Campbell and Botoulas. In the order that I am going to issue I will set finite dates for the filing and delivery of further affidavits herein. I was urged by the joint liquidators not to permit the filing of further affidavits. It seems to me that while there is some merit in the contention that the applicant has elected to deal to some extent with the grounds on which it seeks the setting aside of the winding-up order, that it cannot be said that it sought to set out its entire case on the papers as they stand at present. The interests of justice require that further affidavits be permitted so as to ventilate all the issues and also for other interested parties, such as the ex-employees of the company who may wish to advance further reasons for or against the

setting aside, to be able to do so.

I make the following order:

A rule nisi do hereby issue calling on all interested parties to show cause before this Court on the 27th day of September 2010 at 10h00 why an order in the following terms should not be made:

That all proceedings in relation to the winding-up of the first respondent, Diamond Core Resources (Pty) Limited (in liquidation) registration number 1998/013468/07 be set aside.

Directing any person who unsuccessfully opposes the application to pay the applicant's costs occasioned by such opposition.

Directing the joint liquidators of the company in liquidation (the second respondent) to pay the applicant's costs occasioned by the opposition *de bonis propriis*.

Further and/or alternative relief.

The applicant is directed, prior to the return day, to provide security in a form acceptable to the Registrar of this Court in respect of:

The proved claim of Craig Campbell in the sum of R1 331 057.22 together with interest and costs and the proved claim of Theodoros Botoulas in the sum of R9 734 748.00 together with interest and costs;

The fair and reasonable administration fees and expenses of the joint liquidators relating to the administration of the first respondent as determined by the Master of this court.

The applicant is to provide a written undertaking before the return day that it will assume joint and several liability as surety and co-principal debtor with the first respondent in respect of the claims of any creditors of the first respondent not referred to herein.

This order is to be served as follows:

On the first respondent at its registered office.

On the second respondent at the office of its attorney of record.

On the third respondent at its place of business.

On the employees of the first respondent by means of service on Mr. Luke Fortein, the duly appointed representative of the employees of the first respondent.

This order, together with a copy of all the papers filed on record on behalf of the applicant, the second respondent and the third respondent together with all annexures thereto are to be furnished via electronically receipted telefacsimile or delivery by hand to each of the creditors of the first respondent as per the list marked Annexure "E5" to the founding affidavit.

A copy of the order is to be published once in the Government Gazette and once in a newspaper circulating in the Northern Cape Province.

The parties are granted leave to file supplementary affidavits as follows:

The applicant and the third respondent are to file supplementary affidavits by no later than Friday 9 July 2010 at 16h00.

The second respondent and all other interested parties are to file supplementary affidavits either in opposition to or in support of the application by no later than Friday 30 July 2010 at 16h00.

The applicant must file its supplementary replying affidavit by no later than Friday 13 August 2010 at 16h00.

The applicant and the third respondent and all other interested parties who support the application are to file their written heads of argument by no later than Friday 3 September 2010 at 16h00.

The second respondent and all other interested parties are to file their written heads of argument by no later than Friday 17 September 2010 at 16h00.

SA MAJIEDT

JUDGE

FOR THE APLICANT : ADV CE PUCKRIN SC AND ADV C WOODROW

INSTRUCTED BY : ENGELSMAN MAGABANE INC KIMBERLEY

FOR THE 1ST RESPONDENT : NO APPEARANCE

FOR THE 2ND RESPONDENT : ADV MM RIP SC AND ADV J VORSTER

INSTRUCTED BY : VAN DE WALL & PARTNERS INC, KIMBERLEY

FOR THE 3RD RESPONDENT : ADV KW LÜDERITZ

INSTRUCTED BY : N.XENOPHONTOS ATTORNEYS, BEDFORDVIEW

1 Compare: Ward and Another v Smit and Others: in re Gurr v Zambia Airways Corporation Ltd 1998(3) SA 175 (SCA) at 180 H.

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2 1999(1) SA1086 (SCA) at 1091 I – 1092 E

2

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3 Compare: s 345(2) of the Act which reads as follows: “In determining for the purposes of ss(1) whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company”.

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4 Another example which springs to mind is attachment to found or confirm jurisdiction.

4

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5 Compare: Ex parte Strip Mining: In re: Natal Coal Exploration Company Limited, supra at 1091 F-G.

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