

SOUTH AFRICA / JUDGMENT

Barnard N.O and Others ; In re TFM Industries (Pty) Ltd (2023–035743)

[2023] ZAGPJHC 420 (3 May 2023)

[2023] ZAGPJHC 420

COURT

South Gauteng High Court, Johannesburg

BEFORE

Malungana

CASE / FILE NUMBER

2023–035743

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case Number: 2023

– 035743

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

In

In the ex parte

application:

ANNEKE

BARNARD N.O

First Applicant

RALPH

FARREL LUTCHMAN N.O

Second Applicant

RANJITH

CHOONILALL N.O

(In their capacities

as the joint provisional liquidators

of TFM Industries

(Pty) Ltd (in liquidation)

Third Applicant

In re

TFM
INDUSTRIES (PTY) LTD (IN LIQUIDATION)
Registration
No: 2005/038362/07
Master's
Ref No: G949/2022
Neutral Citation: Anneke
Barnard N.O & others in re TFM Industries (Pty) Ltd (In
Liquidation) (Case No: 2023 – 035743) [2023] ZAGPJHC 420
(03 May 2023)

JUDGMENT

MALUNGANA AJ

Introduction

[1] The following facts are either common cause or established by undisputed evidence. TFM Industrial (Pty) Ltd ("TFM") is presently in liquidation, a final winding up order having been granted on 7 September 2022.[1] The records of TFM reflect that the creditors have claims in excess of R43 million, whilst its asset are valued at approximately R28,3 million. Prior to the ongoing liquidation TFM was conducting its business from the premises situated at number 33 Industry Road, Olifantsfontein ("the premises"), in terms of the lease agreements concluded with OEC Industrial Holdings (Pty) Ltd and Brilliant Accent Holdings (Pty) Ltd (collectively referred to as "the landlords"). TFM defaulted on its rental obligations, and the new landlord has served a notice of termination of the lease agreements.

The relief sought

[2] The applicants, the joint liquidators of TFM have launched, as a matter of urgency an application in which they seek certain relief. The ipsissima verba of the order sought by the applicants in the notice of motion is as follows:

"1. That the forms and service provided for in the rules of court are dispensed with to the extent required or necessary, that the

applicants' non-compliance with same be condoned and the application be enrolled, heard and determined as one of urgency as contemplated in rule 6(12).

2. In terms of sections 386(5) and 387(3), read with section 386(1)(e), of the Companies Act, 2008 the liquidators shall have the following powers:

2.1 to appoint contractors and/or service providers to remove the assets of the Company from the premises situated at 33 Industry Road, Olifantsfontein and to relocate the assets to alternative premises;

2.2 to raise money on the security of the assets of the Company, or to enter into credit agreements with contractors and /or service providers and /or landlords to facilitate the process of removing and storing the assets of the Company on the security of the assets of the Company:

2.3 to engage the services of attorneys assist the liquidators and give legal advice in entering into agreements with landlords, contractors and service providers necessary to take and implement measures for the protection of the assets of the Company;

2.4 to engage the services of attorneys and counsel to institute these proceedings on behalf of the Company;

2.5 to agree with such attorneys and counsel on the tariff or scale of fees charged or to be charged by and paid to such attorneys and counsel for the rendering of services to the Company and to conclude written agreements with such attorneys as contemplated in section 73(2) of the Insolvency Act, 1936, and, to the extent that they have done so, to ratify and confirm the actions of the liquidators.

3. Authorising the applicants to approach this Court on the same papers, supplemented to the extent necessary, for an order granting the applicants further powers should the need arises.

4. That the costs of this application be costs in the winding up of the Company.”

[3] The application is opposed by TFM Holdings (Pty) Ltd, Ritam Holdings Ltd, TFM Manufacturing (Pty) Ltd and TFM Customizing (Pty) Ltd, all of whom have applied to be admitted in these proceedings as Intervening Parties. They will hereinafter be referred as Intervening Parties (‘IPs’).

The issues

[4] The issues which fall to be determined are:

- (a) Whether this application is urgent;
- (b) Whether the Intervening Parties should be admitted in these proceedings; and
- (c) Whether the relief sought by the applicants should be granted.

[5] It is helpful at the outset to deal with the application for leave to intervene by the Intervening Parties. The test for intervention in the litigation is well established in our law. A party seeking leave to intervene must prove that he or she

- (a) has a direct and substantial interest in the subject-matter of the litigation; and
- (b) the application is made seriously and is not frivolous, and the that the allegations made by the applicants constitutes a prima facie defence to the relief sought in the main application.

[2]

- [6] The IPs state in their application that they are known creditors of the TFM, and have also launched a business rescue application in respect of the Company. During the hearing, Counsel for the liquidators of TFM informed the court that they would not oppose the IPs application to intervene. Under the circumstances it would not be necessary for this Court to consider the merits of the intervention application. It would suffice to state that I am persuaded that the parties should be admitted in these proceedings.
- [7] As regards urgency, the applicants have placed the following relevant facts before the Court for consideration. The Landlords have claims against TFM arising from its failure to pay rentals over a protracted period of time. The arrear rentals owing to the Landlords exceeds R5,8 million. It is common cause that these claims are secured by the landlords' legal hypothec over the property of TFM. Owing to the escalation of costs caused by the continued occupation of the property, the parties approached the Master in terms of the provisions of s 386 (2A) of the Companies Act for an authority contemplated under s 388(2B) to sell the Company's assets. The authority was duly granted.[3]
- [8] The public auction of the assets of TFM was scheduled for the 24th of November 2022. However, it was cancelled after the Intervening Parties successfully launched an application to review and set aside the Master's decision *supra*.
- [9] Meanwhile the TFM continued to occupy the premises of the Landlords on the month to month lease agreement pending the sale of the assets of the Company.
- [10] On 7 February 2023 a second authority was granted by the Master for the Applicants to sell the assets of TFM without conditions. The auction was scheduled for the 23rd of February 2023, but the sale could not take place due to the Intervening Parties having launched business rescue proceedings.
- [11] Presently the premises under which the assets of the TFM are kept have been sold, and the new Landlord requires TFM to vacate. It appears this decision was born out of the meeting held on 27 March 2023, during the attendance of the business rescue proceedings.[4]
- [12] On 4 April 2023, a correspondence was addressed by the legal representatives of the new Landlords stating that the assets of TFM stored in their client's premises must be removed as a matter of extreme urgency.[5]
- [13] In paragraph 47 of their founding affidavit, the applicants further aver that the liquidators remain responsible for the preservation of the assets of the Company (TFM). The landlords have served the termination notice on the company and liquidators, and TFM ought to have vacated the premises already. For them to do so they need to urgently raise funds for the relocation and there would be less financial prejudice for the general body of creditors.

[14] The Intervening Parties contend in their answering affidavit that the application filed by the applicants lacks urgency. According to the IPs the landlords informed the liquidators, as early as 9 December 2022 of their intention to sell the premises, and that TFM should vacate on 3 March 2023.[6]

[15] As regards the relief sought in the notice of motion, the Intervening Parties, contend that on 31 March 2023, they had tendered an unconditional offer to provide alternative premises for the storage of TFM's assets. The tender to store the assets would have prevented further costs for the estate of TFM. The IPs would also be responsible for the relocation costs. Should the relief sought be granted, the IPs contend, would have detrimental consequences on the company in the event of the business rescue application becoming successful.

Applicable legal principles

[16] It cannot be overstated that the procedure set out in Rule 6(12) is not simply there for the taking. In *East Rock Trading & (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[7] laid down three principles as follows:

"[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[17] Section 386

(4) (i) of the Companies Act (the Act) provides that the liquidator of the company is entitled to perform any act or exercise any power for which he is not expressly required by the Act subject to leave of the Court.

[18] Section 386 (5) provides that:

"In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets."

[19] Section 388 of the Act reads as follows:

“Court may determine questions in voluntary winding-up –

- (1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any powers which the Court might exercise if the company were being wound up by the Court.
 - (2) The Court may, if satisfied that the determination of any such question or exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on application as it thinks fit.”
- [20] Having set out the legal principles and the frame work, I now proceed to deal with the merits of the application.

Merits of the application and conclusion

- [21] As regards the question of urgency, I am satisfied that the applicants have made out a case for the matter to be determined in terms of rule 6(12). In a correspondence from G B Liebmann Behrmann & Co, dated the 4th of April 2023 addressed to Goodes & Company Attorneys, the applicants were informed in no uncertain terms that the assets stored

on the premises of the new landlord be removed as a matter of urgency.[8] There seems to be a concession amongst the parties involved in this litigation that the liquidators have a statutory duty to take control and possession of the assets of the company. However, there is a disagreement on how and where the assets should be stored, with the Intervening Parties contending that they have tendered to have the assets stored in one of the intervening parties property at no costs to TFM or company. The intervening parties also submit that, if the relief is granted, they would suffer prejudice when the business rescue application becomes successful. Applicants counsel submitted that this proposition by the IPs is speculative, and cannot prevail in that neither the landlords nor the IPs are prepared to indemnify the creditors against any claims which may arise from the relocation of the assets of the company.

- [22] It is clear to me, if one has regard to the fact that the tender made by the IPs comes with no guarantee or indemnity against loss or destruction of those assets, if relocated to one of the IPs premises. It follows that the liquidators have to take certain measures to preserve the assets. It bears repeating that they have a statutory duty to preserve the assets of TFM, and cannot be cajoled into agreeing to something that does not serve the interests of the company and the general body of creditors. I do not comprehend the contention that the IPs will be prejudiced if the goods were relocated elsewhere pending the outcome of the business rescue application. I hasten to add that the relief sought by the liquidators in the instant case is not to alienate the property of the company but to preserve it. This much is clear from the affidavits filed in support of this application.

Order

[23] For these reasons, the following order is made:

23.1 It is declared that this application is urgent as contemplated in Rule 6(12).

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23.2 The first to fourth intervening parties are granted leave to intervene in this application.

23.3 In terms of sections 386(5) and 387(3), read with section 386(1)(e), of the Companies Act, 2008 the liquidators shall have the following powers:

23.3.1 to appoint contractors and/or service providers to remove the assets of the Company from the premises situated at 33 Industry Road, Olifantsfontein and to relocate the assets to alternative premises;

23.3.2 to raise money on the security of the assets of the Company, or to enter into credit agreements with contractors and /or service providers and /or landlords to facilitate the process of removing and storing the assets of the Company on the security of the assets of the Company;

23.3.3 to engage the services of attorneys assist the liquidators and give legal advice in entering into agreements with landlords, contractors and service providers necessary to take and implement measures for the protection of the assets of the Company;

23.3.4 to engage the services of attorneys and counsel to institute these proceedings on behalf of the Company;

23.3.5 to agree with such attorneys and counsel on the tariff or scale of fees charged or to be charged by and paid to such attorneys and counsel for the rendering of services to the Company and to conclude written agreements with such attorneys as contemplated in section 73(2) of the Insolvency Act, 1936, and, to the extent that they have done so, to ratify and confirm the actions of the liquidators.

23.4 The applicants are authorised to approach this Court on the same papers, supplemented to the extent necessary, for an order granting the applicants further powers should the need arise.

23.5 The Intervening Parties are directed to pay the costs of this application.

MALUNGANA AJ

JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearances

For the Applicant: Lizelle Acker Instructed by Reitz Attorneys For the Respondent: Faan Kock instructed by Goodes & Co Attorneys

Date of hearing: 26/04/2023

Date of judgment: 03/05/2023

- [1] Para 10 of FA Case-line 002-3
- [2] Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality 1991
- (1) SA 677 (Tk).
- [2] Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re
Sizwe Development v Flagstaff Municipality 1991
- (1) SA 677 (Tk).
- [3] Para 16 of the FA. Case lines 002-5
- [4] Para 3.1 of the FA. Case lines 002-9
- [5] Para 33 of the FA. Case lines 002-12
- [6] Para 24 of the AA. Case lines 008-9
- [7] (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paras 6 and 9
- [8] Annexure “FA11” to the FA. Case lines 003-93.
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