
SOUTH AFRICA / JUDGMENT

C Pro Construction PTY v Caliber Devco CC and Others (63054/15) [2018] ZAGPPHC 663 (3 September 2018) [2018] ZAGPPHC 663

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom

CASE / FILE NUMBER

63054/15

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 63054/15

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

3

SEPTEMBER 2018

In

the matter between:

C
PRO CONSTRUCTION (PTY)
LTD
Applicant
and
CALIBER
DEVCO CC
1st Respondent
BENNIE
KEEVY
NO.
2nd Respondent
PHINEAS
BONGANI NOKWENA NO.
3rd Respondent
THEUNIS
CORNELIUS MULLER NO.
4th Respondent
ZAHEER
CASSIM
NO.
5th Respondent
MUSTAFA
MOHAMMED
NO.
6th Respondent
THE
MASTER OF THE HIGH COURT
(SOUTH
GAUTENG
DIVISION)
7Th Respondent
(NORTH
GAUTENG
DIVISION)
8th Respondent
THE
COMPANIES AND INTELLECTUAL
PROPERTY
COMMISSION
9TH Respondent
ALBERT
EDWARD SWANEPOEL
10th Respondent (First interested party)
JOSHUA
JACOBUS PIENAAR
11th Respondent
(Second
interested party)
CALIBER
MANAGEMENT (PTY) LIMITED

12TH Respondent
(Third
interested party)
ASKARI
DEVELOPMENT (PTY) LIMITED
13th Respondent (Fourth interested party)

JUDGMENT

STRIJDOM, AJ

Introduction

[1] This is an application by the applicant, a creditor of the first respondent for an order;

1.1 declaring the voluntary liquidation of Caliber Devco CC the first respondent to be null and void ab initio;

1.2 in terms of which the voluntary liquidation purportedly registered by CIPC, the ninth respondent on 10 November 2011 be set aside, including the appointment by the Master of the South Gauteng High Court of the second and third respondent's as the liquidators of Caliber Devco CC;

1.3 declaring the liquidation proceedings in terms of the voluntary liquidation, including the first and general meetings of creditors and all further proceedings that have purportedly been adopted by the company under voluntary liquidation by the second and third respondent's to be null and void;

1.4 in terms of which the fourth, fifth and sixth respondent's in their capacity as the joint liquidators appointed by the Master of the North Gauteng High Court consequent upon the court liquidation of the first respondent on 13 January 2012 in the North Gauteng High Court are authorised to reconvene and proceed with the first meeting of creditors.

[2] The first respondent was finally liquidated by order of court in this division on 13 January 2012.

[3] A provisional order was granted in this court dated 6 February 2017 granting the relief in terms of which the voluntary liquidation of the first respondent was declared null and void, that the appointment of the second and third respondent's as liquidators were set aside and declaring the liquidation proceedings in terms of the voluntary liquidation of 10 November 2011, including the meeting of creditors and the purported confirmation of a liquidation and distribution account, null and void and to be set aside.

In terms of the said provisional order the winding up proceedings of the first respondent pursued in this court under case number 55319/2011 were declared valid and binding on all parties. The application is now before this court for a final order.

- [4] There is no appearance for the first to ninth respondent's only for the tenth to thirteenth respondent's (the interested parties).

LOCUS STANDI

- [5] It was submitted by counsel for the interested parties that the applicant has no locus standi based on the following:

5.1 the applicant does not have a claim sounding in money (i.e is not a creditor) and;

5.2 even if it is assumed that the applicant may have some claim in money, then such a claim would have become prescribed.

- [6] It was further submitted that the case that the applicant is sought to be made out in the founding affidavit is that Caliber Devco CC is indebted to C Pro, pursuant to an arbitration award but the arbitration award makes no mention of any amount that Caliber Devco CC owes to C Pro.
- [7] There is no merit in this submission, in that, on or about 12th of January 2012 some two months after the purported voluntary liquidation of the first respondent was registered with the CIPC, the entity represented by Swanepoel issued a statement of affairs in terms of Section 363 of the 1973 Companies Act. In the form CM100 the companies full liability to the creditors are set out in list A, which totalled R35 589 093.36. The applicants' claim against the first respondent is incorporated albeit for an amount of RS 478 564.43, which is approximately R1 million less than the correct claim of the applicant.[1]

PRESCRIPTION

- [8] The first to fourth intervening parties who oppose the application, asserts that the applicant's claim against the entity has become prescribed.
- [9] It was submitted on behalf of C Pro that the completion of prescription was delayed by virtue of the liquidation order that was granted in this court on 13 January 2012. Section 359 (1) of the Companies Act 61 of 1973 provides for the suspension of legal proceedings until the appointment of a final liquidator.
- [10] Counsel on behalf of the first to fourth intervening parties argued that final liquidators were appointed pursuant to the order that was granted on 13 January 2012 already on 16 May 2012. [2] Accordingly Section 13 (1) of the Prescription Act has no bearing on the matter and C Pro's claim was extinguished by prescription on 12 January 2015.
- [11] The liquidators had not been finally appointed and their appointment had not been confirmed by creditors. By virtue of the supervening voluntary liquidation, the liquidators were precluded from investigating the affairs of the first respondent. Persons with rights of action against the company are prevented by operation of the 1973 Companies Act (Section 359 (1) (a) from interrupting prescription and consequently completion of prescription is delayed. Prior to the compliance with Section 359 (2) of the 1973 Act, prescription will not

run. The liquidators the fourth, fifth and sixth respondent's appointed by the court have not been appointed finally and prescription is delayed until compliance with Section 359

- (2) after the date of their final appointment.

THE VOLUNTARY LIQUIDATION OF CALIBER DEVCO

- [12] After purporting to enter a notice of opposing on 31 October 2011 to the application for liquidation launched by the applicant in the North Gauteng High Court, CIPC at the behest of the first respondent's attorneys, managed to register the voluntary liquidation of the first respondent on 10 November 2011 with full knowledge of the pending court application. The notice of resolution to wind up a solvent company was registered on 10 November 2011.
- [13] The resolution by the members of the company referred to by the Commissioner of CIPC was adopted on 19 September 2011.[3] However, the form CM100 confirmed on oath by the member Swanepoel of the first respondent is dated the 12th of January 2012, some four months after the resolution was adopted on 19 September 2011.
- [14] As a consequence, the voluntary winding up proceedings did not comply with the prescripts of the provisions of the applicable legislation referred to and Section 363 (1) of the 1973 Act. The lack of compliance with Section 363 (I) of the 1973 Act of considering the resolution in a creditor's voluntary winding up, the form CM100 considered with the representations with regard to the insolvency of the first respondent rendering the voluntary liquidation proceedings null and void.
- [15] The purported adoption of a resolution by members on the date as aforesaid, also did not comply with the provisions of the 1973 Act, which still applies in terms of Act No. 71 of 2008, the new Companies Act.
- [16] The resolution was adopted in terms of Section 80 of the 2008 Act read with regulations 40 of the 2008 Act and the transitional arrangements issued in terms thereof, effective from 1 May 2011, which clearly prescribes how and in what manner a voluntary liquidation of a solvent company should be effected.
- [17] As a consequence, the appointment of the liquidators, the second and third respondent's by the Master of the South Gauteng High Court in terms of the purported voluntary liquidation and the meetings of creditors and or any other steps taken in terms thereof are void ab initio.
- [18] The first respondent was placed under voluntary liquidation in terms of a notice of resolution to wind up a solvent company.
- [19] The resolution itself was effected on form CO R40. 1, which provides for a notice in terms of Section 80 of the Companies Act 2008 pertaining to the resolution to wind up a solvent company.[4]
- [20] Section 80 of the Companies Act No. 71 of 2008 provides for the voluntary winding up of a company that has adopted a special resolution to do by the company or by its creditors.

[21] The significance of solvent or insolvent where those terms are used in item 9 of schedule 5 of part G of Chapter 2 of the Act, the traditional arrangements pertain to the state of insolvency, which in our law is being accepted to mean "actual" or "literal" solvency or insolvency, which involves a comparative measurement of the value of the company's assets and its liabilities. If the total value of the liabilities exceeds of a company exceeds the total value

of the assets of a company, it is actually insolvent.

[22] The winding up of the first respondent as a solvent company whilst the company was insolvent to the amount of more than R35 million, renders the purported voluntary liquidation null and void.

[23] It appears from the papers and from the form CM100 that the first respondent was at all relevant times insolvent, but had been purportedly placed under voluntary liquidation as a solvent company in contravention of the provisions of items 9 of Schedule 5, which prescribes that a close corporation is to be wound up voluntarily by members or creditors under XIV of the 1973 Companies Act.

[26] In terms of item 9 (2) of Schedule 5 of the new Companies Act No. 71 of 2008, Sections 343, 344, 346 and 348 to 353 do not apply to the winding up of solvent companies, which are now dealt with in terms of Sections 79 to 81 of the new Companies Act. Only companies that are "insolvent " may be wound up pursuant to the provisions of Chapter XIV of the 1973 Act, either voluntary or compulsory.

[27] A special resolution must be adopted in terms of Sections 199 to 203 of the 1973 Act. The notice of the resolution must indicate the proposed resolutions i.e. to wind up the corporation voluntary in terms of Section 199, the reason for the resolution as well as the effect of the resolution. The resolution must be submitted for registration to the Companies and Intellectual Property Commission on form CM26 together with a copy of the notice convening the meeting, alternatively the consent to propose and pass a special resolution at a meeting of which the required notice had been given. In terms of the evidence presented in relation to the voluntary liquidation adopted by Caliber Devco on 19 September 2011, a resolution was adopted irregularly in terms of Section 80 of the Companies Act of 2008 and Regulation 41 of the Company Regulations of 2011, which applies only to a solvent company.

[28] The minutes of the meeting clearly stated incorrectly so that the company was wound up in terms of Section 67 of the Close Corporation Act. Section 67 has been deleted and substituted by Section 224 (2) of Act No. 71 of 2008 and it is prescribed that Section 67 must be administered in accordance with the laws contemplated in item 9 of Schedule 5 of the new Companies Act.

[30] The members of Caliber Devco could not have been presented with the form CM100 when the resolution was adopted on 19 September 2011. The incomplete CM100 (Annexure DD10) was completed and signed on 12 January 2012.

- [31] Section 363 of the 1973 Act applies only to the voluntary liquidation of insolvent companies. In my view there was no compliance with the prescripts of Section 363. The appointment of the liquidators and the proceedings conducted in terms of the voluntary liquidation is therefore also void ab initio. The confirmation of a liquidation and distribution account with also be null and void.
- [33] The court has an unfettered discretion to grant compulsory winding up.[5]
- [34] The intervening applicants' purport to rely on two (2) resolutions in terms of which the members of the two (2) Close Corporations resolved to intervene in terms of a resolution to that effect.[6] Annexure "FA3" is a resolution adopted by the members of Largo Development CC, which is not one of the intervening entities.
- [35] It was submitted by counsel for the applicant that in respect of the other intervening party Askare Development CC, in terms of searches conducted in the records of the Companies and Intellectual Property Commission by the applicant's legal representatives that two (2) Close Corporations are registered in that name in respect of each of the registered Close Corporations under that name, additional members are registered who have not taken part in the resolution adopted.

Moreover, the resolution does not make any reference to the registration number of the particular Close Corporation, no resolution was adopted in respect of the intervening applicant Caliber Management (Pty) Ltd.

- [36] The objective facts in relation to the failure to comply with the provisions of the Act when the voluntary liquidation resolution was adopted, taints the entire proceedings thereafter as being null and void.

[37] In the result:

- a) the applicant is entitled to a final order in terms of the rule nisi; and
- b) that the costs of this application be paid out of the insolvent estate of the first respondent.

JJ STRIJDOM AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION , PRETORIA

Appearances:

Counsel for the applicant:

Adv M A Badenhorst SC

Instructed by:

KMG & Associates Incorp

Brooklyn, Pretoria

Counsel for the 10 to 12 respondent's: Adv M v R Potgieter SC

Instructed by:

Mark - Anthony Beyl Attorneys

Date of Judgment:

3 September 2018

- [1] See Annexure DD10 of founding affidavit p.97- 108
- [2] See Annexure DD5 of founding affidavit p.76
- [3] See Annexure 0 0 8 to the founding affidavit p16
- [4] Founding affidavit p.16 par 13.3 Annexure DD8 p. 94
- [5] King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) ltd 1 998 (4) SA 1240 (D)
- [6] Annexures FA2 and FA3 p. 220 to 221

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