

SOUTH AFRICA / JUDGMENT

## De Waal v African National Congress Youth League (49137/2017) [2018] ZAGPJHC 694 (30 July 2018) [2018] ZAGPJHC 694

COURT

South Gauteng High Court, Johannesburg

BEFORE

S E Weiner

CASE / FILE NUMBER

49137/2017

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IN THE REPUBLIC OF

SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO.: 49137/2017

In

the matter between:

HUGO

JOHAN DE

WAAL Applicant

and

AFRICAN

NATIONAL CONGRESS YOUTH

LEAGUE Respondent

**JUDGMENT**

WEINER J

**INTRODUCTION**

- [1] The applicant seeks to wind up the respondent consequent upon an act of insolvency on the part of the latter. This application is unopposed.
- [2] Lamont J, on 30 January 2018, struck the matter from the roll. He was of view that the applicant ought to have applied for the respondent's sequestration rather than its liquidation.
- [3] The applicant accordingly, on 10 April 2018, amended the Notice of Motion, in terms of Rule 28(1), so as to claim, in the alternative to his prayer for liquidation, for the respondent's estate to be sequestrated.
- [4] The matter came before Siwendu J on 17 July 2018. It stood down until 20 July 2018, for the purposes of heads of argument being filed on the effect of the Companies Act 2008 on Chapter 14 of the Companies Act 1973. The heads of argument were filed and I will deal with this issue below. Due to certain logistical problems, Siwendu J stood the matter down to this week.
- [5] The matter came before me on 26 July 2018.

**SERVICE**

- [6] The application was served on the respondent and its employees on 15 December 2017 by affixing a copy of the application to its main door at Chief Albert Luthuli House, 54 Pixely Seme Street, Johannesburg, its principal place of business (Luthuli House).
- [7] On 17 April 2018, the applicant through the Sheriff, served its Notice of Intention to Amend on the respondent and its employees, one Bongani Finance, a person ostensibly in control of the address set out above.
- [8] On 2 July 2018, the Notice of Set down for was served on one Vukile, an employee and the PA to the SG of the respondent.
- [9] No opposition was filed, nor was there any appearance for the respondent on any of the occasions referred to above.

**THE APPLICANT'S CASE**

- [10] The applicant took cession of a debt owed by the respondent to Ms Otta Helena Zille (Zille).

- [11] The applicant had rendered services to Zille in respect of a defamation action that she had instituted against, inter alia, the respondent in the Western Cape Division of the High Court, in 2010.
- [12] The respondent and the first and second defendants in the defamation action accepted liability for Zille's costs of suit on the party-and-party scale. In addition, the respondent and the other defendants were ordered to pay Zille's costs of suit on the attorney and client scale.
- [13] The costs were taxed in the total amount of R93,218.09 (ninety three thousand two hundred and eighteen rand and nine cents).
- [14] Zille ceded her right, title and claim to that amount to the applicant in respect of payment for his services rendered in respect of the defamation action.
- [15] On 25 May 2016, payment of the taxed costs was demanded from the respondent. Neither payment, nor a response was forthcoming from the respondent.
- [16] On 12 September 2016, the applicant caused a writ of execution to be issued and served on the respondent at Luthuli House. The Sheriff rendered, for all intents and purposes, a nulla bona return.
- [17] On 29 June 2017, a second attempt to execute against the respondent was made. This attempt, too, yielded a nulla bona return from the Sheriff.

#### NULLA BONA RETURN

- [18] The issue as to whether the nulla bona return was stale, was one which the court was required to deal with, more particularly as there was no appearance for the respondent.
- [19] As set out above the second nulla bona return was obtained over a year ago. Several factors need to be considered. Although the matter is only now being heard, the application was issued in December 2017, some six months after the date of the nulla bona return. Service took place in December 2017; the Notice of Amendment was served on 17 April and the Notice of Set Down was served on 2 July 2018. No opposition was forthcoming to challenge the allegation that the respondent did not have sufficient assets to satisfy the writ, or at all. In the publication Joffe at al, High Court Motion Procedure: A Practical Guide, LexisNexis, the authors say that where the nulla bona return relied upon, is older than six months, the applicant must provide proof that there has been no material alteration in the respondent's financial position in the interim.
- [20] This issue has been dealt with in two judgments emanating from this court. Boruchowitz J, sitting in a Full Bench in *Seaways (Pty) Ltd t/a South African Express Line v Rubin*,<sup>[1]</sup> held as follows:

'It is common cause that there was a substantial lapse of time of approximately a year between its issue and the launch of the application for sequestration. It is a long-standing practice in this Division that an applicant who is armed with a recent nulla bona return is entitled to approach

the Court without notice to the respondent ..... In cases where a nulla bona return is not a recent one there must be allegations supported by facts that the debtor's position is unchanged (see *Abell v Strauss* 1973 (2) SA 611 (W) at 613B-C; *Wilken & Others NNO v Reichenberg* 1999 (1) SA 852 (W) at 860A-C).

A nulla bona return, whether recent or not, is sufficient to establish an act of insolvency in terms of s 8(b) of the Act. But where the nulla bona relied on is not a recent one, the failure to indicate that the debtor's circumstances have not improved in the interim may be a significant factor in the exercise of the Court's discretion to grant a sequestration order (see *First Rand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) paras 28-30). Rubin has not opposed the sequestration application and there is no reason to suppose that his financial position has improved since the issue of the nulla bona return. Accordingly, the lapse of time between the issue of the return and the launch of the application for sequestration is not a factor that would affect the exercise of the Court's discretion.'

[21] Van der Linde J in *Investec Bank Limited v Le Roux*[2] (footnotes omitted) held as follows, in relation to a nulla bona return in a sequestration application:

'The next point is whether the return of service is stale. The facts are that the writ was served on 25 July 2013, and the application for sequestration was issued on 14 January 2014, nearly but not yet six months later. In their loose-leave publication *Joffe at al*, *High Court Motion Procedure: A Practical Guide*, LexisNexis, the authors say that where the nulla bona relied upon is older than six months, the applicant must provide proof that there has been no material alteration in the respondent's financial position in the interim.

The rationale for such a rule is not clear. The arms-length creditor/applicant will have little access to or knowledge of the debtor's affairs. And when the matter comes before the court the debtor will have had an opportunity to resist the application by, if it applies, showing that she or he has assets to satisfy the judgment. And if she or he does not have assets to satisfy the judgement, then the applicant's difficult burden of showing no improved financial position would in any event have been discharged.

Certainly the legislature in s.8(b) of the Insolvency Act did not require the nulla bona return to be younger than seven months; how then could the courts legitimately impose the limitation? The only explanation for the rule could be that it is simply a rule of practice, and adjunctive to another rule of practice, and not adjunctive to a statute, which in view of the constitutional separation of powers it could never be.

One such explanation could be that it is only if the application is not served on the respondent, and a provisional order is thus sought without notice to the respondent, that such a requirement makes sense and, perhaps more importantly, could be imposed by a court. Then one rule of practice (younger than seven months) is imposed to ameliorate another rule of practice (no notice to the respondent in cases of nulla bona), and no issues of offending separation of powers arise.

In *Abell v Strauss*, 1973 (2) SA 611 (W) at 613B, relied on by Joffe at al, Irving Steyn J dismissed an application based on a return that was “some seven months old” on the basis of dicta in *Bhyat v Khurishi*, 1929 TPD

896. ...

.... (In *Bhyat*) Feetham J remarked by the way that notice ought to have been given. The judge dismissed the application however on the basis that neither the act of insolvency nor factual insolvency had been shown. There was no statement that a nulla bona return had a use-by date in this context.

....

It was in this context that Boruchowitz, J, writing for a full court of this division in .... *Seaways (Pty) Ltd t/a South African Express Line v Rubin* (31419/2010)

[2013] ZAGPJHC 118 (24 May 2013), pointed out that a nulla bona return, whether recent or not, is sufficient to establish an act of insolvency for the purposes of s.8(b) of the Insolvency Act.

The learned judge, in my respectful view, relegated the whole issue of staleness of a nulla bona return to its rightful place: that it might be relevant in the exercise of the court’s discretion not to grant a provisional sequestration order.’

[22] I accordingly find that, in the circumstances of the present case, the Applicant can rely on the nulla bona return of 29 June 2017.

#### CHAPTER 14 OF THE COMPANIES ACT / COMPANIES ACT 2008

[23] It is submitted by the applicant that the respondent falls to be liquidated as a body corporate. It is further contended that the definitions in and provisions of Chapter 14 of the Companies Act, 1973 (the 1973 Act), still apply to the liquidation of insolvent

companies/corporate entities.

[24] Item 9 of Schedule 5 to the Companies Act, 2008, provides that the provisions of Chapter 14 of the old Act still apply to the winding up of insolvent companies, as if the new Act had not been passed. In particular, item 9 provides:

‘9. Continued application of previous Act to winding-up and liquidation.

(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).’

[Emphasis added]

[25] Chapter 14 becomes inapplicable only when the Minister issues a notice in the Government Gazette, in terms of Section 9(4). The Minister has not done so and, accordingly, the transitional arrangements remain applicable.

[26] In *Van Der Merwe v Duraline (Pty) Ltd*,<sup>[3]</sup> a full bench of the Western Cape High Court confirmed that Chapter 14 of the old Act and its definitions continue to govern the winding up of insolvent companies. Gamble J found:<sup>[4]</sup>

‘[T]he entire winding up process of an insolvent company on the basis of inability of a company to pay its debts must, until the transitional

provisions of the New Act are varied, take place in terms of Chapter 14 of the Old Act. Once reliance is placed on those sections for such winding up, I consider that the definitions, internal references and interpretations which have applied to that Chapter of the Old Act will continue to apply, and it is not permissible to cross-reference to provisions of the New Act whilst so applying Chapter 14 of the Old Act.’

[27] Accordingly, the definitions in and provisions of the old Act – as well as the case law interpreting those definitions and provisions – continue to apply. Section 1 of the old Act defines a “company” as:

‘a company incorporated under Chapter IV of this Act and includes any body which immediately prior to the commencement of this Act was a company in terms of any law repealed by this Act ...’

[28] Section 337(1) of the old Act – which falls within Chapter 14 – defines a “company” as including:

*“a company, external company and any other body corporate...” [Emphasis added]*

[29] The authors of Henochsberg observe:<sup>[5]</sup>

‘The definitions contained in this section are for the purposes of the provisions of Chapter XIV which deals with winding-up. The definition of ‘company’ in this section is not inconsistent with that contained in s 1(1): the word ‘company’ as used in s 337 has the meaning given to it in s 1(1) and the extended meaning indicated, i.e. it includes an external company and any other body corporate. [Emphasis added]

[30] The applicant submits that it is necessary to distinguish between an association that is a common-law body corporate (namely an universitas personarum) and is capable of being liquidated, from one that is an unincorporated association that falls to be sequestrated. This distinction was expressed in *Ex TRTC United Workers Front & others v Premier, Province of the Eastern Cape*,<sup>[6]</sup> by Van Zyl J as follows:<sup>[7]</sup>

‘A distinction must be drawn between on the one hand, corporate associations which are by virtue of legislation (statutory associations) or under the common law (*universitas personarum*) legal entities distinct from their members, and what are referred to as unincorporated associations, on the other. For present purposes it is only necessary to deal with a *universitas* and an unincorporated association. The distinction between these two entities has been explained as follows in *Webb v Northern Rifles*:

*“An universitas personarum in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. A universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals*

forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members.”

A *universitas* is therefore a separate legal entity that has perpetual succession with rights and duties independent from the rights and duties of its members. .... Being a legal persona, a *universitas* may sue or be sued in its own name. It derives these characteristics from the common law and it is not necessary for it to be created by or registered in terms of a statute.

By contrast, ... An unincorporated association is regarded as merely an aggregation or collection (a body) of natural

persons. .... it refers to nothing more than a collection of individuals who... are bound to one another by contract and who act jointly in pursuit of a common purpose. It has no existence on its own. It consequently cannot own property and has no *locus standi* to sue or be sued in its own name. In legal proceedings by or against the association, every member must as a result be cited as a plaintiff or a defendant as the case may be.’ [Emphasis added]

[31] For purposes of this application, the enquiry is whether the respondent, as an association, constitutes a body corporate that is susceptible to being liquidated. The authors of *Henochsberg* say the following in respect of whether an association can be a body corporate: [8]

‘At common law an association of natural persons may be a *universitas*, i.e. a body corporate. The characteristics of such a body are that it should be capable of owning property apart from its members and it should have perpetual succession ... Whether a particular association is such a body depends on its nature, its constitution, its objects and its activities ... But it is decisive of its being a *universitas* if its constitution indicates that it has the said characteristics.’ [Emphasis added]

[32] The authors opine that the definition of a body corporate bears its common-law meaning.[9] This opinion was confirmed in *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Shiffscommerz Aussenhandelsbetrieb der VVB Schiffbau Intervening*,[10] where the Full Court of the Natal High Court, as it then was, held:[11]

“Body Corporate” is not specifically defined and it therefore bears its common law meaning, an association of individuals capable of holding property and of suing and being sued in its corporate name.’

At 754H, the Court stated:

‘A body corporate is not defined but, since a body corporate is included within the meaning of “company” for the purposes of s 337 it is difficult to escape the conclusion that the Legislature intended that they should be wound up like an ordinary company or an external company in terms of chap XIV of the Act and that, when one sought to place such a body in liquidation, it could only be done in terms of chap XIV and in no other manner.’

[33] The common law meaning of body corporate has its origins in the Appellate Division decision of *Morrison v Standard Building Society*,[12] where it was held:

‘In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or universitas then it can sue in its own name.’[13]

[34] The applicant submits that the respondent fulfils the common-law requirements for an universitas personarum and is, therefore, a body corporate under section 337. The requirements for a universitas personarum were restated by the erstwhile Appellate Division in *African National Congress and another v Lombo* (per Corbett CJ):[14]

‘It is conceded by counsel for the appellants (correctly in my view) that prior to the enactment of certain legislation which resulted in each of the appellants being declared an ‘unlawful organisation’ ... each of them constituted a universitas personarum, i.e. an artificial or juristic person constituting a legal entity apart from the natural persons (members) composing it, having the capacity to acquire rights and incur obligations and to own property apart from its members and to sue and be sued, and having perpetual succession.’ [Emphasis added]

[35] Accordingly, an entity must fulfil three main requirements to qualify as an universitas personarum.

35.1 First, it must have a legal existence apart from its members and thus be capable of suing and being sued in its own name.

35.2 Second, it must have perpetual succession.

35.3 Third, it must have the capacity to acquire rights and incur obligations as well as own property in its own name.

[36] In having regard to an entity's constitution, one can determine whether it has a legal existence apart from its members.[15]

[37] All three the requirements set out above are borne out by the respondent's constitution, which in relevant part, provides:

'The ANCYL shall be a legal persona with a perpetual succession of power apart from its individual members, to acquire, hold and alienate property, enter into arrangements, do all things necessary to carry out its aims and objectives, and defend its members, property and reputation.' [Emphasis added]

[38] Further, the respondent's constitution provides that it may be wound up separately from its members and any assets, remaining after satisfaction of all the respondent's liabilities, must then be transferred to the African National Congress:

'Upon dissolution or winding up, the assets of the ANCYL remaining after satisfaction of all its liabilities, shall be given or transferred to the ANC.'

[39] The pursuit of profit is not a common-law requirement to qualify an entity as an universitas personarum.[16]

[40] Accordingly, based upon the respondent's own Constitution and the authorities referred to above, the respondent falls within the definition of a body corporate, as defined in section 337 of the old Act and is liable to be liquidated as such.

#### GROUND OF LIQUIDATION

[41] As Chapter 14 of the old Act and its accompanying definitions remain the applicable law under which an insolvent company is wound up, they will be considered below.

[42] The applicant submits that respondent cannot pay its debts as envisaged by section 345(1)(b) read with section 344(f) of the old Act and, accordingly, falls to be wound up on that basis.

[43] Section 345(1)(b) of the old Act stipulates when a company is deemed to be unable to pay its debts:

'(1) A company or body corporate shall be deemed to be unable to pay its debts if –

(a) ...

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process;

(c) ...'

[44] The Sheriff has rendered two separate nulla bona returns of service. This meets the requirement for purposes of section 345(1)(b). As set out above, the application was served on 15 December 2018, the nulla bona return was dated 29 June 2018, and several other processes have been served on the respondent in the past seven months. The respondent has not reacted to any of such processes. It has not opposed the application to show that it is now able to pay its debts and that its financial position has changed. The respondent is deemed to be unable to pay its debts. There is no evidence before this Court

that rebuts the deeming provision

[45] Accordingly, the respondent falls to be wound up on this ground alone.

[46] Applicant also contends that the respondent falls to be wound up on the basis that it is just and equitable. In my view, it is not necessary to deal with this ground, as the previous ground is sufficient for the purposes of winding up.

#### THE STATUTORY FORMALITIES

[47] The applicant has furnished sufficient security and a certificate from the Master confirming that security has been furnished. It has also been provided within the prescribed time period.

[48] In an affidavit deposed to by the applicant's correspondent attorney, it is confirmed that service has taken place on the South African Revenue Services, the respondent, and the employees. There has, therefore, been compliance with section 346(4A)(b) of the old Act.

#### CONCLUSION

[49] Accordingly, the respondent ought to be wound up and the following order is granted:

1. The respondent is placed under final winding-up in the hands of the Master.
2. Costs of the winding-up will be costs in the winding up.

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JUDGE S E WEINER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 26 JULY 2018

Date of order: 26 JULY 2018

Date reasons handed down: 30 JULY 2018

Appearances

Attorney for the Applicant: VON LIERES COOPER BARLOW AND HANGONE

Counsel for the Applicant: ADV J MEIRING

[1] (31419/2010)

[2013] ZAGPJHC 118 (24 May 2013) paras 7-8. [2] (575/2014)

[2016] ZAGPJHC 11 (11 February 2016) paras 22-32.

[1] (31419/2010)

[2013] ZAGPJHC 118 (24 May 2013) paras 7-8.

[2] (575/2014)

[2016] ZAGPJHC 11 (11 February 2016) paras 22-32.

[3]

[2013] ZAWCHC 213 (23 August 2013).

[4] At para 20.

[5] Meskin et al., Henochsberg on the Companies Act, 1973, p 663.

[6]

[2009] JOL 23737 (ECB).

[7] At pp 11–12.

[8] Ibid p 52(1).

[9] Ibid p 664(1).

[10] 1979 (4) SA 745 (N).

[11] At 751A.

[12] 1932 AD 229.

[13] Morrison, p 238.

[14]

[1997] 1 All SA 697 (A).

[15] Morrison, p 238.

[16] Morrison, p 236.

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