

SOUTH AFRICA / JUDGMENT

Dinath N.O and Others v Mukhawana & Mukhawana Suplly & Logistics (Pty) Ltd (27679/2018) [2019] ZAGPPHC 1065 (28 May 2019) [2019] ZAGPPHC 1065

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

27679/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO

OTHER JUDGES: YES/NO

(3)

REVISED

CASE NO: 27679/2018

28/5/2019

In the

ex-parte application of:

IMRAN

DINATH N.O.

1st

APPLICANT

HELENA

JANNETHA DE BEER N.O.

2ND

APPLICANT

ABRAHAM

VICTOR DAWSON

N.O.

3RD

APPLICANT

(In

their capacities as the appointed provisional

Trustees
in the insolvent estate of Gerard
Jacques
Du Plessis - Masters Ref: T3317/17)
and
MUKHAWANA &
MUKHAWANA SUPPLY
RESPONDENT
& LOGISTICS (PTY)
LTD
(Registration No:
2014/190691/07)

JUDGMENT

NEUKIRCHER J:

1. What is before me today is an application for the final winding up of the respondent. The respondent was placed under provisional winding-up by way of urgency on 24 April 2018 by Fabricius J.

2. The applicants are the trustees in the insolvent estate of one Gerard

Jacques Du Plessis ("Du Plessis"). Du Plessis was finally sequestrated as a consequence of a massive fraud perpetrated by him and his accomplice, Mr Mkatoko Trevor Mukhawana ("Mukhawana"). Between these two, they concocted a scheme in which funds to the value of approximately R 33 million, which was earmarked for payment to the Madibeng Local Municipality, was stolen. It appears that Du Plessis paid his accomplice an amount of approximately R 11 million, which amount was paid, according to the applicants, into the bank account of the respondent.

3. A separate application for the sequestration of Mukhawana was launched.

He is the sole director and shareholder of the present respondent. The application, despite being opposed, was successful and a final order of sequestration was granted^[1] on 8 March 2019 after a provisional order was granted in December 2017.

4. The respondent has elected not to file an answering affidavit in the present proceedings. Instead, on 31 May 2018 the respondent delivered a Notice of Intention to Oppose without following that up with an answering affidavit. On 27 June 2018 the provisional order was extended and the respondent was given until 16 July 2018 to file any answer - as stated, none was forthcoming.

5. Puzzlingly, the respondent's present attorney of record filed a new Notice of Intention to Oppose on 21 February 2019 - what should have followed was a rule 30 Notice but that did not happen.

6. Instead, on 20 March 2019, the respondent filed a "Notice in terms of Rule 6(5)(d)(iii)".

7. Rule 6(5)(d) of the Uniform Rules provides as follows:

"(d) Any person opposing the grant of an order sought in the notice of motion shall -

(i)

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, If any, together with any relevant documents; and

(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question."

8. Bearing in mind that the original Notice of Intention to Oppose was delivered on 31 May 2018, the respondent is out of time with the rule 6(5)(d)(iii) Notice. Furthermore, there was a court order dated 27 June 2018 directing the respondent to deliver any answering affidavit (and therefore by implication its rule 6(5)(d)(iii) Notice) by 16 July

2018. Its failure to do so is without explanation.

9. Given that the provisional order was granted on 24 April 2018, the Notice of Intention to Oppose delivered on 31 May 2018 was quite clearly in respect of the hearing in respect of the upcoming final order and thus the further notice filed on 21 February 2019 is neither here nor there - it certainly does not extend the respondent's dies as, I am sure, it was intended to do.

10. But the respondent has bigger problems than this: as already stated, the sole director and shareholder of the respondent was sequestrated provisionally in December 2017 and finally on 8 March 2019.

11. In terms of section 9(8)(b)(i) of the Companies Act, 2008 a person is disqualified to be a director of a company if he is an unrehabilitated insolvent and in terms of the Insolvency Act 24 of 1936, a "insolvent estate" means "an estate under sequestration". A "sequestration order" means "any order of court whereby an estate is sequestrated and include a provisional order; when it has not been set aside."

12. Section 8 of the Insolvency Act provides for the immediate appointment of a trustee upon sequestration (and this Includes a provisional sequestration).

13. Section 150 of the Insolvency Act provides:

"(3) When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted:

Provided that no property belonging to the sequestrated estate shall be realised without the written consent of the insolvent concerned."

14. Thus, given the provisions of both the Companies Act and the Insolvency Act, once Mukhawana was sequestrated, he ceased to be a director and shareholder of the respondent and his duties and functions were taken

over by the appointed trustees of his estate, who are Messrs Patel & Bezuidt.

15. Mr Patel has filed a supplementary affidavit, which I have accepted, explaining that he is in charge of the day-to-day administration of Mukhawana's estate, that at no time did Mukhawana approach either him or Bezuidt for permission to oppose the final order of liquidation in this matter, or to appoint legal representatives on behalf of the present respondent to do so, that neither he nor Bezuidt gave their consent to these actions and that any mandate provided by Mukhawana to the respondent's "attorneys" should be regarded as void ab initio.

16. Mr Groenewald (purportedly on behalf of the respondent) has argued that, as the supplementary affidavit contains no confirmatory affidavit from Bezuidt there was no consent for Patel to file that affidavit. I disagree. In, for example, *Diener N.O. v Minister of Justice & Others*,^[2] the third respondent on the appeal was one of the liquidators of a close corporation who opposed the relief sought in the High Court and also opposed the appeal. His co-liquidators (the fourth and fifth respondents) took no part in either the High Court proceedings or the appeal and yet he was allowed to continue.

17. In my view, it may be a different matter where proceedings are initiated by one liquidator without the authority of the others^[3] but in the present matter, Mr Patel merely provides the court with an affidavit relating to the facts of the matter and those are:

- (a) the issue of the sequestration of Mukhawana; (b) the fact that he is the sole director and shareholder of the respondent; and
- (c) that his provisional liquidators have not consented to the opposition of the present proceedings. Thus, in all respects Mr Patel is no more than a witness who is providing information to this court which is relevant to weighing up whether the final order should be granted or not.

18. This being so, I find that any power of attorney/instruction to oppose this application given by Mukhawana on or after 20 December 2017^[4] is void and the notice in terms of rule 6(5)(d)(iii) is struck out.

19. The question still remains whether a final order of liquidation should be granted:

19.1. The provisional order granted by Fabricius J on 24 April 2018 was:

19.1.1. served on the Master of the High Court on 25 April 2018;

19.1.2. served on SARS on 25 April 2018;

19.1.3. served on CIPC on 2 May 2018;

19.1.4. served at the registered address of the respondent on 7 May 2018 by affixing at the main entrance;[5]

19.1.5. served on the employees at the same address on 7 May 2018;

19.1.6. published in the Government Gazette and in the Citizen Newspaper on 8 June 2018.

19.2. Thus, the formalities for the grant of the final order have all been complied with in my view.

20. I am also satisfied that a case is made out on the papers for the final winding-up of the respondent:

20.1. the applicants have established, on a balance of probabilities, that

there is no legal basis for the respondent to receive payment of the amount of R11 480 867.78, which was paid by Du Plessis to Mukhawana into the bank account of the respondent.

20.2. the applicants, by launching this application, are attempting to ensure

that all those funds are repaid (as they appear to be impeachable transactions)[6] to the insolvent estate for the eventual distribution to the benefit of the general body of creditors.

20.3. security has been set by the applicants and the first applicant has the support of the second and third applicants in the application.[7]

20.4. It appears that the respondent is commercially insolvent and is unable

to repay the debt as contemplated in sections 344(f) of the Companies Act, 1973. Mr De Beer has submitted that, in addition, the Respondent is complicit in the fraud and that therefore the winding-up is just and equitable as contemplated in section 344(h) of the Companies Act 1973 - I agree.

21. Mr De Beer has submitted that, in the event that I find that Mr Mukhawana had no authority to instruct that these proceedings be opposed, I should exclude the costs of opposition from any costs in the liquidation. In my view this would follow naturally from such a finding.

22. Thus, the order I make is the following:

22.1. A final order of liquidation is granted.

22.2. Costs shall be costs in the liquidation excluding any costs of opposition.

NEUKIRCHER J

Date of hearing: 16 May 2019

Date of judgment: 28 May 2019

[1] I am told that an application for leave to appeal has been filed, but not yet heard.

[2] 2018 (2) SA 399 (SCA)

- [3] See: Union Share Agency & Investments Ltd (In liquidation) v Hatton, 1927 NLR 99
- [4] Which is the date of his provisional sequestration.
- [5] Which is stipulated in the court order itself and ... the company search attached to the application
- [6] Under for example, sections 26, 29 or 31 of the Insolvency Act.
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