

SOUTH AFRICA / JUDGMENT

James and Another v Van der Westhuizen N.O and Others (66148/18) [2020] ZAGPPHC 152 (27 January 2020) [2020] ZAGPPHC 152

COURT
North Gauteng High Court, Pretoria

BEFORE
C J Collis

CASE / FILE NUMBER
66148/18

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
(1)
REPORT
ABLE: NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)
REVISED
CASE
NO: 66148/18
27/1/2020
In

the matter between:

CLIVE
EDWIN JAMES
FIRST APPLICANT
ENGELA
JAMES
SECOND APPLICANT
And
KOBUS
VAN DER WESTHUIZEN N.O
FIRST RESPONDENT
WILLIE
ENRICO PRINCE
N.O
SECOND RESPONDENT
TSHWANE
TRUST CO (PTY) LTD N.O
THIRD RESPONDENT
83
AIR CONDITIONING (PTY)
LTD
FOURTH RESPONDENT
THE
MASTER OF THE HIGH COURT
FIFTH RESPONDENT

JUDGMENT

COLLIS J:

INTRODUCTION

[1] This is an opposed application wherein the applicants pray for the following relief:

1.1 That claim 1 accepted as proven in liquidation proceedings be stayed, as the claim is based on an unenforceable summary judgment, (and for the claim to be proven in a procedurally correct manner);

1.2 That the first to third respondents be removed as liquidators in that their certificate of appointment as liquidators be revoked and set aside, and for them to be replaced with an objective and impartial liquidator to be appointed by the fifth respondent.

1.3 That further procedures and enquiries in respect claim 1 be stayed and that the respondents be interdicted, restrained and prevented from continuing with such further procedures and enquiries in respect of claim 1.

BACKGROUND

[2] The applicants were the directors of Centra Vac (Pty) Ltd ('the company').

- [3] On 3 October 2016 a special resolution was passed for the voluntary liquidation of the company and pursuant thereto, the company status was changed.[1]
- [4] On 27 October 2016 and after the resolution was passed for the voluntary liquidation of the company, the fourth respondent obtained summary judgment against the company.[2]
- [5] On 3 June 2017 the first, second and third respondents were appointed the liquidators of the company in liquidation per reference number T. 3462/16.[3]
- [6] On 7 June 2017, a first creditor's meeting was held and at was at this meeting that claim 1 which forms the underlying causa for the summary judgment, was accepted as a proven claim by the liquidators.[4]

THE APPLICANTS CONTENTIONS

- [7] On behalf of the applicants it is contended that claim 1 is ultra vires and of no force and effect as it was based on a summary judgment which was taken against Centra Vac after the resolution liquidating the company was registered. As such it did not take note of the already existing lack of legal status of the company in liquidation.
- [8] In addition to this, the applicants contend that on 9 March 2018 Mr Bradley Brazington, the legal representative of the fourth respondent informed the first respondent of the liquidation status of the company, this after same was brought to the attention of the parties at the enquiry held by the first respondent on the 8th March 2018.[5]
- [9] It was on this basis that the applicants challenged the continuance of the enquiry and requested the first respondent to take steps to remedy the defects.
- [10] It is further the applicants contention, that their repeated attendances of enquiries premised on an ultra vires and invalid underlying claim which has been accepted as proven, is debilitating in respect of their health, taking emotional strain on their marriage and infringes on their rights vested in terms of our Constitution.[6]
- [11] In addition to the above, the applicants contend that they have a clear right that the liquidation proceedings should be administered by an objective, honest and bona fide liquidator, at arms-length, as could be expected and it on this basis that they seek that their appointment as liquidators be set aside and revoked.[7]

THE RESPONDENTS CONTENTIONS

- [12] On behalf of the first to third respondents it is contended, that the judgment obtained during summary judgment remains valid until such time as it is set aside by a court and that this judgment was obtained in circumstances where the judgment creditor was unaware of the voluntary liquidation of the company.[8]

- [13] Furthermore, that even if it is found that there exists merits to set aside the said judgment; the first and second respondents would have no power or locus standi to do so, as the moment the company went into voluntary winding up, the directors were divested of all powers relating to any proceedings regarding the insolvent company and that such powers vested with the duly appointed liquidators.[9] It is solely them that vests with the power to bring an application to either set aside or rescind the judgment.
- [14] In addition the respondents alleges that section 359 of the Companies Act 71 of 2008 provides that legal proceedings are suspended and attachments are void when a company has been liquidated.[10]
- [15] Furthermore, the respondents alleges. that the applicants had failed to attend the first meeting of creditors despite the meeting being validly advertised and it was at this meeting where the Master who holds an overriding discretion to appoint a final liquidator had chosen the liquidator.[11]
- [16] It was also at this first meeting of creditors that the fourth respondents claim was presented and being aware that the judgment was obtained after the date of voluntary liquidation the claim had to be proven.
- [17] In this regard the liquidators had placed reliance on the combined summons as issued under case number 61931/2016. The claim of the fourth respondent was duly investigated and the first respondent was satisfied as to its validity.[12] As nothing was found untoward in accepting the claim, the first and second respondent was thereafter appointed as the final liquidators.[13] As mentioned the judgment was obtained by way of summary judgment for services rendered to the company in liquidation, which application the applicants had failed to oppose.[14]
- [18] It is further the first and second respondent's contention that the launching of the present application and the challenge of their appointments as liquidators, is merely a knee jerk reaction to the subpoenaed served on the second applicant to attend the proceedings of the enquiry. That prior to the date of the launching of the present application, no challenge was raised to the appointment of the liquidators, despite the fact that their appointment had taken place as early as June 2017.[15]

APPLICABLE LEGISLATIVE FRAMEWORK

- [19] Section 44 of the Insolvency Act 24 of 1936 provides as follows:

“44 Proof of liquidated claims against estate:

- (3) A claim made against an insolvent estate shall be proved at a meeting of creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim:....

- (4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule of this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty- three, the amount at which he values the security....."

[20] Section 45 of Act 24 of 1936 provides as follows:

"45. Trustee to examine claims-

- (1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.
- (2) The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in facts owes the claimant the amount claimed.
- (3) If the trustee disputes a claim after it has been proven against the estate at the meeting of creditors, he shall report the fact to the Master in writing and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provision of section seventy-five."

[21] Section 339 of the Companies Act 61 of 1973 further provides as follows:

"339. Law of insolvency to be applied mutatis mutandis. In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by this Act."

[22] In the present instance, it is common cause between the parties that the grievance by the applicants, is premised on the acceptance by the first and second respondents of the claim by the fourth respondent.

[23] It is further common cause between them, that the applicants were absent from the first meeting of creditors called albeit that same was properly advertised in the Government Gazette on 19th May 2017.

- [24] In their replying affidavit, the applicants set out that their absence at the first meeting of creditors was as a result of them having been unfortunately blissfully unaware of the date and mechanics of the first creditors meeting.....", and them having been without the services of a legal representative, who had withdrawn and that the liquidator should have somehow made contact with their erstwhile attorneys to inform them of the date of the first meeting of creditors.[16]
- [25] Now firstly, there simply is no requirement in law, that liquidators are obliged to correspond with directors personally (or with their attorneys) and by so doing to inform them of the details as to when the first meeting of creditors is scheduled to take place.
- [26] Publication in the Government Gazette is what the Act prescribes and this is so to afford all interested parties and more specifically creditors of the company in liquidation an opportunity to present their claims against the said company in liquidation.
- [27] The rationale for this is to allow for an open and transparent process to be embarked upon and it follows that all claims made against a company in liquidation will be made at a public forum and will be subject to examination by the officer who presided over the meeting and then by the trustees in terms of the provisions of section 45.
- [28] In addition to this, the applicants having taken the decision to voluntary place the company in liquidation ought to have appraised themselves of the process which will follow once a company had placed itself in voluntary liquidation and their ignorance of the law in this regard cannot be used as an excuse.
- [29] As mentioned previously section 45(3) of the Insolvency Act specifically provides for a mechanism in terms of which an aggrieved creditor or a member can seek the expungement of a claim. In this regard although correspondence purporting same was directed to the liquidators, this correspondence exchange occurred several months after the first meeting of creditors was held and it also failed to provide evidence before the liquidator in respect of which the summary judgment in terms of which the judgment was granted could be challenged by the liquidators.
- [30] In the absence thereof, there simply exists no basis upon which the liquidators was obliged to challenge the judgment of the fourth respondent by way of a rescission application and in the absence thereof the judgment stands until it is set aside by a court. It therefore follows that the application must fail.
- [31] The acceptance of claim 1 by the appointed liquidators is the basis upon which the applicants further contend warrants that the appointment of the liquidators to be set aside and revoked and further procedures and inquires in respect of claim 1 to be stayed. As previously mentioned the Master holds the overriding discretion to appoint a final liquidator of choice and on the evidence placed before this court, nothing points to the fact that the applicants had indeed approached the Master to challenge the appointment of the first and second respondents as liquidators of the company in liquidation, but rather that such

challenge was launched as a knee jerk reaction by them to avoid attendance and their participation in the inquiry currently embarked upon by the appointed liquidators. The applicant by approaching the Court to revoke the appointment of the liquidators, without first approaching the Master, is to request the Court to usurp the function of the Master.

[32] It therefore must follow, that the applicants have failed satisfy this court to be awarded the relief which they seek and consequently their application must fail.

[33] In the result the following order is made:

33.1 The application is dismissed.

33.2 The applicants are ordered to pay the costs of the application on an Attorney and Client scale personally, and jointly and severally, the one paying the other to be absolved.

C. J. COLLIS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

APPEARANCES:

1. FOR THE APPLICANTS:

ADV. Z. PANSEGROUW

2. INSTRUCTED BY:

D.P. DU PLESSIS INCORPORATED

3. FOR THE FIRST, SECOND &

THIRD RESPONDENTS:

ADV. J. HERSHENSOHN

4. INSTRUCTED BY:

BRAZINGTON & McCONNELL

5. DATE OF HEARING:

26 AUGUST 2019

6. DATE OF JUDGMENT:

27 JANUARY 2020

[1] Founding Affidavit para 32 p 12

[2] Founding Affidavit para 34

[3] Founding Affidavit para 35

- [4] Founding Affidavit para 37
- [5] Founding Affidavit para 39 and Annexure" CEJ 6"
- [6] Founding Affidavit para 48 & 51.
- [7] Founding Affidavit para 53 & Notice of Motion prayer 1.
- [8] Answering Affidavit para 5.7
- [9] Answering Affidavit 5.7 & 5.10
- [10] Answering Affidavit para 5.5; Section 359 Act 71 of 2008 provides as follows: 359 Legal proceedings suspended and attachments void: (1) When the Court has made an order for the winding- up of a company or a special resolution for the voluntary winding- up of a company has been registered in terms of section 200-
- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator;
- and
- (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.
- [10] Answering Affidavit para 5.5; Section 359 Act 71 of 2008 provides as follows:
- 359 Legal proceedings suspended and attachments void: (1) When the Court has made an order for the winding- up of a company or a special resolution for the voluntary winding- up of a company has been registered in terms of section 200-
- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator;
- and
- (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.
- [11] Answering Affidavit para 5.14 & 5. 15
- [12] Answering Affidavit para 14.3.3
- [13] Answering Affidavit para 6.7
- [14] Answering Affidavit para 6.20 & Minutes of Meeting held by the Master p 133, Annexure "KW9"
- [15] Answering Affidavit para 6.20.5 & 6.22
- [16] Replying Affidavit para 88

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