

SOUTH AFRICA / JUDGMENT

Kramer v Westraad and Others; In re: Kramer v Ursispace (Pty) Ltd (5602/2016) [2017] ZAFSHC 220 (19 October 2017) [2017] ZAFSHC 220

COURT

Free State High Court, Bloemfontein

BEFORE

J.J.F. Hefer

CASE / FILE NUMBER

5602/2016

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FREE STATE COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 5602/2016

In the interlocutory application between:

MARITZ JOHAN (FELIX) KRAMER Applicant

and

JACOBUS JOHANNES (BUKS) WESTRAAD

First Respondent

ETIENNE VISSER

Second Respondent

URSISPACE (PTY) LTD

Third Respondent

In re:

MARITZ JOHAN (FELIX) KRAMER

Applicant

And

URSISPACE (PTY) LTD

Respondent

CORAM:

HEFER, AJ

JUDGMENT:

HEFER, AJ

HEARD ON: 24 AUGUST 2017

DELIVERED ON: 19 OCTOBER 2017

- [1] This is a rather extra-ordinary application in which the Applicant seeks the joinder of two additional parties as Respondents, merely to enable Applicant to obtain an order to the effect that such additional parties would pay the cost of the liquidation proceedings instituted by the Applicant against an existing Respondent party. The Applicant further seeks an order in terms of which Applicant be allowed to withdraw its application for liquidation in such proceedings. In order to make sense of the rather peculiar circumstances of the matter, the facts need to be set out as concisely as possible.

THE

FACTS:

- [2] The Applicant and the First Respondent has apparently been familiar with each other since 2007. It appears that the Applicant has performed various construction works at the instance of the First Respondent at the well-known Emoya Estate, Bloemfontein, of which the First Respondent is the registered owner, as well as various other developments in Bloemfontein, namely Lillyvale, Riversdale as well as Fellissier.
- [3] At some stage the Third Respondent was incorporated and registered. The First Respondent as well as a certain Mr. Jeremy Berlyn became equal shareholders of Third Respondent. The Third Respondent, amongst others, financed the Lillyvale development. Since the Third Respondent's involvement in the Lillyvale development, the Applicant conducted the construction work in his own name instead of a close corporation of which he apparently is a member.
- [4] The Applicant alleges that the Third Respondent failed to pay him the amount of R150 000,00 which was due and payable in regards to the Lillyvale development. Although the First Respondent refers to certain additional allegations pertaining to the unworkmanlike manner of performance by the Applicant, the First Respondent does not deny that the Third Respondent, of which, as stated he is one of two shareholders, is indeed indebted to the Applicant in this amount.

[5] During 2016 the First Respondent informed the Applicant that he would assist him to get the money from the Third Respondent. It is common cause that at that stage, the relationship between the First Respondent and Mr. Berlyn deteriorated. According to the First Respondent it was agreed that he would take responsibility for the amount of R75 000,00 for the work performed in the Lillyvale development on behalf of Ursispace, although, according to him, he did not agree with the Applicant's claim against the Third Respondent. The First Respondent further alleges that the Applicant was to claim the balance of the amount due from Mr. Jeremy Berlyn. According to the First Respondent, when the Applicant requested him to assist him in this regard, he indicated that he was not willing to communicate with Mr. Berlyn but instead referred the Applicant to the Second Respondent, a practising attorney, to assist him to collect the amount from Mr. Berlyn.

[6] It is common cause that proceedings were indeed instituted by the Applicant for the liquidation of the Third Respondent. According to the Applicant such proceedings were instigated by the First Respondent in corroboration with the Second Respondent. In broad

terms, the Applicant alleges that he received a telephone call from the Second Respondent at some stage during September 2016 during

which the Second Respondent introduced himself and informed him that the First Respondent initiated an application for the liquidation of the Third Respondent. This allegation is of course disputed by both First as well as Second Respondents.

[7] During this telephone conversation, Applicant alleges that he also heard the First Respondent in the background. The Second Respondent then informed Applicant that he would let him know when the documents were ready to be signed. At some stage the Second Respondent indeed contacted the Applicant and requested him to go to his offices. Upon his arrival at the offices of the Second Respondent, according to the Applicant, he had a less favourable impression of the Second Respondent as well as his offices. Of importance is that the Applicant alleges that he did not have the opportunity to read the founding affidavit in support of the liquidation application. The Applicant alleges that because the First Respondent wanted to help him, he actually did proceed to sign such founding affidavit without reading it. He only perused the founding affidavit for the first time after the application had been issued and according to the Applicant, this was the first opportunity he had to read such affidavit. Upon perusal of such founding affidavit, he noted that reference was made to the commissioner of oaths who according to the affidavit, administered the oath whilst the Applicant alleges that when he signed the founding affidavit, it

was only done so in the presence of the First Respondent.

- [8] Upon perusal of the founding affidavit, Applicant further discovered that the amount which was due and payable by the Third Respondent towards the Applicant, was R249 000,00 which, according to the Applicant, is untrue whereas it was only R150 000,00. The Applicant further alleges that the invoice which was appended to the founding affidavit was not compiled by him and he did not deliver such invoice to the First Respondent whereas the amount of R249 000,00 was not due by the Third Respondent.
- [9] The Applicant then proceeds with various aspects of the founding affidavit which according to him, are not correct and in fact untrue. The detail of such facts need not be set out herein. At this stage it needs to be mentioned already that the Applicant does not provide details of when in particular he perused the founding affidavit and discovered the errors as alleged by him. Of importance is that it also need to be mentioned at this stage that save for the incorrect amount, namely R249 000,00, the Applicant did not confront either the First nor the Second Respondent with any of the incorrect facts which were contained in the founding affidavit and which, as stated, are incorrect. According to the Applicant, he only contacted the Second Respondent after Mr. Jeremy Berlyn confronted him with the incorrect amount referred to in the founding affidavit to the liquidation application.
- [10] According to the Applicant at the stage when he confronted the Second Respondent with the incorrect amount, he already instructed him at that stage to withdraw the application. The Second Respondent, according to the Applicant, however assured the Applicant that everything will be in order. The Applicant further alleges that had he been made aware of any cost implications in regards to the liquidation application, he would not have proceeded with such application because of the financial difficulties he experienced at that stage. According to the Applicant he insisted on numerous occasions that Second Respondent withdraws the liquidation application against the Third Respondent, but to no avail. At some stage it also appeared to the Applicant that the First Respondent did not intend to pay the Applicant any money as was suggested by Mr. Jeremy Berlyn. It was at that stage that the Applicant also realised

that he was merely used by the First Respondent together with the Second Respondent to have the Third Respondent liquidated because of the First Respondent's differences with Mr. Berlyn.

- [11] According to the Applicant the allegations pertaining to Third Respondent's indebtedness towards the First Respondent can be

attributed to the fraudulent conduct of the First Respondent. The Applicant alleges in particular that the First Respondent used him in the sense that he was to gain financially by adding the R99 000,00 to the amount due to the Applicant by the Third Respondent. Furthermore according to the Applicant through this application the First Respondent sought to settle his differences with Mr. Berlyn. In that sense the First Respondent acted mala fide.

[12] The Second Respondent in broad terms disputes the allegations by the Applicant pertaining to coercion between himself and the First Respondent as alleged by the Applicant. The Second Respondent in particular disputes that the Applicant was not aware of the cost implications in regards to the liquidation application. In support hereof the Second Respondent attached detailed transcriptions of two telephonic conversations which took place between the Applicant and the Second Respondent during February as well as March

2017. The contents of these transcriptions will only be dealt with as far as they may be relevant for purposes of the adjudication of the application.

[13] The relevant portions for purposes of this judgment in the said transcription read as follows:

Mnr. Kramer:

"Ek het eintlik 'n ... ek het eintlik 'n disturbing ding gekry wat my eintlik heeltema/ disturb het. Um die ander outjie wat ek jou gese het hy was bereid om ... sy pa was bereid om te kom na jou toe en te onderhandel ... en blykbaar het um ... met hierdie uitstel van die likwidasie, het Buks vir hom h vir hom (onhoorbaar) gestuur en gese hy het die saak vir drie weke uitstel ... Buks laat hom weet hy betaal net die helfte aan my nie ... My geld, hulle sat die helfte betaal toe se Buks hy betaal niks nie. Dit het ek op wit en swart gesien, sms. Hy se hy betaal niks nie."

"U weet vandag ... ek ... nou nie vandag nie ... toe ek nou die goed sien, toe sien ek ... toe se ek vir Jeremy 'weet jy wat ek gaan my prokureur bel en vir hom se hy moet maar die likwidasie my likwidasie terugtrek en vergeet die geld ... los die geld vergeet ek stap weg. Ek het nie nus vir hierdie mudslinging nie."

Mnr. Visser:

"Daar is 'n klomp kostes aan verbonde ..."

"Ja nee ek weet, ek weet daar is kostes aan verbonde."

Mnr Visser:

"Daar is 'n klomp kostes aan verbonde. Wat gaan nou daarvan word?"

Mnr Kramer:

"Nee dis reg dis reg. Buks het my gebruik om 11 likwidasie in te gebruik en dis hoekom ek hierdie ding nou kanselleer want ek is gebruik om 'n

likwidasie te bring. Sadat hy homself kan verryk. Hy was by jou en ek weet daai dag toe hy ... toe jy my gebel het."

"Nou staan al die kostes weer op my. Dis reg, dis reg Ettienne, dis reg laat hom ... ek kan dit vat ... ek sal dit vat ... ek sal dit vat. Dit wys jou net weet watse tipe ou hy is."

"Nee dit is reg as daar kostes is om betaal te word dan gaan ek n plan maak. Al moet ek gaan geld teen om dit te doen. Ek sal dit doen. Ek sal dit doen maar ek wil net vir jou weer n keer se dit is Buks Westraad se modus of operandi."

[14] The further importance of the contents of the transcription is that the Applicant confirmed during his conversations with the Second Respondent that he was not able to transport his grandson due to the fact that he did not have the necessary transport, which fact is disputed by the First Respondent. Furthermore Applicant confirmed that only the amount of R150 000,00 was due by the Third Respondent to the Applicant.

[15] The Second Respondent further alleges that the certificate of balance which was used in support of the liquidation proceedings and which was appended to the main application, emanated from a summons issued against the Respondent, which was brought to the Second Respondent's attention by the First Respondent. According to the Second Respondent however, First Respondent did not play any role whatsoever in the liquidation application or exercised any form of influence and/or decision making. The Second Respondent further disputes Applicant's allegations to the effect that he (Applicant) did not know the Second Respondent prior to the liquidation proceedings. According to the Second Respondent he has consulted with the Applicant in regards to two matters of which the First Respondent provides the relevant file reference numbers as well as the facts pertaining to such consultations.

[16] According to the First Respondent the Applicant has done some additional construction work for Mr. Jeremy Berlyn and his father

Peter which caused the development in Lillyvale to be delayed. As a result of this the Third Respondent lost approximately R480 000,00. For this reason and also because of certain outstanding retention work which was to be performed at the Pearl Ridge Development, the First Respondent was unwilling to pay the Applicant any of the moneys which was due by the Third Respondent to the Applicant.

[17] The First Respondent further alleges that the Applicant has earned a considerable income through the First Respondent as well as entities of which First Respondent is part of, during the past nine years. According to him, the Applicant is irresponsible with his finances. A great deal of money is spent by the Applicant on his grandson. First Respondent further alleges that during the second half of 2015 the Applicant visited him at his offices. He was upset because Mr. Jeremy and Dr. Peter Berlyn refused to pay him for construction work done by him on their behalf. The First Respondent telephoned Mr. Berlyn and tried to solve the problems on Applicant's behalf, to no avail. It appears that during the middle of 2016, the relationship between the First Respondent and Mr. Berlyn has deteriorated to such an extent that First Respondent was not willing to assist Applicant with the collection of the funds which was due and payable by the Third Respondent to the Applicant. The First Respondent then referred the Applicant to Mr. Etienne Visser to enable him to assist with the collection of the money. First Respondent disputes that he tried to convince Applicant to proceed with

the liquidation proceedings. In regards to the Second Respondent, the First Respondent alleges that the Second Respondent was at that stage his attorney of record. According to him the Second Respondent mentioned that a liquidation application will be in the best interest of Applicant to enable him to get his money from Third Respondent. The First Respondent indicated to Third Respondent that he would not oppose such an application because, according to him, he would not gain any advantage from such an application and furthermore that he was not willing to do any business with either Mr. Jeremy nor his father, Dr. Peter Berlyn. According to the First Respondent he offered his help in providing the necessary documentation for such an application.

First Respondent, however, does not provide any detail of which documentation he refers to. According to the First Respondent, the Applicant's wish to withdraw the application for liquidation is not because of the irregularities as alleged, but merely because the Applicant and the Berlins are now on a good footing and it appears that Jeremy Berlyn is indeed willing to pay his share of the amount due by the Third Respondent to the Applicant. The Applicant never confronted the First Respondent with the irregularities as alleged.

[18] The reply by the Applicant to a large extent contains legal argument pertaining to the matter and does not necessitate detailed

discussion. In broad terms the Applicant joins issue with the allegations as contained in both the First and Second Respondents'

opposing affidavits.

[19] In regards to the facts and allegations upon which the Applicant relies, it is evident that there is a dispute of fact in regards to First and Second Respondents' role pertaining to the instigation of the liquidation process. In this regard, Mr. Snellenburg SC, on behalf of the Applicant, in his Heads of Argument referred me to the matter of Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2000] ZASCA 106; 2000 (3) SA 371 SCA where Heher JA referred to the principle that an Applicant who seeks final relief on motion proceedings, must in the event of

conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or bona fide dispute of fact or are so farfetched or clearly untenable that the Court is justified in rejecting them merely on the papers. In particular, at paragraph 13 of the judgment the following was said:

“A real, genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed... When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they may be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied.”

[20] In Room Hire Co. Ltd v Jeppe Street Mansions (Pty) Ltd 1949

(3) SA 1155 (T) Murray, AJP at 1162 said the following:

“In as much as the ascertainment of the true facts is effected by the trial judge, on considerations not only of probability but also of credibility of witnesses giving evidence viva-voce, it has been emphasised repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavit, in disregard of the additional advantages of viva-voce evidence ... “

[21] The first task is accordingly to identify the facts of the alleged involvement of the First Respondent in initiating and continuing the liquidation application of the Third Respondent, on the basis of which a legal dispute are to be decided.

[22] According to the Applicant, during the middle December 2016, Mr. Jeremy Berlyn contacted him and enquired about the amount

of R250 000,00 which appeared in the liquidation application. The Applicant further alleges that upon his arrival back in Bloemfontein

at that stage he telephoned the Second Respondent and requested a meeting upon which Second Respondent told him to come and see him the next day. The Applicant then in particular states that he went to see the Second Respondent during which visit he informed the Second Respondent that the amount which was due to him was indeed R249 000,00 and not R150 000,00. In answer to these allegations, and in particular the previous visit to the offices of the Second Respondent, the Second Respondent merely refers to the transcripts of the telephonic conversations. The contents of the transcripts does not shed any light on the previous visits to the Second Respondent as alleged by the Applicant.

[23] In the transcript of the conversation of 22 February 2017, the Second Respondent indicated that he has already received an invoice from the liquidator in the amount of approximately R40 000,00. In the context of the conversation it appears that Second Respondent had already discussed the withdrawal of the liquidation application with the provisional liquidator which he would have only done subsequent to the Applicant's visit and after Applicant had informed Second Respondent of his misgivings.

[24] In the same breath Heher JA in the Wightman- matter also referred to circumstances where the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer or more importantly, countervailing evidence. In this

particular regard the First and Second Respondents and more in particular Second Respondent's failure to provide any transcription in regards to the first telephonic conversation which the Applicant refers to which took place during September 2016 needs also to be considered. The Applicant alleges in particular that it was Mr. Visser who contacted him and not vice versa. Applicant then deals extensively about what was said during this conversation during which he also amongst others heard the First Respondent laughing in the background. The allegations pertaining to these are however, admitted.

- [25] First Respondent, in broad terms elected to attempt to attack the Applicant's character in order to impugn the credibility of his version. Mr. Steenkamp, on behalf of the First Respondent, argued that due to certain discrepancies between the contents of the founding affidavit and the contents of the transcriptions which were disclosed by the First Respondent, the Applicant is not open and frank in his founding affidavit. Mr. Steenkamp further argued that it is improbable that the Applicant would have signed the founding affidavit of the liquidation application without perusing it first in view of the circumstances prevailing. According to him further, the First Respondent did not collude with the Second Respondent as averred by the Applicant.
- [26] Mr. Roux SC on behalf of the Second Respondent presented his argument in, if I may say so, a quite different yet pleasant and capable manner. What he actually did is that in a somewhat narrative manner he described what, according to the Second Respondent is the true state of affairs. In short Mr. Roux told the story that the Applicant decided to institute liquidation proceedings against the Third Respondent in an attempt to collect his money from the Third Respondent in an attempt to collect his money from the Third Respondent which was due by the Third Respondent to the Applicant. It is common cause that the First Respondent and Jeremy Berlyn were equal shareholders in the Third Respondent. At some stage, which is also not disputed by either one of the Respondents, Mr. Jeremy Berlyn apparently approached the Applicant and offered to pay him R75 000,00 in regards to his share of indebtedness to the Applicant by the Third Respondent. It also appears that Mr. Jeremy Berlyn also offered Applicant the use of a certain motor vehicle in order to assist him to convey his grandson to school amongst others. At some stage it also came to the knowledge of the Applicant that the First Respondent as the other shareholder did however, not intend to settle his share of indebtedness towards the Applicant. The Applicant knew, according to Mr. Roux on behalf of the Second Respondent that the First and Second Respondent did not collude with each other. However, due to the offer by Mr. Berlyn and due to the refusal of the First Respondent to make payment towards the indebtedness, the Applicant decided to withdraw the application for liquidation proceedings and now wishes to hold First as well as Second Respondent liable for the costs of such liquidation application. It is this "story" as advanced on behalf of the Second Respondent which necessitates careful consideration.

[27] It is common cause that the Third Respondent was established after it appeared a close corporation, Loyal Harvest CC, which was involved in the Pearl Ridge Development needed additional finances. The Third Respondent then replaced the Loyal Harvest CC as developer.

[28] It is further common cause that the First Respondent together with Jeremy Berlyn are the only shareholders of the Third Respondent.

[29] According to the Applicant, during 2016 the First Respondent indicated that he would assist him to get his money from the Third

Respondent. It is common cause that at that stage the relationship between the First Respondent and Jeremy Berlyn has deteriorated to such an extent that the First Respondent was not willing to communicate with Jeremy Berlyn pertaining to the moneys due to the

Applicant. The First Respondent disputes Applicant's allegations to the effect that it was he that suggested that the Third Respondent be liquidated to enable the First Respondent to get his money from the Third Respondent. What is important is that, according to the First Respondent, he indicated to the Second Respondent that he was not going to oppose the application for liquidation because he was not to gain anything from opposing such application. Furthermore, according to the First Respondent, he "mentioned" to the Applicant that he will not oppose the application for liquidation because he no longer wishes to do business with me and Peter Berlyn. It is obvious that the First Respondent also wishes the Third Respondent to be liquidated because, as stated by the First Respondent himself, that will solve any further future problems with the Berlyns.

[30] It is also common cause that in regards to the liquidation proceedings itself, there were discussions between the First and

Second Respondent. The Second Respondent states in particular that certain facts were disclosed by Westraad and that certain inferences

were made by him in this regard. However we do not know what these facts were, nor which inferences were made by the Second Respondent.

[31] It is further common cause that a copy of action proceedings instituted in the Free State High Court against the Third Respondent

was handed by the First Respondent to the Second Respondent from which, according to the Second

Respondent, "certain facts appeared". It appears that this copy of the action proceedings referred to by the First Respondent

was indeed handed by the First Respondent to the Second Respondent for purposes of the liquidation proceedings. It could only have been for that purpose. The Second Respondent states himself that it was this judgment documentation together with other documentation which provided the background for purposes of the Section 345(1)(a) notice and thereafter the liquidation application together with the inferences drawn from the aforesaid documents and statements therein contained.

[32] From these facts, which are common cause, it appears undoubtedly that First Respondent played an active role in the institution and continuation of the liquidation proceedings. This, however, does not necessarily mean that he colluded with the Second Respondent and that the Applicant is therefore entitled to the relief as sought.

[33] The First Respondent fails to deal with Applicant's referral to the contents of a sms message from the First Respondent addressed to Jeremy Berlyn in which the First Respondent apparently indicated that he was not willing to pay his share of the debt by the Third Respondent to the Applicant. This is also dealt with in the transcription provided by the Second Respondent. This fact is

therefore further support for the narrative story by the Second Respondent as advanced by Mr. Roux on behalf of the Second common cause and apparently followed after Jeremy Berlyn indicated that he was willing to settle the debt by the Third Respondent to the Applicant as far as his half share is concerned, on the basis that the liquidation proceedings against the Third Respondent was to be withdrawn. However, it appears that due to the bad blood between the First Respondent and the Berlins, the First Respondent not only fails and/or refuses to pay his share of the debt to the Applicant but also in fact wishes that the liquidation proceedings against the Third Respondent should continue. That is again the only inference that can be drawn from the facts common cause. In this regard it is also quite significant that up until today the Second Respondent did not follow the Applicant's instruction to withdraw the application for liquidation but in fact rather chose to withdraw as attorney of record on behalf of the Applicant.

[34] Mr. Snellenburg, on behalf of the Applicant referred me to the matter of Goldfields Ltd and Others v Motley Rice LLC 2015 (4) SA 299 GJ dealing with the joinder of funders to proceedings already instituted in Court. In this matter Mojapelo DJP made a distinction between pure funders of litigation and other funders. In this regard the following was stated:

"Pure funders have no personal interest in the litigation. They do not stand to benefit from it and they do not fund litigation as a matter of business. They do not seek to control the course of the litigation that they fund... The other type of litigation funder is distinguishable from the pure funder described above. I shall call this second type of funder the 'controlling funder' or 'funder for own interest' to distinguish it from the pure funder of litigation. The controlling funder does not merely fund litigation proceedings, but substantially also controls the proceedings that it funds, or at any rate stands to benefit from them. Justice ordinarily requires that, proceedings, but substantially also controls the proceedings that it funds, or at any rate stands to benefit from

them. Justice ordinarily requires that, if the proceeding fail this second type of funder will pay the successful party's costs."

- [35] Mojapelo DJP, however, in the Goldfields-matter came to the conclusion that because the Respondent was not to benefit from the action already instituted, the Respondent was not to be joined as a party.
- [36] As far as the First Respondent in the present matter is concerned, in view of the undisputed facts referred to above, it can be found without any doubt that the First Respondent indeed stands to benefit from the continuation of the liquidation proceedings against the Third Respondent whereas he himself states that according to him, it means the end of the business relationship with the Berlyns and in particular Jeremy Berlyn. This is so in spite of the fact that it cannot be found that the First Respondent is indeed a funder to the liquidation proceedings. On that basis the First Respondent should indeed be joined as a party to the present liquidation proceedings.
- [37] As far as the Second Respondent is concerned, it is not quite clear from the affidavits filed on behalf of the Applicant on which basis a cost order against Second Respondent will be sought in the event of Second Respondent also being joined to the liquidation proceedings. In his heads of argument, Mr. Snellenburg, on behalf of the Applicant referred to Section 74 of the Insolvency Act, 24 of
1936. In terms of this legislation, if it appears to a Court that any attorney, with intention to benefit himself improperly advised the institution, defence or conducting of legal proceedings by or and against an insolvent estate order the whole or part of the expense thereby incurred to be borne by that attorney personally.
- [38] In short, based on the facts before me, it cannot be said that Second Respondent had the intent to benefit himself at any stage or has incurred any unnecessary expense in regards to the liquidation proceedings. There can therefore be no basis on which the Second Respondent can be held liable for the costs in regards to the liquidation proceedings. In respect of the Second Respondent, the application for joinder should therefore fail.
- [39] The Applicant further seeks an order in terms of which the Applicant is granted leave in terms of Rule 41(1)(a) of the Uniform Rules of Court to withdraw the liquidation application entered into by the Applicant against the Third Respondent. However, by implication the said Rule only provides that a Court may grant leave for the withdrawal of any proceedings already instituted before an order of Court has been issued. As soon as an order has been issued, as in the present matter where a provisional order of liquidation has already been issued, a Court cannot grant such leave whilst a provisional order of liquidation still stands. The appropriate manner will be for the provisional order of liquidation to be discharged and then, as far as necessary, to make an appropriate order in regards to costs. Whereas it is clear from the papers that the Applicant do not wish to continue anymore with the application for liquidation, although the return date of the provisional liquidation order is unknown to me, at this stage the rule nisi may be discharged.

- [40] What further needs to be considered is who should be held liable for the costs of the application for liquidation. In this regard the allegations by the Applicant himself need to be considered. Upon perusal of the transcripts of the telephonic conversations between the Applicant and the Second Respondent, it appears as mentioned earlier, that there had been at least one previous conversation between the Second Respondent in regards to the continuance of the liquidation application. It appears that during the conversation on 22 February 2017, that the Applicant was upset about the fact that the First Respondent did not want to pay the amount due by the Third Respondent to the Applicant. At that stage the Applicant also confirmed that the amount pertaining to the claim by the Applicant against the Third Respondent was indeed R100 000,00 less as the one as contained in the papers. What is of further importance is that during the conversation on 1 March 2017, the Applicant again confirmed that he was used, according to him, by the First Respondent to institute the liquidation proceedings against the Third Respondent.
- [41] In neither one of the transcriptions of the two telephonic conversations referred to does the Applicant mention the fact that he did not read the founding affidavit before he signed it. The closes he gets to that is by saying he now realises that an amount of R249 000,00 should in fact be R150 000,00. Applicant also does not confront the Second Respondent with the fact that he did not sign the founding affidavit in the presence of a commissioner of oaths. Most importantly upon consideration of the contents of the transcriptions referred to, during the conversations with the Second Respondent, the Applicant was not at all surprised by the fact that he was to be held liable in the event of the liquidation proceedings against the Third Respondent being withdrawn.
- [42] I consider it highly unlikely, as argued by Mr. Steenkamp, where Applicant attempted to recover the amount of approximately R150 000,00 from the Third Respondent, which must have been important to the Applicant, that an adult person will sign a sworn affidavit in the circumstances as described by the Applicant. If the Applicant failed to read the founding affidavit before signing such affidavit, he only has himself to blame. Even if it is accepted that the Applicant did not read the affidavit before he has signed it, the fact remains that the Applicant initiated the liquidation proceedings against the Third Respondent with the purpose of recovering the amount claimed by the Applicant from the Third Respondent. That aspect cannot be denied by the Applicant. Even if the liquidation process was indeed suggested by the First Respondent, the Applicant willingly and as stated, with the purpose of recovering the debt due by the Third Respondent, initiated the liquidation proceedings against the Third Respondent. Therefore, although the First Respondent may be held liable for the costs of liquidation, there is no reason why the Applicant should also not be held equally liable for such costs.
- [43] As far, as the costs of the present application is concerned, in view of my finding in regards to the liability of both the Applicant and the First Respondent of the costs of the application for liquidation, I consider it just that as far as the Applicant and the First Respondent is concerned, each party should pay their its own costs. As far as the costs of the Second

Respondent is concerned, such costs was incurred solely through the actions of the Applicant. There is therefore no reason why the First Respondent should be burdened by such costs.

[44] Lastly, as far as the Second Respondent is concerned, it is common cause that the Second Respondent did not withdraw the liquidation

proceedings as instructed by the Applicant at some stage, but in fact withdrew as an attorney acting on behalf of the Applicant. It also appears that First Respondent served the proverbial two gods in handling the liquidation proceedings against Third Respondent.

Although, as stated there is no basis that the Second Respondent may be held liable for the costs of the liquidation, I consider it necessary that the Free State Law Society investigates the actions of the Second Respondent and in particular whether he acted in a professional and ethical manner.

In view of the above, the following order is made:

ORDER:

1. First Respondent is joined as Second Respondent in the liquidation application under civil case number 5602/2016.
2. The provisional liquidation order in case number 5602/2016 is discharged.
3. Applicant and First Respondent is ordered to pay the undermentioned costs with regards to the liquidation application under civil case number 5602/2016 jointly and severally, the one to pay the other to be absolved:
 - (a) All expenses, costs and fees of the provisional liquidators in the liquidation application;
 - (b) All expenses, costs and fees in respect of drafting, issuing and prosecution of the liquidation application.
4. In regards to the interlocutory application to join the Second and Third Respondents in the liquidation application:
 - (a) in regards to Applicant and First Respondent, each party is to pay its own costs; and
 - (b) Applicant is to pay the costs of Second Respondent.
5. A copy of the judgment is to be delivered to the Free State Law Society by the Registrar.

J.J.F. HEFER, AJ

On behalf of Applicant:

Adv. N. Snellenburg SC

Instructed by H J Stander, Stander & Partners Attorneys

BLOEMFONTEIN;

On behalf of First Respondent: Adv. M. DJ Steenkamp

Instructed by A. de Wet, Webbers Attorneys, 96 Charles Street

On behalf of Second Respondent: Adv. J. Roux SC

Instructed by E Visser, 15 Barnes Street

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2017/220.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/kramer-v-westraad-and-others-unknown-topic-afshc-2017>

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