

SOUTH AFRICA / JUDGMENT

Safta Properties (Pty) Ltd and Others v Vukani Aviation (Pty) Ltd and Others (34072/19) [2020] ZAGPPHC 667 (17 June 2020) [2020] ZAGPPHC 667

COURT

North Gauteng High Court, Pretoria

BEFORE

M. Mbongwe

CASE / FILE NUMBER

34072/19

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REPUBLIC OF SOUTH AFRICA

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: 34072/19

In the matter between:

SAFTA PROPERTIES (PTY)

LTD

1st Applicant

(in liquidation)

HEIKO DRAHT

N.O.

2nd Applicant

TUELO RONALD THOMAS

N.O

3rd Applicant

and

VUKANI AVIATION (PTY) LTD

1st

Respondent

SAFTA HOLDINGS (PTY
LTD
2nd Respondent
SOUTH AFRICAN FLIGHT TRAINING ACADEMY
(PTY) LTD
3rd Respondent
AIRLUMO (PTY) LTD
4th
Respondent
SAFTA MAINTENANCE (PTY)
LTD
5th Respondent
NHLANHLA
DUBE
6th Respondent
CYNTHIA
NONHLANHLA RADEBE
7th
Respondent

JUDGEMENT

MBONGWE, AJ:

SUMMARY

- [1] The 1st applicant is a company in liquidation. The 2nd and 3rd applicants are, in terms of the CERTIFICATE OF APPOINTMENT (Annexure HD1) in the first instance, the LIQUIDATORS of the 1st applicant and, in the second instance, the PROVISIONAL LIQUIDATORS of the 1st applicant. The 1st, 2nd and 3rd applicants have launched this application seeking, inter alia, a declaratory order that the 1st to the 5th respondents be deemed not to be juristic persons and that their individual existence be ignored and they be considered or viewed as embodied in the 1st applicant. This proposed order is, according to the applicants, in terms of the provisions of sections 20(9), 22, 141 (2) (c) and 141 (3) of the Companies Act 71 of 2008.

THE RESPONDENTS

- [2] The applicants describe each of the 1st to the 5th respondents as a company duly incorporated in terms the company laws of the Republic of South Africa. The applicants also state the individual company registration numbers of each of the said respondents. The registered physical office address of these respondents is the same.
- [3] The 6th respondent is described as a pilot, a director of the 1st to the 5th respondents and a previous director of the 1st applicant.

- [4] The 7th respondent is described as a business woman who is or was a shareholder and director of most of the 1st to the 5th respondents and a previous director of the 1st applicant.

ORIGIN OF THE LIQUIDATION PROCESS

- [5] The liquidation of the 1st applicant originates from a judgement that was obtained against it for rental due to a school from which it had rented a portion of its hostel dwelling. Despite the 6th respondent's opposition and contention that the 1st applicant was not insolvent, the final liquidation order was granted on 17 August 2017.

BACKGROUND INFORMATION

- [6] The 6th respondent established the 1st respondent in 2006 and was joined by the 7th respondent in 2013. The 6th and 7th respondents respectively held a 80/20% shareholding in the 1st respondent.
- [7] The 1st respondent, represented by the 6th respondent entered into an agreement with the Department of Higher Education ("DHE") in terms of which the DHE was to provide funding for the training of previously disadvantaged individuals as pilots.
- [8] To further the objectives of the said agreement, the 1st respondent purchased a shareholding in the 2nd respondent; the holding company in respect of the 1st applicant, the 3rd, 4th and 5th respondents.
- [9] None of the companies under the 2nd respondent (SAFTA GROUP) had any financial obligation towards the 1st respondent. However, companies in the SAFTA group were to provide the services necessary for the realisation of the objectives of the agreement between the 1st respondent and the DHE. The services included the training of student pilots, their accommodation and catering.
- [10] These proceedings are a part of the ongoing liquidation of the 1st applicant for the debt aforementioned. The 1st, 2nd and 3rd applicants seek an order the effect of which would be that the 2nd, 3rd, 4th and 5th respondents are viewed as having ceased to have their individual juristic existence and are embodied in the 1st applicant. In short, it is sought that the SAFTA group of companies should, as a result of the insolvency of one of them, be absorbed into and treated as inextricable from the insolvent 1st applicant.

POINT IN LIMINE : THE AUTHORITY OF THE APPLICANTS

- [11] The main consideration in the present hearing is centred on the authority of the applicants, particularly the 2nd and 3rd applicants, to launch this application. The respondents contend that the Certificate Of Appointment issued by the Master of this Court does not lend the applicants the authority to institute these proceedings. Hereunder I traverse the contents of the said certificate (Annexure HD1) to the founding affidavit.

11.1 There is a clear ambiguity in the certificate in that the English version of the heading reads: "CERTIFICATE OF APPOINTMENT OF LIQUIDATOR(S)", the words PROVISIONAL LIQUIDATOR(S) / PROVISIONAL JUDICIAL MANAGER/ JUDICIAL MANAGER having been scratched out. This suggests the appointment of the 2nd and 3rd respondents as liquidators of the 1st applicant.

11.2 More in the middle of the certificate it appears that the 2nd and 3rd applicants were appointed Provisional Liquidators "with the powers set out in Section 386(1) (a) (b) (c) (e) and 4(d) of Act 61 of 1973 of the Company known as SAFTA PROPERTIES (PTY) LTD REG NO: 2008/009679/07"

[12] The 2nd and 3rd applicants rely on the contents of the certificate for their authority to institute these proceedings. The respondents contend

that the certificate does not confer the authority asserted by the applicants and pray for the dismissal of this application.

[13] This court took the decision that the present proceedings be limited to the hearing of arguments and determination made on the applicants' authority.

ARGUMENTS AND THE LAW

[14] The applicants' reliance on the provisions of Section 386(1) of the Companies Act of 1973 is a none starter for the assertion that these provisions confer authority on them to institute these proceedings. While this section deals with the general powers of the liquidators, the express extent of the liquidators' powers is defined by the prerequisites set out in sub sections

(d) and (e) of that section. Section 386(1) (d) requires the liquidator to "summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purposes as he may consider necessary". Section 386(1) (e) deals with the liquidators' powers in relation to the protection and better administration of the affairs and property of the company subject to the provisions of subsection (3), (4) and (5). While I refer specifically to the powers of the liquidator in terms of section 386(3) hereunder, it is important to state that subsections (d) specifically makes authorisation by the company or its creditors or contributories a pre requisite for the liquidators' actions in circumstances such as the institution of proceedings, as in the present case. There is no need to state that the applicants have not shown any evidence of having complied with the prescripts of these provisions. Section 386(1) (e) deals with the liquidators' powers with regard to the measures they may take for the protection and better administration of the affairs and property of the company, but subject to the provisions of subsections (3), (4) and (5).

Similarly, these provisions do not give authority to the applicants to institute proceedings of the nature concerned in this case.

[15] I now consider the source of the authority of a liquidator to institute or engage in legal proceedings on behalf of a company in liquidation by the Master of the High Court. In terms of Section 386(3) of the Companies Act 61 of 1973, the liquidators of a company in a winding up by the Court act in the name and on behalf of the company on the authority granted by meetings of creditors and members or contributories or on the direction of the Master given under Section 387. The applicants have not shown that they are clothed with any such authority to institute the present application. I find, consequently, that the applicants have not complied with the enabling provisions of the Companies Act. Further, a ratification of the situation is not open to them in light of the fact that the winding up in this case is not voluntary or at the instance of the directors of the 1st applicant, but by the court. I find that the point in limine was well taken and the application is accordingly dismissed.

COSTS

[16] The principle is that liquidators who purport to act in the name or on behalf of a company without the peremptory authorisation stipulated in Section 386(3) are held to be acting in their personal capacities and consequently personally liable for the costs of the relevant proceedings (see the full bench decision of the South Gauteng High Court in AUBY, JOHN DEON v PELLOW, ALLAN DAVID N.O. & MOTALA, ENVER MOHAMED N.O., CASE NO: A5009/12 handed down on 14 March 2013).

ORDER

[17] In the light of the findings in this judgement the following is ordered:

1. The application is dismissed.
2. The 2nd and 3rd respondents are ordered to pay the costs of this application in their personal capacities.

M. MBONGWE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

Date of hearing : 16 March 2020

Date of Judgement : 17 June 2020

APPEARANCES

For the Applicant : Mr P. A. Wilkins

Attorneys

: C. J. Human Attorneys,

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For the Respondent : Mr Sam Shalom Cohen

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JUDGEMENT ELECTRONICALLY TRANSMITTED

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