

SOUTH AFRICA / JUDGMENT

Shivanand and Another v Krugkor Franchise (PTY) Ltd and Others (13634/2019) [2022]

ZAGPJHC 474 (15 July 2022)

[2022] ZAGPJHC 474

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

13634/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 13634/2019

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
NOT
REVISED.
15
July 2022
In

the matter between:

KAMALJID
PREM SHIVANAND
First
Applicant
SHIVCOM
CC
Second Applicant
(REGISTRATION
NO: 2007/108318/23)
and
KRUGKOR
FRANCHISE (PTY) LTD
First Respondent

DEON
MARIUS BOTHA
Second Respondent
SUNE
SMITH
Third Respondent
PRIME
UNIVERSAL FOODS
Fourth Respondent
CUBISOL
INVESTMENTS 3 (PTY) LIMITED
Fifth Respondent
SOUTH
AFRICAN REVENUE SERVICES
Sixth
Respondent
THE
MASTER OF THE HIGH COURT,
Seventh Respondent
JOHANNESBURG
THE
COMPANY AND INTELLECTUAL PROPERTY
Eighth Respondent
COMMISSION

JUDGMENT

YACOOB J:

1. The second applicant (“Shivcom”) was wound up by this court on 15 May 2019 at the instance of the first respondent (“Krugkor”). The first applicant (“Shivanand”) now brings an application, ostensibly together with Shivcom, to set aside that winding up on the basis that it should never have happened. Shivanand contends that he is duly authorised to bring this application on Shivcom’s behalf. He is the sole member of Shivcom. However, since Shivcom is in liquidation, it is the liquidators who have the power to bring the application on its behalf. Nevertheless, Shivkumar remains entitled to bring the application on his own behalf as an affected person.
2. The second and third respondents are Shivcom’s liquidators, and the fourth and fifth respondents are creditors of Shivcom. The remaining respondents are cited as a matter of form. Of the respondents, only Krugkor participates in these proceedings.
3. It is common cause between the parties that the law requires there to be extraordinary circumstances in order to set aside the winding up, as there is no allegation that Shivcom is or was not insolvent.

4. In the founding affidavit the basis of the setting aside was that the winding up application was brought only as a response to the summons Shivkumar caused to be served on Krugkor and that the winding up application was never properly served. In the replying affidavit and in argument, the basis was alleged fraud. Mr Kaplan clarified in argument that the applicants rely on both the common law and section 354 of the Companies Act of 1973.
5. The legal basis of the application was not clearly set out in the affidavits. In fact Mr Kaplan relies on the answering affidavit for the establishment of the fraud. It only became clear in Mr Kaplan's replying argument what the real basis of this application is. Be that as it may, I proceed to consider whether Shivkumar has made out a case for the setting aside of the liquidation.
6. Shivkumar claims that the liquidation was obtained as a result of fraud, and that this is on its own sufficient to set aside the winding up. In argument the allegedly faulty service was not emphasised. Krugkor suggests that if there was any fraud the liquidators will deal with it.
7. Krugkor is a franchisor of Dros Restaurants. Shivcom is a franchisee, Shivanand having apparently entered into a franchise agreement with Krugkor on Shivcom's behalf, on 13 November 2017. The agreement is not annexed to the papers. The franchise was to be at Lonehill Mall. The franchise was apparently initially purchased by a Mr Naidoo who did not want to continue with it, and who passed on the opportunity to Mr Shivanand. Mr Naidoo does not depose to an affidavit confirming this, but it is common cause between the parties that Mr Naidoo paid the initial fees and that Shivcom became the franchisee. There is an email attached to the founding affidavit which implies that Naidoo was still part of negotiations as late as 27 October 2017. However there is no specificity at all about Naidoo's involvement, and about how Shivcom came to be the franchisee. In the replying affidavit Shivkumar makes the allegation that the money paid towards the franchise fees by Naidoo was a loan to him, but again there is no specificity.
8. According to Shivkumar, there are two instances of fraud which provide grounds sufficient to set aside the liquidation.
9. The first is that the liquidation was instituted to avoid a summons that Shivkumar issued against Krugkor. According to Shivkumar this is a fraud on the court (using the court for ulterior motives) as well as on Shivkumar and Shivcom. Since there is no contention that Shivkom is not actually insolvent, and in fact it appears just as likely that summons was issued to avoid a threatened liquidation, I find that there is no merit in this ground.
10. The second instance of alleged fraud is that the deponent to the answering affidavit ("Jordaan") received payments into his personal bank account and never issued a VAT invoice. This resulted, according to Shivanand, in Shivcom suffering cash flow problems. Again, Shivanand does not provide any proof that he and or SHivcom made these payments. The allegations suffer from the same vagueness found throughout the founding affidavit.

11. According to Jordaan, payments were managed by him as a favour to Shivanand and Naidoo, and that he introduced Shivanand to a Mr Mienie who was to be the project manager. According to Jordaan he himself never provided any service and therefore did not and could not provide VAT invoices.
12. It seems that Shivanand expected a “turnkey solution” which the first respondent does not provide, and Jordaan assisted Shivanand with a view to achieving this solution.
13. Shivanand also complains that the set up of the franchise cost more than the estimates he was given. This is clearly not a basis on which to set aside the liquidation. There is no intimation that Shivanand or Naidoo was given a lower estimate deliberately, or that costs were deliberately inflated.
14. Shivanand appears to have expectations which were not met, which is unfortunate. However, he has failed to make out a case for the relief he has sought. In particular, the vagueness of the papers make it difficult for this court to make any definitive findings.
15. It is clear that there were some miscalculations, as conceded by the first respondent, but again, that is not a basis on which to set aside the liquidation. The company is not doing business, and a liquidator is as able as anyone else, if not more able, to take steps to deal with any mismanagement or fraud.
16. Ultimately, the reason for the outcome of this matter is that Shivanand simply has not made out a case for the relief sought. The papers are replete with hearsay and vague allegations not supported by evidence, and no finding can be made in his favour.
17. For these reasons, I make the following order:

“The application is dismissed with costs.”

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicants: J L Kaplan

Instructed by :

Ian Levitt Attorneys

Counsel for Respondent: E van As

Instructing Attorneys: De Kock and Associates

Date of hearing: 24 August 2021

Date of judgment: 15 July 2022

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