LOM Business Solutions t/a Set LK Transcribers/LR

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: 6414/09

DATE: 12/08/2009

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED

DATE 30/11/09 SIGNATURE

10 In the matter between

COME WHAT MAY PROPERTIES (PTY) LTD	1st APPLICANT
MEGA SUPER CEMENT CC	2nd APPLICANT
and	
MASTER OF THE SOUTH GAUTENG HIGH COURT JOHANNESBURG	1st RESPONDENT
APHANE BENNETT	2nd RESPONDENT
VAN DER MERWE, LIEBENBERG DAWID RYK	3rd RESPONDENT
MOLOTO, LEBOGANG MICHAEL	4th RESPONDENT
20 MALATSI-TEFFO, LILY MAMPINA	5th RESPONDENT

J U D G M E N T

CJ CLAASSEN J: The 1st applicant in this application is a creditor of the 2nd applicant. The first applicant became such a creditor when cession was taken from a certain financial institution of its claim against

the 2nd applicant. The 2nd applicant is a close corporation, which was placed in liquidation by this Court on 13 April 2007. As a result of such liquidation the 3rd, 4th and 5th respondents were appointed as its joint liquidators.

Subsequently thereto on 19 March 2008 the members of the 2nd applicant sought and obtained in the North Gauteng High Court a discharge of the 2nd applicant from liquidation. There is currently pending before that Court an application under case number 08/8885 to set aside the order discharging the 2nd applicant from liquidation. I am informed from the bar that this application is due to be heard during the month of September of this year.

Be that as it may, the 2nd respondent is the official acting on behalf of the Master of the High Court who is the 1st respondent in regard to the liquidation proceedings that the 2nd applicant was involved in before its discharge from such liquidation. The 3rd, 4th and 5th respondents submitted to the 2nd respondent what is known as an "intromission account". This document is a voluminous document and it is attached to the founding affidavit as annexure CW11.

The Companies Act makes no provision for the submission of an intromission account. It would seem as if the submission of this intromission account resulted from some policy document issued by the Master of the High Court in regard to what is to happen after a company has been discharged from liquidation. A copy of this intromission account was also sent to the attorneys of record of the applicants on 11 August 2008.

On 15 August 2008, while the 2nd applicant was still discharged from liquidation, the 2nd respondent declared that the liquidators' intromission account had been examined and found to be in order and he then confirmed the account. It is the confirmation of this account, which resulted in the applicants launching this application.

In the notice of motion the following relief is sought.

1. "Reviewing and setting aside the decision of the 1st respondent in terms whereof and on 15 August 2008 its functionary the 2nd respondent confirmed the intromission account submitted to it by the 3rd, 4th and 5th respondents and which account purported to relate to the administration by the 3rd, 4th and 5th respondents of the insolvent estate of the 2nd applicant; and
2. That the 3rd, 4th and 5th respondents within seven days of the grant or the order sought in prayer 1 pay into the trust banking account of attorney John Joseph Finley Cameron, to be specifically designated for the benefit of the applicants and the 3rd, 4th and 5th respondents, all amounts that they received relative to remuneration and arising from the account and/or any other remuneration amounts that they received from the insolvent estate of the 2nd applicant and whilst under the administration of the 3rd, 4th and 5th respondents; and
3. That the 3rd, 4th and 5th respondents within 30 court days of the grant of the order sought in prayer 1, serve and file a further intromission account on the 1st respondent and on the 1st and 2nd applicants care of attorney J J F Cameron 204 Corner Drive Bramley Johannesburg; and

4. That the 1st respondent does not confirm the second account for a period of 10 court days after receipt thereof so as to afford the 1st and 2nd applicants an opportunity to object thereto and to make representations for purposes of prevailing upon the 1st respondent to disallow the fee entitlements of the 3rd, 4th and 5th respondents; and

5. That the 2nd respondent personally alternatively the 1st and 2nd respondents jointly and severally alternatively the 1st, 2nd, 3rd, 4th and 5th respondents [should these last named three respondents oppose this application] jointly and severally pay the costs of this application and on the scale as between attorney and client."

Only the 3rd respondent opposed the relief sought in the notice of motion by filing an answering affidavit. The 4th respondent also opposed the application but did not file any answering affidavit. The 5th respondent did not oppose the application. As far as the 1st and 2nd respondents are concerned, a report known as the Master's Report was filed but the application itself was not opposed. This report is to be found as an annexure to the papers at paginated page 597.

The entire purpose and motivation behind the launching of this application was in order for the 1st applicant to be able to object to an account submitted by the liquidators and, in particular, to object to the fees charged by the liquidators. It is the contention of the 1st and 2nd applicants that these liquidators did not perform their function properly and that they should not be entitled to any remuneration at all. This much was intimated by the attorney of record for the applicants in a letter to the 1st respondent.

Mr Gilbert appearing on behalf of the 3rd respondent took certain points *in limine*. The most important one is that the review application of the 1st and 2nd respondents' confirmation of the intromission account is flawed. The basis of this contention is to be found in the fact that upon discharge of a company from liquidation the various provisions and regulations dealing with the liquidation process, are no longer applicable. For this submission he relied on Blackman Companies Act, revision service 2, 2005 at 14/224/2 as well as the decision in the Supreme Court of Victoria in the case of *Krextile Holdings [Pty] Ltd] v Widdows Raybrush Fabrics [Pty] Ltd* 1974 VIC Lexis 132 at paragraphs 14 and 15. In this particular case, the following is stated and I quote:

> "In my opinion all the matters that flow directly from or are invoked by the making of an order as a part of the process of winding up under the provisions of the Companies Act 1961 are "proceedings in relation to the winding up". It is the performance or observance of all the statutory powers and duties indicated above which are comprehended within the expression "all proceedings in relation to the winding up".
>
> Accordingly, if an order were made under section 243 of the Companies Act 1961 it would be the process of winding up referred to in the various statutory consequences set out above and which directly flow from the making of the order that would be stayed. The Court of course is not empowered to revoke or recall its order once it has been passed and entered. The effect of a perpetual stay of proceedings under section 243 however must mean

> a virtual end to the winding up process under that order. The statutory provisions that ordinarily would cause certain things to be done no longer apply to the company and the order for the winding up becomes quite inoperative. Doubtless, the Court would protect the interest of the liquidator and any person who could possibly be affected by its order by invoking the latter part of the section to grant an order for a stay only on terms. But once a perpetual stay was granted the winding up process comes to an end under the order and the company still existing as *persona juridica* may then carry on its business and affairs in accordance with its memorandum and articles of association as if no winding up order existed. To say the least this conclusion may be regarded as somewhat paradoxical. The order to wind up made by a Court of competent jurisdiction remains unrevoked even though a stay be granted. But on granting the stay under section 234 the Court renders its own order a dead letter."

In the present matter, the liquidation order was in fact discharged. The consequences would be similar to those referred to in the aforesaid case. Blackman supports the proposition that the statutory provisions that ordinarily would cause certain things to be done no longer apply to the company.

The attack by the applicants on the legality of the confirmation by the 1st and 2nd respondent of the intromission account, is based on various provisions of the Companies Act, in particular sections 403 to 408 of the Companies Act. Reference in support of this attack was also

made to the regulations being CM101 paragraph 5 and CM104.

I am persuaded however by the argument of Mr Gilbert and authorities referred to above, that all the statutory liquidation provisions contained in the Companies Act, do not apply once a liquidation order has been discharged. The 2nd applicant became a fully fledged juristic person again, able to conduct its business in accordance with its articles of association and memorandum.

The significance of this conclusion is the following. First of all, it means that the act of confirming the intromission account by the Master was not an act pursuant to the provisions of the liquidation provisions in the Companies Act. It was an act presumably inspired by the policy documents issued by the first respondent. These policy documents are to be found at pages 611 to 617 of the papers. In particular, under the heading "Queries" when an order has been set aside, the following is stated and I quote:

> "Ask for confirmation from the liquidator trustee that all administration costs have been paid. Request written confirmation from directors of the company members of the close corporation that they have been placed in possession of all the assets."

Then under the heading "Remember" paragraph 1,

> "A provisional account does not get advertised or confirmed so these queries get deleted on the query sheet."

The further consequence of the non-applicability of the liquidation provisions after discharge from liquidation, is that the confirmation by the Master is not an act prescribed by any legislation.

The Companies Act does not contain such a provision. The Master's confirmation can at best be understood as a necessary action due to a *lacuna* in the Companies Act. The act does not deal with the particular situation after discharge of a liquidation order.

In that capacity, the Master is therefore not acting as a functionary of any State organ. That being the case, the confirmation can also not be reviewed pursuant to the provisions of the Promotion of Administrative Justice Act 3 of 2000. In this Act, "administrative action" means any decision taken by an organ of State when exercising the power "in terms of any legislation". The concept of an organ of State refers to any functionary exercising power or performing a function in terms of the Constitution or a Provincial Constitution or exercising the public power or performing a public function in terms of any legislation.

As previously stated the Master in confirming the intromission account was not acting in terms of any particular legislation. At best he acted in pursuance of policy rules made by the Master for purposes of regulating the situation which is not covered by legislation. That being the case, I am of the view that the review application is ill conceived and cannot succeed.

Mr Wetton on behalf of the applicant referred me to section 151 of the Insolvency Act which allows any person affected by an order in terms of the Insolvency Act to object thereto and to seek relief in Court. However, this section is part and parcel of the liquidation proceedings of companies by virtue of section 339 of the Companies Act. The argument that I referred to above will therefore equally be applicable to

section 151 of the Insolvency Act. Once insolvency or liquidation has been discharged, those provisions no longer apply.

The basis of seeking the review of the Master's confirmation was not based upon the fact that the Master had no power to confirm the account. Rather the applicants brought the application on the basis that such confirmation was contrary to the express provisions dealing with confirmation of accounts as provided for in the various sections dealing with the liquidation process in the Companies Act. It cannot therefore now be argued that the Master had no power to confirm this particular intromission account. The applicants' case must stand or fall by the basis upon which it was brought namely that the confirmation was contrary to express statutory provisions.

The next point raised by Mr Gilbert is that at best for the applicants and after discharge of the liquidation order, a duty rests upon the erstwhile liquidators to account to the company with regard to the assets of the company while they were administering the liquidation. This much is quite clear as set out by Galgut J in *Howard Motors [Pty] Ltd v Waterson* 1963 (3) SA 669 (T) where it was stated that:

> "A liquidator is for all practical purposes an officer of the company while he is so controlling and conducting the affairs of a company in liquidation."

In *AMS Marketing Company [Pty] Ltd v Holtzman and another* 1983 (3) SA 263 (W) at 270 A, Levisohn AJ held that:

> "Up to the moment of discharge of a company from winding up, all activities performed and all work done by him in the continuation of the company's

business operations will have been performed and done by him in his capacity as a primary organ of the company."

It goes without saying that once a company is no longer subject toy liquidation limitations, it would want to continue business and therefore would want to have all its assets under its control again. To that extent there is a duty upon the liquidators to account to the company, in this case 2nd applicant.

The basis upon which the applicants sought the relief in paragraph 3 and 4 in the notice of motion is based upon the successful review of the Master's confirmation of the intromission account. Once that falls by the wayside for the reasons set out above, I am of the view that the relief sought in paragraphs 3 and 4 of the notice of motion cannot be granted as it has throughout the case been based upon a wrong conception of the legal category under which the confirmation by the Master was executed.

There are further points raised by Mr Gilbert *in limine*, which I prefer not to deal with, one of which is that this application is premature in that the application in the North Gauteng High Court must first be concluded to establish the status of the 2nd applicant.

I then come to the question of costs. Mr Gilbert strenuously argued that Mr Cameron the attorney of record for the applicants was not duly authorised to bring this application. This argument is based on the fact that subsequent to the discharge order the 2nd applicant was again placed in liquidation, voluntary by the members of the 2nd applicant. As of now the 2nd applicant is therefore again in

liquidation. New liquidators were appointed to the 2nd applicant in liquidation and the question was whether they authorised Mr Cameron to continue with this application. An affidavit was filed by one of the new liquidators indicating that he has the support of the 2nd liquidator in sanctioning this application. The 3rd liquidator opted to resign as he preferred not to make any decision in regard to this application. In my view, it cannot be said that Mr Cameron was not authorised to bring this application. The request to make the cost order against Mr Cameron *de bonis propris* is therefore ill conceived.

10 For the reasons aforesaid, I therefore come to the conclusion that the application cannot succeed. I make the following order.

1. The 1st and 2nd applicants' application is dismissed with costs.
2. These costs are to be regarded as costs of administration in the liquidation of the 2nd applicant.
