

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/16580

DATE:23/09/2011

NOT REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

GOLLEL INVESTMENTS (PTY) LTD

Applicant

and

48 NAGINGTON ROAD (PTY) LTD

Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant who is a member of the respondent applies for the appointment of a provisional *curator ad litem* in terms of section 266(3) of the Companies Act No. 61 of 1973 (*“the Act”*) to conduct an investigation into certain of the affairs of the respondent.

[2] On 30 March 2011 the applicant gave notice to the respondent in terms of section 266 of the Act calling upon the respondent to institute proceedings within one month from the date of service of the notice. On 29 April 2011 the applicant issued and served the present application on the respondent.

[3] On 1 May 2011 the new Companies Act, the Companies Act No. 71 of 2008 came into effect. In terms of section 10 of Schedule 5 to the new Act:

“10(1) Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act as if it had not been repealed.”

The effective date is 1 May 2011.

[4] As at that date the present proceedings were pending in this Court.

[5] Accordingly the proceedings in this Court in respect of this matter are to be dealt with as if the new Act had not repealed the Act.

[6] The provisions of section 266 of the Act provide:

“266. Initiation of proceedings on behalf of company by a member.—

(1) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto.

(2) (a) Any such member shall serve a written notice on the company calling on the company to institute such proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the company fails to institute such proceedings within the said period of one month, the member may make application to the Court for an order appointing a curator ad litem for the company for the purpose of instituting and conducting proceedings on behalf of the company against such director or officer or past director or officer.

(3) The Court on such application, if it is satisfied—

(a) that the company has not instituted such proceedings;

(b) that there are prima facie grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified, may appoint a provisional curator ad litem and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3) or confirm the appointment of the curator ad litem for the company and issue such directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the curator ad litem, as it may think necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect.”

[7] As appears more fully from paragraphs 266(2)(a) the applicant was required to serve a written notice on the respondent calling on the respondent to institute the relevant proceedings within one month from date of service of the notice. The notice was also required to state that if the respondent failed

to do so the applicant would make an application to the court under section 266(2)(b).

[8] A compliant notice was duly served on 30 March 2011.

[9] Under and in terms of section 266(2)(b) if the respondent failed to institute such proceedings within one month the applicant would be entitled to make application for the appropriate order.

[10] The applicant was entitled to make application within one month from the date of service. One month means one calendar month. The civil method of computation of time is used.

See: Section 2 of the Interpretation Act 33 of 1957 Blackman Jooste and Everingham *Commentary on the Companies Act* (8th Revision, 2011) para 78-2.

The use of the term “*from date of service*” is indicative that the first day is to be excluded and that the one month period would expire one month from the date of the notice (namely on 30 April 2011). See *Pivot Point SA (Pty) Ltd v Registrar of Companies and Another* 1980 (4) SA 74 (T) at 79B-D. Even if the other method of calculation is used (namely including the day upon which the notice was given the respondent would be entitled until midnight on 29 April 2011 to institute the proceedings referred to in the notice.

[11] On any calculation if the words “*make application*” constitute issue or issue and service the present proceedings were launched during the one

month period available to the respondent to institute proceedings. It was submitted that the words “*make application*” mean actually move the application in court.

[12] The authorities are set out in the matter of *The Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (NmHC). The words “*make application*” are ambiguous. They could mean make application by issuing only; issuing and serving; issuing, serving and setting down for hearing or issuing, serving, setting down for hearing and actually being heard. The words in the Statute must be considered to discover what the appropriate meaning is.

[13] The Act requires the notice to set out that application will be made if the company fails to perform an act within a particular time. If this does not happen a right is then conferred upon the applicant in section 266(2)(b) to make application. Integral to the right to make application is the failure of the company to have performed the act required of it within the period of one month. Upon a simple reading of the statute the applicant would have no right to make application to the court until the one month period had elapsed.

[14] It was submitted that at the time the application is made all that the court needs find is that the company has not instituted the proceedings. The issue and service so it was submitted could take place during the one month period and as long as the hearing (the making of the application) took place

after the one month period the court would be able to reach the finding it was required to reach by section 266(3)(a). If this interpretation were the correct interpretation the applicant to make out his cause of action and produce the evidence required to substantiate it in the founding affidavit would need only show delivery of the relevant notice by the time of issue of the proceedings. Immediately after the notice had been delivered the applicant would be able to issue the application under section 266.

[15] The fact that the applicant in the notice would be requiring the company to institute proceedings and that it had afforded the company the full time allowed at the date of institution would not disentitle the applicant from immediately commencing the proceedings. If this interpretation were correct the Act would allow parallel proceedings to exist simultaneously in the sense that the applicant would have instituted proceedings seeking an order against the company to obtain the appointment of a provisional curator while at the same time requiring the company to institute proceedings.

[16] In my view it would be vexatious to allow the applicant to commence proceedings at a time when the company was allowed the opportunity of considering its position and taking steps to implement its decision i.e. during the one month allowed. In my view the right of the applicant to institute proceedings under section 266 is dependent upon the completion of the month period allowed to the company.

[17] If it were not so the company would be obliged to oppose the application and prepare relevant documentation to oppose the application while it was considering its position. The section in my view did not envisage this vexatious situation. It is not simply a matter of costs as it was submitted by the applicant. The company is involved in an expensive and time-consuming activity of opposing litigation brought against it. This very act detracts from its ability to in a settled atmosphere with proper time, consider its position.

[18] I need not consider whether the position is different between issue and issue and serve as there was both issue and service on the same date. In my view the making of the application occurred prior to the lapse of the month allowed the respondent and hence was premature.

[19] It was submitted that as the notice had been issued prior to the coming into force of the new Act the provisions of the new Act would govern in any event. The answer to this submission in my view is to be found in Schedule 5 section 10 of the new Act. I dealt with this previously.

[20] The parties were agreed that the employment of two counsel was warranted.

[21] As the application was brought prematurely the application in my view must fail.

[22] I accordingly make the following order:

The application is dismissed with costs including the costs consequent upon the employ of senior and junior counsel.

**C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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Counsel for Applicant	:	Adv. Subel SC Adv. Theron
Attorneys for Respondent	:	Fluxmans Attorneys
Counsel for Respondent	:	Adv. Van der Linde SC Adv. Currie
Date of hearing	:	21 September 2011
Date of Judgment	:	