REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

01/04/2014 .....

DATE SIGNATURE

CASE NO: 11144/2013

In the matter between :

NOLUTHANDO MADIMABE	Applicant
and	
TRANSDECO GTMH (PTY) LTD (IN LIQUIDATION)	First Respondent
HARRY KAPLAN NO	Second Respondent
LUKE BERNARD SAFFYY NO	Third Respondent
THE MASTER OF THE HIGH COURT	Fourth Respondent

JUDGMENT

MBONGWE, AJ :

[1] This application was launched in terms of the provisions of Section 359(2)(b) of the companies Act of 1973 [" the Act "]. In terms of Section 359(2)(a) a party in pending proceedings or who intends to institute proceedings against a company in liquidation must, within four weeks from the date of appointment of liquidators for such company, give the liquidators notice, in writing, of its intention to continue or commence proceedings against the company, failing which such party is considered to have is abandoned its claim. Section 359(2)(b) provides an olive branch to a party who could not give timeous notice by affording such party an opportunity to apply to court for an order that it has not abandoned its claim and intends to continue therewith. This application is being opposed by the 1st, 2nd and 3rd respondents.

[2] The granting of an application in terms of section 359(2)(b) is dependent on the court being persuaded on the evidence placed before it with regard to the circumstances relating to the failure to give timeous notice to the liquidators as well those prevailing immediately prior to and at the launch of the application.

[3] The applicant in casu instituted proceedings in the Labour Court in 2007 against the 1st respondent seeking compensation consequent to an alleged harassment and rape she had been a victim of at her place of employment at the hands of her co-worker. Both the applicant and her assailant were in the employ of the 1st respondent at the time of the occurrence. The pleadings had been closed and a trial date awaited when the 1st respondent was placed in voluntary liquidation in

October 2008. In terms of Section 200 of the Act, all proceedings are suspended at such stage pending the appointment of the final liquidators for such company. The liquidators of the 1st respondent were appointed on 6 May 2009.

[4] It is alleged in the founding affidavit deposed to by the attorney acting on behalf of the applicant, both in this application and the case pending in the Labour Court, that she had not been aware of the liquidation of the 1st respondent until she was so informed by the attorneys who represented the 1st respondent in that court in a letter dated 28 January 2009. She was not given the details of the appointed liquidators despite her follow up letters requesting same. It was only after she had finally managed to establish the name of the attorneys representing the liquidators that she was furnished, in a response letter dated 15 July 2009, with details of the liquidators including their date of appointment. Details of efforts made by the applicant's attorney to establish the identities of the appointed liquidators are set out in the founding affidavit and supported by attached copies of the relevant correspondence with various attorneys and the Master's office.

[5] A day after receiving the details of the liquidators, applicant's attorney filed a purported notification of the applicant's intention to continue with its claim against the 1st respondent. It was by then 45 days since the date of appointment of the liquidators - well outside the period of four weeks prescribed in Section 359(2)(a). In prayer 1 the applicant seeks an order that this notification be considered to be due notice.

[6] The following are issues for determination by this court:

6.1 Issue has been taken with regard to the founding affidavit having been deposed to by the applicant's attorney and not the applicant herself and the absence of a confirmatory affidavit by the applicant. It is submitted on behalf of the respondents that this being a substantial application, it was imperative that the applicant herself depose to the founding affidavit and that, in the current circumstances, no proper application has been brought before this court. Counsel for the applicant argued otherwise.

6.2 The second issue to be determined is whether the applicant had been in wilful or negligent in failing to give timeous notice to the liquidators and whether the steps that were followed by the applicant to identify the liquidators were reasonable; the time it took for the applicant to launch this application to achieve compliance with the prescripts of Section 359(2)(b) was also placed in issue.

[7] In determining the first issue, this Court takes into consideration the following: that the applicant's attorney had already been involved in the pending proceedings in the Labour Court when the 1st respondent was placed in voluntary liquidation; she corresponded with the attorneys who acted on behalf of the 1st respondent in the Labour Court, the Master's office and finally traced the attorneys representing the appointed liquidators . As stated above, annexures of the relevant correspondence are attached to the founding affidavit and are not disputed. Through her communication, Mr Cohen, an attorney representing the liquidators, attended the Labour Court at some stage for a scheduled pre –trial conference. The applicant, in my view, could at best have been advised by her

attorney of these developments, but would certainly not swear positively thereto. Consequently, I find that there could be no better qualified person to depose to the founding in this application than the applicant's attorney. A confirmatory affidavit by the applicant would have served no purpose as it would contained hearsay evidence which is not admissible. The respondents' argument in this regard is rejected.

[8] With regard to the deponent's reference, in the founding affidavit, to the cause of action in the labour court proceedings, I do not believe that it correct to view that as amounting to giving testimony on the merits of that case. The reference is made merely to informs this court what the nature of the applicant's claim is. Consequently, the respondents' assertion that hearsay evidence is contained in the founding affidavit stands to be rejected.

[9] I interpose, prior to dealing with the second issue raised, to do a brief overview of the purpose of Section 359 of the Act as well as some important considerations that inform the court in arriving at a decision whether or not to grant an application of this nature . The purpose of this section is to regulate and prescribe a manner by which a party could have its claim entertained by the liquidators. The Act sets out a restrictive, rather than a prohibitive, procedure relating to claims against a company in liquidation. By providing the liquidators with a defence in respect of notices given outside the prescribed period without conferring on them the authority to condone a late notification, the Act seeks, in Section 359 (2)(b), to use the neutrality the court in its assessment and determination whether an applicant deserves to be afforded an opportunity to continue with or to commence proceedings against a company in liquidation. It is against this background that I find untenable the dictum by Harms JA that liquidators are not obliged to raise the defence provided to them in Section 359(2)(a) - (See BARLOW TRACTOR Co

(Pty) Ltd v TOWNSEND 1996(2) S.A 869 (A) at 884F-G). It follows from this finding that the applicant's prayer 1 cannot be considered.

[10] In my view, liquidators are not obliged to always oppose an application brought in terms of Section 359(2)(b) particularly in circumstances where they are aware that the applicant is actively involved in pending proceedings against the company in liquidation and, secondly, because the decision whether to grant or dismiss an application in terms of Section 359(2)(b) is discretionary to the court which has to be persuaded that the applicant had not abandoned its claim.

[11] I turn to consider the second issue raised which I shall address simultaneously as I deal with some of the relevant considerations that inform the court's decision in the present case :

11.1 It is importance to commence by stating that the Act does not prescribe a period within which an applicant has to launch an application in terms of Section 359(2)(b). Equally important is to state that the need for the liquidators to finalise the liquidation process as soon as possible in the interest of creditors and all interested parties dictates that an unreasonable delay in bringing an application in terms of Section 359(2)(a) may jeopardise the chances of the application being granted irrespective of the prospects of success of the pending proceedings or the proceedings sought to be instituted against a company in liquidation. This will be the situation where the liquidators have reached a critical stage of finalising the liquidation process that granting the application would result in prejudice being caused. The situation is different in the present case as evidenced

by the fact that a similar application involving the respondents was heard in this court this week, suggesting that not much by way of inconvenience or prejudice is occasioned by this application.

11.2 The station of the applicant and the company concerned at the time the company is placed in liquidation are also factors to be considered. In the present case both the applicant and the 1st respondent are parties in pending proceedings and were awaiting a trial date when the 1st respondent was placed in liquidation. Until the liquidation intervened, the applicant had done everything necessary to have her case ventilated in court. To this end pleadings were closed and a pre-trial conference scheduled for the 29 August 2012 was, due to the applicant's communication, attended by and postponed at the instance of a Mr Cohen, an attorney representing the liquidators.

[12] I have considered all the steps that were taken by the applicant which I find were reasonable and persistent in trying to establish the details of the liquidators for the purpose of giving the required notice. I have also noted the criticism of route followed by the applicant's attorney, which criticism I find to be subjective in nature. I cannot find that applicant's attorney's initial reliance on obtaining non prejudicial information from an opponent colleague in pending proceedings was particularly unreasonable.

]13] The duty of the court in applications of this nature is to assess and determine on the evidence presented whether the conduct of the applicant in relation to its claim has been such that only an abandonment of such claim can be inferred. I find in

the present case that applicant has done all things reasonable and which are consistent with a determination to pursue the claim. I find that the omission to give timeous notice in terms of Rule 359(2)(a) has been satisfactorily explained. In the absence of prejudice to the liquidation process, the creditors and any other interested party, there is no reason why this application should not be granted (See SOUTH AFRICAN TRANSPORT SERVICES v JOUBERT NO 1986 (2) SA 395 (C) at 400 - 401).

[14] In determining the issue of costs, I take into account the fact that launching this application was the only route, in terms of the Act, open to the applicant after failing to give timeous notice to the liquidators. On the other hand I cannot find reason for opposition to this application, bearing in mind that the liquidators, through their attorney, Mr Cohen, became aware of the pending proceedings in the Labour Court to realise that the applicant was determined to continue with its claim against the 1st respondent. I find, consequently, that the opposition of this application was unreasonable. I cannot think of any reason why the 1st respondent should not be ordered to pay the costs in these circumstances.

[15] Resulting from the findings in this judgment, the following order is given :

1. It is declared that the applicant has not abandoned its claim in the pending proceedings against the 1st respondent in the Labour Court and applicant is hereby granted leave to continue therewith.

2. The 1st respondent is ordered to pay the costs of this application.

M. MBONGWE, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	03 MARCH 2014
DATE OF JUDGMENT	:	01 APRIL 2014
FOR THE APPLICANT	:	ADV J. DANIELS
INSTRUCTED BY	:	WEBBER WENTZEL ATTORNEYS, JOHANNESBURG
FOR THE RESPONDENTS:		ADV J. SUTTNER SC
INSTRUCTED BY	:	F. J. COHEN ATTORNEYS JOHANNESBURG