IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 46072/2013

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

23 November 2017

(Signature)

THAMAE, SKAKE JOHANNES — **1st Applicant**

AND 45 OTHER APPLICANTS

and

ROERING,LEIGH WILLIAM, N.O. — **1st Respondent**

MONYELA, KGASHANE CHRISTOPHER. N.O. — **2nd Respondent**

MOHOSH, GREGORY KELETSO, N.O. — **3rd Respondent**

PEMA, JAYANT DAJI, N.O. — **4th Respondent**

Heard on: 13 November 2017

Delivered on: 28 November 2017

JUDGMENT

DE VILLIERS AJ:

[1] This is an application in which the applicants seek the discharging of the provisional liquidation order granted by this court in respect of Blyvooruitzicht Gold Mining Company Ltd ("***the company***"), and the simultaneous placing of the company in business rescue. I am told that the provisional liquidation order was granted in August 2013 and that it has been extended from time to time.

[2] The first four respondents are the provisional liquidators of the company. They oppose the application. The fifth respondent is the Master of the High Court, Johannesburg, who does not oppose the application.

[3] The application takes place against the background of a mining community that finds itself in desperate circumstances after the Blyvooruitzicht gold mine stopped operations. The 46 applicants describe themselves as "*members of the local community and former employees of*" the company.

[4] The matter took an unexpected turn on the morning of the hearing. I was presented with a further replying affidavit served on Wednesday 8 November 2017 when new attorneys came on record. The roll had closed earlier and the affidavit did not find its way to me before the hearing on Monday 13 November 2017.

[5] The bundle was incomplete. During the hearing I learnt of further affidavits that should have been before me. At the end of the hearing my bundle comprised of:

[5.1] A notice of motion. The matter commenced as an urgent application;

[5.2] A founding affidavit served on or about 13 February 2017;

[5.3] An answering affidavit, probably served on or about 16 February 2017, as well as an additional affidavit served simultaneously by Mr R L Floyd. Three confirmatory affidavits to the answering affidavit were served a few days later, on or about 21 February 2017;

[5.4] A replying affidavit served on or about 22 February 2017;

[5.5] A supplementary (answering) affidavit served on or about 21 April 2017 by the four respondents. Two confirmatory affidavits to the supplementary (answering) affidavit were served on or about 5 May 2017;

[5.6] A (supplementary) replying affidavit to the supplementary (answering) affidavit served on or about 21 April 2017 served on or about 5 September 2017;

[5.7] A further supplementary (answering) affidavit served on or about 27 September 2017 by the four respondents;

[5.8] A further (supplementary) replying affidavit to the supplementary (answering) affidavit served on or about 21 April 2017, itself served on or about 5 September 2017;

[5.9] As alluded to earlier, a (further) replying affidavit to the further supplementary (answering) affidavit served on or about 26 September 2017, itself served on 8 November 2017.

[6] I am conscious of the fact that new attorneys came on record for the applicants on about 8 November 2017. They are not to be blamed for the poor state of the court file or the manner in which their clients' case has been presented.

[7] The supplementary answering affidavits were short, a few pages long in each case, and purported to place evidence about new matter before the court. These include averments about ownership of a certain Rock Stockpile 2, averments about a memorandum by certain community members, averments about the sale of so-called Shaft 1 Headgear, averments about the cession of a mining right, averments that a final liquidation will be sought, and averments about the involvement of a businessman in the application for business rescue. In the end, none of these averments played a role in the findings that I make herein.

[8] The admissibility of the further replying affidavit served on Wednesday 8 November 2017 was argued first. The parties had consensus that the matter had to be postponed if I were to allow the affidavit. It would call for a response as new matter was raised therein.

[9] During argument it became clear that the merits of the application had to be argued too, as if the applicants had no prospects of success, the application should be dismissed and not be prolonged.

[10] Minutes before the end of the day, the applicants asked for a postponement to rectify any defects in their papers should the court find that the further replying affidavit should not be admitted. In essence, this was an application to be allowed to supplement the founding papers.

[11] Stegman J in **Reynolds NO v Mecklenberg (Pty) Ltd** 1996 (1) SA 75 (W) at 78 and further correctly complained about the failure by practitioners to apply a disciplined approach to litigation. If such an approach is followed, the learned judge stated at 80E-F:

> '*When motion proceedings are prepared in this orderly way it is usually possible for counsel to demonstrate in argument, quite quickly and clearly, the factual context in which the relief is sought; whether the question to be decided is one of fact or law; and, if the question is one of fact, whether or not it can be resolved in motion proceedings. It is when the matter is not prepared in such an orderly way that serious problems tend to arise which may, as in the present case, result in substantial delay.*'

[12] The law about pleading and proving a case in motion court is trite. Every practitioner certainly must know that the function of affidavits in motion proceedings is to place pleadings and evidence before the court. On the difference between *facta probanda* (essential averments necessary to found a cause of action in this case), and the *facta probantia* (evidence to support a finding of the correctness of the *facta probanda*) the law is trite too, see **Choice Holdings Ltd and Others v Yabeng Investment Holding Co Ltd** 2001 (3) SA 1350 (W) para 34. See too **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 279 (T) at 323F and further (under the heading '*The law relating to the content of affidavits generally*').

[13] Before I consider admitting the supplementary replying affidavit, the first matter that I have to determine is if the applicants have shown that they have *locus standi*.

[14] As reflected earlier, the applicants describe themselves as "*members of the local community and former employees of*" the company. This is in dispute. The averment in the founding affidavit is a bald averment. The confirmatory affidavits thereto by the remaining 45 applicants merely confirm the correctness of the founding affidavit and contain an averment in each case that the applicant is unemployed. No proof of prior employment in any form, no matter how incomplete, is provided. No periods of employment or positions held are alleged.

[15] The provisional liquidators allege that they could find no record of the 46 applicants' employment and take issue with the averment of former employment in the answering affidavit. This is a matter that has to be determined on the principles set out in the well-known **Plascon Evans** test (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C).

[16] The response in the replying affidavit to the denial in the answering affidavit of former employment, is difficult to read. The sentences are incomplete, and do not contain the customary heading "*ad paragraph ...*". It appears

that the only response in reply is an averment that there is no proof either before the court that the applicants are not former employees. It seems to me that this answer misconceives the onus upon the applicants to allege and prove their *locus standi* (**Mars Incorporated v Candy World (Pty) Ltd** 1991 (1) SA 567 (A) at 575H).

[17] Not only has former employment not been proven, but not one applicant avers that she/he was employed by the company when it was placed in provisional liquidation.

[18] The procedure to apply to place a company in business rescue is set out in the **2008 Act**. In terms of section 131(1) to (2) (emphasis added):

> "*(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.*
>
> *(2) An applicant in terms of subsection (1) must-*
>
> *(a) serve a copy of the application on the company and the Commission; and*
>
> *(b) notify each affected person of the application in the prescribed manner.*"

[19] An "*affected person*" for the purposes of an application for business rescue is defined in section 128(1)(a) of the **2008 Act** as (emphasis added):

> "*In this Chapter-*
>
> *(a) 'affected person', in relation to a company, means-*
>
> *(i) a shareholder or creditor of the company;*
>
> *(ii) any registered trade union representing employees of the company; and*
>
> *(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives*".

[20] Assuming for the moment that the definition would be wide enough to include former employees under section 128(1)(a)(iii), in the absence of proof of such employment, the applicants are not affected persons with *locus standi*. The applicants further do not allege that they are not represented a trade union. I make no findings on any extended interpretation of the **2008 Act**, as on the facts of this matter, the applicants have failed to prove that they are even former employees of the company.

[21] Accordingly, it would serve no purpose to consider admitting yet another affidavit into evidence.

[22] The first applicant also alleges that he is authorised to bring the application on behalf of a number of organisations (none of which is an applicant). These organisations are the (a) Progressive Woman Cooperative, Blyvooruitzicht, (b) Small Town Regeneration Programme of the Blyvooruitzicht Community, (c) Villages, Townships, and Small Dorpies Organisation, (d) Bokgabaneng Resources and Construction, (e) Rorisang Men and Youth Development Programme, (f) Unemployment Forum of the Blyvooruitzicht and Khuma Communities, and (g) Rate Payers Forum of the Stilfontein Rate Payers Association. It seems to me that the applicants intended to convey that they form part of the local community upon which the current closure of the mine impacts.

[23] Mr Roux SC urged me to interpret section 131(1) of the **2008 Act** to include in a purposive interpretation as an "*affected person*", members of the local community, such as the applicants. Leaving aside the dispute about the views of the local community (and if a community necessarily would have to speak with one voice), in my view such an interpretation would be impermissible in the light of the definition provided in section 128(1)(a) of the **2008 Act** that expressly defines "***affected person***" to apply to the chapter in which section 131 is contained.

[24] Due to my finding on *locus standi*, I do not address in any detail further matters where the applicants faced difficulties:

[24.1] The consequences of the applicants' failure to serve the application on the Companies and Intellectual Property Commission or on other affected parties. I was told that the original founding papers reflecting a hearing on 15 February 2017 was served on the CIPC on Friday afternoon, the day before this hearing;

[24.2] The respondents' objection to the hearsay evidence in the founding affidavit. The failure by the applicants to allege and prove their case is not limited to the bald averments about their former employment, but equally applies to the averments about alleged misconduct by the provisional liquidators (all based on newspaper articles only) in the founding affidavit (the original replying affidavit took the matter no further). These averments clearly are inadmissible hearsay evidence under section 3(1) of the **Law of Evidence Amendment Act** 45 of 1988. Mr Roux SC asked me to admit the evidence in the interest of justice, but no case has been made out in terms of section 3(1)(c) of that act to enable me to exercise such a discretion;

[24.3] The respondents' defence that the applicants have failed to prove that "*it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company there is a reasonable prospect of rescuing the company*" as required by section 131(4)(iii) of the 2008 Act. The alleged business rescue plan is a superficial one and a half page document, not confirmed by the author under oath.

[25] There has been a hardening of attitudes in the courts about the admissibility of further affidavits in opposed motion proceedings. The further replying affidavit served on Wednesday 8 November 2017 may be allowed only in limited circumstances. In **Gelyke Kanse and Others v Chairman of the Senate of the Stellenbosch University and Others** (17501/2016) [2017] ZAWCHC 119 (25 October 2017) Dlodlo J (Savage J concurring) dealt with

the admissibility of further affidavits in an opposed application and collected the authorities. I do not repeat those references.

[26] In this case, I refuse the admissibility of the further affidavit as:

[26.1] The applicants have not established *locus standi*,

[26.2] The founding and initial replying papers make out no case of misconduct by the respondent and/or on prospects of success in a business rescue proceedings. An applicant is not permitted to set up a skeleton case in its founding papers, and seek to flesh it out in later affidavits;

[26.3] The applicants have failed to give notice to affected parties of the proceedings (the late notice to the CIPC amounted to no notice at all, it could not have known that the matter was proceeding before me a court day later);

[26.4] Generally speaking, it is in the interests of the administration of justice that the number and sequence of affidavits should ordinarily be observed. This, generally speaking, ensures a fair, orderly hearing. There must be a degree of predictability on how judges will exercise discretions;

[26.5] The further affidavit is produced late in the day, and would have necessitated a postponement of the matter.

[27] I also refuse the request for a postponement. The applicants should not seek to make out a case in yet further sets of affidavits to be produced.

[28] Accordingly, I grant the following order:

1) The request to admit into evidence a further replying affidavit served on Wednesday 8 November 2017, is denied;

2) The request for a postponement is refused;

3) The application is dismissed with costs, such costs are to include any costs previously reserved.

DP de Villiers AJ

On behalf of the Applicant:	Adv J Roux SC
Instructed by:	NM Aboo Attorneys
On behalf of the 1st to 4th Respondents:	Adv M M Antonie SC
Instructed by:	Edward Nathan Sonnenbergs Inc