REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: ***NO***
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED:

Signature: Date: 22/09/2022

CASE NO: 20031/2018

In the matter between:

PRETORIA OFFICE CHAIRS CC	Applicant
And	
FUSI PATRICK RAMPOPORO N.O.	First Respondent
CHERYL ANNE JONES N.O.	Second Respondent
DI-NAMIC MARKETING CC	Third Respondent
THE MASTER OF THE HIGH COURT,	
GAUTENG LOCAL DIVISION	Fourth Respondent
FENIX OFFICE FURNITURE COMPANY (PTY) LTD	Fifth Respondent

JUDGMENT

NICHOLS AJ

Introduction

[1] The applicant, Pretoria Office Chairs CC, is a creditor of Gauteng Manufacturing and Trading Co (Pty) Ltd (in liquidation) (Gauteng Manufacturing). The first and second respondents, Fusi Patrick Rampoporo N.O. and Cheryl Anne Jones N.O. are cited in their official capacities as the joint liquidators of Gauteng Manufacturing.

[2] The joint liquidators concluded a purported sale agreement with the third respondent, Di-Namic Marketing CC (Di-Namic), in respect of various specified movable assets owned by Gauteng Manufacturing (the Assets) on 1 September 2016 (the Purported Sale).

[3] The applicant contends that the Purported Sale is void and seeks that the joint liquidators be ordered to take possession and control of the Assets, and that such assets be restored to the liquidators to be dealt with in accordance with the provisions of the Insolvency Act.[1]

[4] Di-Namic has opposed the application and instituted a counter application in which it seeks, *inter alia*, ratification of the Purported Sale and an order that the applicant return certain equipment, which is the subject of a sale agreement concluded between the applicant and Gauteng Manufacturing.

[5] The fourth respondent is the Master of the above Honourable Court. The fifth respondent is Fenix Office Furniture Company (Pty) Ltd, a company which is operating from Gauteng Manufacturing's erstwhile business premises and to which Di-Namic has leased the use of certain of the Assets.

[6] No relief is sought against Di-Namic, the fourth and fifth respondents. The joint liquidators delivered a notice to abide the decision of this Court and the only party opposing this application is Di-Namic.

Common cause facts

[7] The facts in this matter are largely common cause and admitted by Di-Namic. Gauteng Manufacturing was placed in voluntary liquidation by the adoption of a special resolution in terms of s 352 of the Companies Act,[2] on 2 August 2016. The joint liquidators

[1] The Insolvency Act No 24 of 1936, as amended.

[2] The Companies Act No 61 of 1973.

are the final liquidators of Gauteng Manufacturing and were appointed as such on 13 December 2016.

[8] The joint liquidators, acting on behalf of Gauteng Manufacturing, concluded the Purported Sale in terms of which Di-Namic purchased the Assets. The Purported Sale was subject to the suspensive condition that Gauteng Manufacturing's creditors were required to consent to the sale. Notwithstanding, Di-Namic took possession and control of the Assets and has been using them since at least September 2016. The relevant unnumbered portion of the Purported Sale reads: '*I understand that this offer is subject to the consent of creditors and if required, the authority of the Master of the High Court.'*

[9] The second creditors' meeting for Gauteng Manufacturing took place on 13 February 2018. At this meeting, the creditors did not consent to the Purported Sale. The relevant numbered resolutions adopted at the second meeting of the creditors reads as follows:

'2. THAT the actions of the Liquidator / Provisional Liquidator / Joint Provisional Liquidators / Joint Liquidators in having disposed of assets, shares and loan accounts, prior to the date of this meeting, save for the sale transaction to Di-Namic Marketing CC, be and are hereby approved and ratified, all costs incurred in relation thereto to be costs in the liquidation.

2.1 the Liquidator / Joint Liquidators, in terms of the Insolvency Act (including but not limited to Section 45 thereof), proceed to investigate the claim of Di-Namic Marketing CC and all securities allegedly held by Di-Namic Marketing CC;

10. THAT the Liquidator / Joint Liquidators be and are hereby authorized to dispose of the immovable and movable assets of the Company by either Public Auction or Public Tender or Private Treaty. The mode of sale for any one or more of the assets to be at the discretion of the Liquidator / Joint Liquidators, and all costs incurred in relation thereto be costs in the liquidation.

30. THAT all actions of the Liquidator / Joint Liquidators to date save for the sale transaction to Di-Namic Marketing CC, be and are hereby approved and ratified.'

[10] Di-Namic remains in possession and control of the Assets and has made no effort to return the Assets to the joint liquidators, who have in turn taken no steps to recover the Assets.

Issues for determination

[11] The crisp issues for determination in this matter are the following:

(a) The effect of the non-fulfilment of the suspensive condition on the Purported Sale and whether there is any basis for Di-Namic to retain possession and control of the Assets.

(b) Whether Di-Namic has made out a case for the relief sought in the counter application.

Application of the applicable law

[12] It is a trite proposition that a failure to fulfil a suspensive condition has the consequence that the contract has no legal force.[3] Although Di-Namic concedes that the Purported Sale was not approved by the creditors of Gauteng Manufacturing as required by the terms of the Purported Sale agreement, it contends for its validity on the basis that it purchased the Assets in good faith. Therefore, it argues that the Purported Sale is valid, irrespective of the non-fulfillment of its suspensive condition.

[13] As authority for this contention, Di-Namic relies on the provision of s 82(8) of the Insolvency Act and the case of *Sheonandan v Thorne N.O. and Another.*[4] The relevant portion of s 82(8) provides as follows:

'*If any person … has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section… the purchase...shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section.*'

[14] Di-Namic's reliance upon these authorities is ill-conceived and misplaced. This matter is distinguishable from the *Sheonandan* case in a number of respects. Firstly, the court in *Sheonandan* was of the view that the trustee was authorised by resolution at the second meeting of creditors to sell all or any of the assets of the estate by public auction, public tender or private sale. The private sale in question occurred after this resolution was passed; and the court concluded that the sale agreement was a valid concluded sale agreement by a purchaser who was indisputably *bona fide* and who purchased the assets for value. It was on the basis of these facts that Milne JP held:

'[M]r Cowley says there has been no completed purchase and, therefore, no purchase within the meaning of sec, 82(2). I am persuaded that there is no substance in this point. It seems to me to be

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[3] *Pangbourne Properties Limited v Basinview Properties (Pty) Ltd* [2011] ZASCA 20 (17 March 2011) para 6.
[4] *Sheonandan v Thorne N.O. and Another* 1963 (2) SA 226.

clear beyond any manner of doubt that the intention of the Legislature was to validate any sale of property in an insolvent estate if the purchaser acted bona fide in entering into the transaction of sale. The transaction of sale here was not only fully entered into and thus, in my view, attracted to it the validation referred to in the sub-section, but had indeed in a large measure been implemented."[5]

[15] It is common cause that the Purported Sale was concluded prior to the second meeting of creditors and that it was not approved or ratified at the second meeting of the creditors. The provisions of s 82 (8) do not apply to sale agreements concluded prior to the second meeting of creditors.[6] In addition, a provisional liquidator is prohibited from concluding any sale without the authority of the Master or the court. Such contract would be void ab initio and cannot be subsequently ratified.[7]

[16] Di-Namic's contention that the Purported Sale is valid because it was a *bona fide* purchaser is therefore rejected. It is clear that a sale agreement was not concluded because prior authority of the Master or the court was not obtained and the second meeting of creditors objected to the sale.

[17] The joint liquidators have an overriding duty to safeguard the integrity of the *concursus creditorum;* to recover and reduce into possession all the assets and property of the company; to realise them and apply the proceeds in satisfaction of the costs of winding up; and, if there is a residue, to distribute it to the creditors entitled thereto in the order of preference and in accordance with the provisions of the Insolvency Act.[8]

[18] This statutory duty is further encumbered by the creditors' resolutions numbered, *inter alia,* 2.1 and 10, directing that the joint liquidators properly investigate the claim of Di-Namic and dispose of the assets of the Gauteng Manufacturing.

[19] The joint liquidators have abided the decision of this Court and in the circumstances, there is no reason why the joint liquidators should not be directed to comply with their statutory obligations and the resolutions of the second meeting of creditors.

[20] The final issue for consideration is whether Di-Namic has made out a case for the relief sought in the amended notice of motion of its counter application. In this regard it

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[5] *Sheonandan v Thorne N.O. and Another* 1963 (2) SA 226 (N) 228 E – F.

[6] *Swart v Starbuck and Others* [2016] ZASCA 83 (30 May 2016) para 18 and 19.

[7] *SAI Investments v Van der Schyff NO and Others* 1999 (3) SA 340 (N) 350 A –F; Section 80 *bis* of the Companies Act.

[8] *CSARS v Stand Two Nine Nought Wynberg (Pty) Ltd and Others* 2005 (5) SA 582 (SCA) para 9, 12 and 14.

seeks, *inter alia* an order that the applicant return certain identified equipment to the joint liquidators; ratification of the Purported Sale; conditional upon the success of the main application, the repayment of the s 89 costs; and costs of suite.

[21] The applicant contends that Di-Namic lacks the necessary locus standi to seek the relief relating to the equipment it purchased from Gauteng Manufacturing. It also contends that the founding averments in support of the relief sought are deficient and the affidavit, which stands as the founding affidavit for the counter application contains no primary evidence in support of the counter application. These contentions are well made.

[22] Ms Lombard, who appeared on behalf of Di-Namic conceded during argument that Di-Namic's contentions that the costs of removing the goods to return them to the joint liquidators were at best speculative. She also conceded that Di-Namic does not stand in the shoes of the liquidators and advised this Court that Di-Namic would not persist with the relief sought in terms of prayers 1, 2 and 3 of its amended notice of motion in the counter application. It would only seek the relief set out in prayer 4 regarding the repayment of its s 89 costs. These concessions were appropriately made.

[23] However, Di-Namic's founding papers do not explain why it should be repaid its s 89 costs immediately, alternatively why the joint liquidators should not address these costs in the winding up of Gauteng Manufacturing.

[24] It is trite that an applicant should at a minimum set out a prima facie case in its founding affidavit.[9] A defective application cannot be rectified in reply or argument.

[25] In the circumstances, I am of the view that Di-Namic has not made out a case for the limited relief sought in the amended notice of motion in its counter application.

Costs

[26] The general rule in matters of costs is that the successful party should be awarded its costs, and this rule should not be departed from except where there are good grounds for doing so.

Order

[27] In the circumstances, I make the following order:

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[9] *Bowman NO v De Souza Roldoa* 1988 (4) SA 326 (T) 336 D – E.

(a) The first and second respondents are ordered to immediately take possession and control of all the movable assets listed on Annexure FA3 ('the Assets') which assets belong to Gauteng Manufacturing and Trading Co (Pty) Ltd (in liquidation) and which Assets were purportedly sold to the third respondent on 1 September 2016.

(b) The Assets are declared to be the property of Gauteng Manufacturing and Trading Co (Pty) Ltd (in liquidation).

(c) The first and second respondents are ordered to deal with the Assets as forming part of the liquidated estate of Gauteng Manufacturing and Trading Co (Pty) Ltd (in liquidation).

(d) The third respondent is ordered to pay the applicant's costs of the application.

(e) The third respondent's counter application is dismissed with costs.

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 14 September 2022.

HEARD ON:	6 September 2021
JUDGEMENT DATE:	22 September 2022
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