IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 3754/2014

Date: 25 September 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

25/9/2014 .....
DATE SIGNATURE

In the matter between:

RIAAN ANTON SWART	Applicant
and	
CHARLENE HEINE	1st Respondent
JUSTINE MARK HEINE	2nd Respondent
DEKSNY TRADING (PTY) LIMITED	3rd Respondent
CHARLES SCOTT STEWARD	4th Respondent
ANTON STRYDOM N.O	5th Respondent

JUDGMENT

PRETORIUS J,

[1] The applicant is applying for a rescission of an *ex parte* order granted on 8 August 2013 by Ledwaba DJP and further, that the enquiry in

terms of section 417 and 418 of the **The Companies Act, 61 of 1973** be stayed pending the declaration of its validity.

[2] The *ex parte* application was heard in chambers by Ledwaba DJP, without any prior notice to the applicant. The applicant argues that section 417 and 418 of The Companies Act are not applicable where a voluntarily winding up is concerned and that the order granted was erroneously granted.

[3] The complaint is that an *ex parte* application is not allowed in this instance without the prior knowledge of the respondent (the applicant) in the present *ex parte* application.

[4] In **Friendland and Others v The Master and Others 1992 (2) SA 370 W** at 376

> *"...the prospective examinee has no right to receive prior notice of the fact that the liquidator is to approach the Master (or the Court) to exercise the discretionary power to order an examination or enquiry under ss 417 and 418, and to summon, or to authorise a commissioner to summon, the prospective examinee to attend. It is only if the prospective examinee should happen to hear in advance, before that power has been exercised by the Master (or the Court), that he can claim any sort of right to be heard.* ***That serious limitation indicates that***

the situation of the prospective examinee is not one in which he enjoys the full extent of the rights usually understood as being accorded when the maxim **audi alteram partem** ***applies.***" (Court's emphasis)

[5] It is evident from the initial application that Ledwaba DJP was informed that the application he had to decide on pertained to a voluntary winding-up.

[6] The respondents submit that although it was not specifically stipulated that an enquiry should be ordered in terms of Section 388 of The Companies Act, Act 71 of 2008 (the "Act") In essence that was the relief requested from Ledwaba DJP where it is set out:

"1. That this matter be heard in camera;

2. ***That leave is granted to the applicants to hold a commission of enquiry into the affairs of the BSA Group Holdings (PTY) LTD*** *(previously registered as Biz Africa 111 (PTY) Ltd) (in liquidation) (hereinafter referred to as the BSA Group);"*

3. *That Advocate Charles Stewart be appointed commissioner to conduct a commission of enquiry into the affairs of the BSA Group under Sections 417 and 418 of the Companies Act of 1973 read with Section 9 of Schedule 5 of the Companies ACT 71 of 2008 (as amended) (hereinafter referred to as "the act")"* (Court's emphasis)

[7] Ledwaba DJP had all the evidence before him, which included that BSA was in voluntary winding-up when he adjudicated the application. There can be no question that prayer 1 could only refer to an enquiry in terms of section 388 of the Act to be established.

[8] The following prayer is for the appointment of a commissioner to conduct the commission of enquiry into the affairs of BSA under section 417 and 418 of the Act.

[9] In **Michelin Tyre CO (South Africa) (Pty) Ltd v Janse van Rensburg and Others** Hefer AP held at paragraph 4:

> *"There are at least two ways of procuring a s 417* ***enquiry even in a voluntary winding-up.*** *The first is to convert the winding-up into a winding-up by the Court under s 346(1)(e);* ***and the other is an application to Court under s 388 for leave to convene an enquiry.*** *"* (Court's emphasis)

[10] The application adjudicated by Ledwaba DJP was clearly based on an application to Court under section 388 of the Act for leave to convene an enquiry, although section 388 is not specifically mentioned. The second prayer relates to the manner in which such an enquiry should be conducted.

[11] In the founding affidavit reference was made to the judgment of Makgoba J where the current applicant launched an urgent application to this court seeking an order that Beagles Run Investments 25 (Pty) Ltd be placed under business rescue.

[12] In **Swart v Beagles Run Investments 25 (Pty) Ltd & others [2012] JOL 28486 (GNP)** Makgoba J found at paragraph 29:

> *"The only other asset of any note is a loan account of some R72 343 000 (as set out in annexure "RS3") where monies have been lent to a related company known* ***as Biz Africa 111 (Pty) Ltd (trading as Business Solutions Africa)*** *of which the applicant is the sole director. The applicant steadfastly refuses to give any information, does not indicate the nature of the transaction and places nothing before court to indicate that such money can or ever will be repaid."* (Court's emphasis)

[13] It is clear that there is some relation to Beagles Run Investments 25 (Pty) Ltd that should be investigated and examined in the present matter, as an amount of R72 343 000.00 has allegedly been loaned to Biz Africa.

[14] I must agree with counsel for the respondent that **Janse van Rensburg and Others v The Master and Others 2001 (3) SA 519** is

applicable in the present application where Soggott AJ set out at paragraph's 11 and 12:

> *"[11] The interpretation of s 417 has been dealt with in the Natal Provincial Division in the matter between South African Philips (Pty) Ltd and Others v The Master and Others 2000 (2) SA 841 (N) at 847F - I,* ***where the Court found that the words in the section clearly expressed the intention of the Legislature to require the antecedent existence of a winding-up order as a jurisdictional requirement, in the absence of which an enquiry in terms of s 417 of the Act cannot be held.*** *This view, in my opinion, is with respect correct. See also Standard Bank of SA Ltd v The Master and Others1999 (2) SA 257 (SCA) at 262A - H; Meskin Henochsberg on the Companies Act 5th ed vol 1 at 884.*
>
> *The above conclusion does not lead to absurdity given the provisions of s 388 of the Act in terms of which, in the case of a company unable to pay its debts a Court may,* ***in a voluntary winding-up, order an examination such as that envisaged by s 417.***" (Court's emphasis)

[15] The jurisdictional requirement is found in prayer 2 of the *ex parte* application where the holding of a commission of enquiry is granted. Without granting this prayer, no section 417 enquiry would be possible. In these circumstances it would not be necessary to convert the voluntary winding-up into a compulsory winding-up, as the first prayer

clearly indicates that the applicant is applying to court for leave to institute an enquiry, which can only be in terms of section 388 of the Act.

[16] The enquiry is necessary if regards is had to Mokgoba J's remarks and the affidavit by the first respondent. The first respondent makes it clear that Mr Mostert, the forensic auditor found irregularities' in the books and documents of the applicant, for example that no annual financial statements were furnished since 2009; there are discrepancies between the FNB cashbook and the BSA ledger accounts and no tax return could be found. Furthermore Mr Mostert had found that for the 2009 financial year the turnover of the company was R2800.00 and the expenses R13.2 million, in 2010 the turnover was R25,000.00 and the expenses R11.4 million, whilst BSA loaned an additional R53 million from various entities.

[17] Mr Mostert could not ascertain from the documents furnished to him whether the BSA group had any income generating activities. The question as to how the huge losses were financed should be investigated. On these grounds alone an investigation and examination in terms of section 417 should be held.

[18] I have considered the explanation by the first respondent regarding condonation for the late filing of the opposing affidavit and

find all the reasons reasonable. I therefor condone the late filing of the opposing affidavit in the interest of justice and due to the difficulties experienced by Mr Mostert to gain information from BSA and the other related entities. There is no doubt in my mind that Ledwaba DJP granted the correct order as he had all the relevant facts before him when he decided to grant the orders. It cannot be said that the order was erroneously granted or granted due to a patent error. Therefor the application must be dismissed.

[19] The following order is made:

The application is dismissed with costs.

Judge C Pretorius

Case number	: 3754/2013
Heard on	: 10 September 2014
For the Applicant	: Adv Vorster
Instructed by	: Leahy van Niekerk Inc
For the Respondent	: Adv Holland-Müter

Instructed by	: Van Greunen & Ass Inc
Date of Judgment	: 25 September 2014