IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 60328/2016

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

09-December-2016 .....

DATE SIGNATURE

9/12/2016

In the matter between:

PROUD AFRIQUE TRADING 256 (PTY) LTD Applicant

and

TIKON PROJECTS SA (PTY) LTD Respondent

DATE OF HEARING : **30 NOVEMBER 2016**

DATE OF JUDGMENT : **09 DECEMBER 2016**

JUDGMENT

MANAMELA AJ

Introduction

[1] In this application for the liquidation of the respondent company, I reserved judgment after submissions by counsel in the unopposed motion court of Wednesday, 30 November 2016. I mentioned at the time that, the application raised very interesting, but yet critical issues not directly addressed in the papers, requiring further reflection. Consequently, I requested counsel appearing for the applicant to furnish me with heads of argument, among others, addressing what the effect or impact of the liquidation order sought would be on the existing voluntary liquidation process. I am grateful to counsel for both written and oral submissions in this regard.

[2] The application was evidently unopposed and therefore there is no need to delve deeper into the issues, save to state only what is necessary to ground the order to be made. I commence the discussion with a brief narration of the background to the matter, only to the extent that it predicates the current application.

Background

[3] During or about July 2015, the applicant and respondent concluded a sub-contracting agreement in terms of which the applicant rendered services to the respondent. I gather from the annexures that the services related to electrical works possibly in a construction engagement the respondent, as a construction company, was the principal contractor.

[4] The applicant rendered invoices to the respondent. When the invoices were not paid, the applicant initially sent an ordinary letter of demand on 1 March 2016, but thereafter -

during April 2016 – sent a formal demand in terms of section 345(1)(a) of the Companies Act 61 of 1973 (the Companies Act).

[5] Subsequent to section 345(1) demand, the parties engaged each other in discussions and exchanged letters in an attempt to resolve the matter amicably, but in vain. However, according to the applicant the respondent admitted part of the amount demanded by the applicant, even though no payment was made.

[6] The applicant issued and served this application in August 2016 and in September 2016 the respondent delivered a notice of intention to oppose the application. The applicant submits in terms of this application that this Court should presume the respondent to be unable to pay its debts as contemplated in section 345 of the Companies Act.

[7] It is what happened after the respondent noted its opposition to the application which appears to locate the nub of this application. The parties again engaged each other in discussions even after the court application was launched, but ultimately the applicant requested that the respondent deliver the opposing affidavit. Initially, the applicant's attorneys directed courtesy letters to the respondent's attorneys, which did not yield the intended result. The applicant enrolled the matter as an unopposed application in early November 2016, but the matter was postponed and eventually came before me as stated above.

[8] On 22 November 2016 the applicant's attorneys received a letter from respondent attorneys advising that the respondent, through a special resolution passed dated 21 October 2016 was placed in voluntary liquidation through registration of the resolution on 27 October 2016. Evidently, this was after this liquidation application was issued and the respondent had indicated their intention to oppose same. It may be opportune to state that the respondent has not withdrawn its opposition to this application, although, as stated above, no opposing papers were filed. Therefore, I only have the applicant's submissions to consider against applicable legal principles.

Applicant's submissions

[9] As indicated above, the applicant submits that the respondent had to be wound up on the basis of inability to pay its debts as provided in section 345(1)(a) of the Companies Act, which is to be read with section 344(f) of the Companies Act.[1] Initially it sought provisional winding up but later submitted that the responded ought to be finally wound up. I will revert to this below. Obviously, the applicant persists in pursuit of this relief despite the respondent being in voluntary liquidation.

[10] Counsel for the applicant submitted at the hearing that section 346 of the Companies Act provides for the liquidation of a company already under voluntary winding up. He grounded this submissions primarily upon the decision in *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* (*King Pie*).[2] Counsel further submitted that the facts of the current application are at all fours with

[1] These provisions remain applicable through item 9 of schedule 5 of the Companies Act 71 of 2008.
[2] 1998 (4) SA 1240 (D); [1998] 4 All SA 179 (D).

those in the *King Pie* decision and therefore that this court can grant the relief sought despite the intervening issue of the voluntary liquidation. It was primarily on this that I decided against disposing of the matter in the unopposed motion court and decided rather to grant an opportunity to the applicant to address the issue by way of further heads of argument. I will discuss this further under the next heading.

Applicable legal principles and the issues

[11] In my view the point of departure herein is section 346 of the Companies Act. It reads as follows in the material part:

> "(1) An application to the court for the winding up of the company may, subject to the provisions of this section, been made –
>
> (a)....
>
> ...
>
> (e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of the company..."

[12] The provision clearly grants the Court jurisdiction to make an order for the winding up of a company already under voluntary winding. However, the situation is only clear to that extent and not beyond, in my view. As to how the Court is to address the existing voluntary liquidation process and its effects, the legislation did not provide any guidance. It is obviously unfathomable that a company could be under both voluntary and compulsory liquidation process, although I cannot immediately imagine the ramifications of such co-

existence. The applicant's counsel directed my attention to the decision of *King Pie* and submitted that there is a beaten path in this regard.

[13] The highlights of the *King Pie* decision are similar those in this mater, save in minor respects like the fact that in *King Pie* the respondent company withdrew opposition to the application for liquidation after registration of the voluntary liquidation special resolution, which wasn't the case in in this matter. In *King Pie* the Court when faced with the situation granted provisional liquidation by way of a *rule nisi* with a return date, but added a second *rule nisi* for the setting aside of the voluntary winding up. The latter order appears to have been granted by the Court *mero motu*. On the return date, the provisional liquidator appeared and challenged the validity of the compulsory winding up proceedings on the basis of section 359 (1) of the Companies Act[3] in that according to his reading of this provision civil proceedings against the company once placed in liquidation are automatically suspended. The provisional liquidator in *King Pie* further argued that the setting aside of the voluntary liquidation as contemplated in section 354 of the Companies Act, requires a substantive application which is to be served on the provisional liquidator and the Master of the High Court and he was not served with such notice. He further challenged the co-existence of the voluntary and compulsory sequestration processes.

[14] Faced with this situation the Court stated that determination based on the following questions was necessary for a decision on the matter:

[3] Section 359(1) reads in the material part: "When ...a special resolution for the voluntary winding-up of a company has been registered in terms of s 200- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator..."

"(a) whether section 359(1)(*a*) of the Act had the effect of suspending the applications for compulsory winding up of the respondents from the date of commencement of the voluntary winding up;

(b) whether it was necessary before proceeding with the applications for compulsory winding up to stay or set aside the voluntary winding up;

(c) whether a compulsory winding up order ought to replace the voluntary winding up; and

(d) what orders for costs would be appropriate in all the circumstances."[4]

[15] The Court then proceeded to deal extensively with those questions or issues. I do not intend revisiting them save to reflect the outcome of the determinations in the next paragraphs.

[16] On the issue of "whether section 359(1)(*a*) of the Act had the effect of suspending the applications for compulsory winding-up" the court answered this as follows:

"The purpose of the provisions of section 359 of the Act "is to ensure that when a company goes into liquidation the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company (per Widgery LJ in *Langley Constructions (Brixham) Ltd v Wells* [1969] 2 All ER 46 (CA) at 47HI)."[5]

And further on as follows:

"In my opinion this language could well describe an application for the winding up of a company.

[4] See *King Pie* at p 1245.
[5] See *King Pie* at p 1245.

And in *S v Swanepoel* 1979 (1) SA 478 (A) at 488DH Rumpff CJ pointed out that in seeking to determine the meaning of the word "proceedings" or its equivalent in legislation great care must be taken to consider the context and ambit of the legislation in question.

In my judgment the phrase "civil proceedings" where it appears in section 359(1) of the Act must be limited in its application to proceedings in which, as De Villiers CJ said in *Collett v Priest*, an "order in the nature of a declaration of rights or of giving or doing something" is sought against the company in question."[6]

[17] Regarding effect of section 354 of the Companies Act, encapsulated in the second and third questions in the *King Pie* decision above, being "whether it was necessary before proceeding with the applications for compulsory winding -up to stay or set aside the voluntary winding-up" and "whether a compulsory winding-up order ought to replace the voluntary winding-up" the Court had this to say:

"Plainly the court has a wide discretion to set aside winding up proceedings. But, having held that the voluntary winding up of a company is no bar to the launching of an application for its compulsory winding up I must in logic hold that it is not necessary to have the voluntary winding up set aside before such an application can be launched. Indeed, as I have already pointed out, section 346(1)(*e*) of the Act provides for the winding up by the court of a company "being wound up voluntarily". This factor demonstrates that the legislature did not contemplate that the voluntary winding up must first be set aside in terms of section 354 of the Act (for then, *ex hypothesi*, the company would no longer be in a state of "being wound up voluntarily") before an application could be brought for its winding up by the court"[7]

[18] I am swayed by the analysis and ultimate findings in *King Pie*. I am also of the view that the exercise of the Court's discretion in favour of curbing what may actually be an abuse of the law is necessary. The respondent company herein was fully aware of this liquidation

[6] See *King Pie* at p 1249.
[7] See *King Pie* at p 1249.

process and is still formally a party to it. It appears that the respondent whilst enagaging the applicant regarding the delivery of opposing papers was taking steps towards its voluntary liquidation. This cannot be countenanced by the Court as it is not a *bona fide* application of our laws. The respondent and the appointed provisional liquidator are urged to take advantage of the order to be made herein and explain what actually transpired. Therefore, I will proceed to grant the relief sought, but only as a provisional order with a return date, in order to grant the company or the appointed provisional liquidator or any person who may be interested to be heard. The same rule will be issued for the setting aside of the voluntary liquidation process. I reiterate that this, in my view, appears to be a just outcome under the present circumstances. I am also of the view that costs form part of the liquidation process whether the provisional order is granted or not.

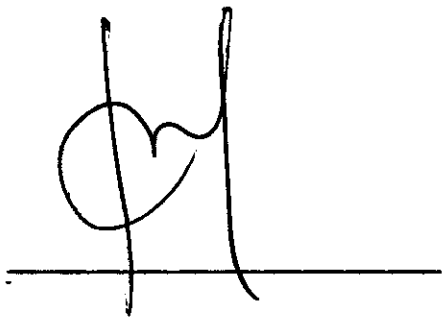
Order

[19] In the premises, I make the following order, that:

1. the respondent is placed under a provisional winding-up order in the hands of the Master of this Court and costs of the application are costs in the liquidation;
2. a *rule nisi* is issued calling upon the respondent and all other interested parties to furnish reasons, if any, to this Court at 10h00 or as soon thereafter as the matter may be heard on 21 April 2017 why the respondent should not be wound up;
3. a *rule nisi* is issued calling upon the respondent and all other interested parties to furnish reasons, if any, to this Court at 10h00 or as soon thereafter as the matter may be heard on 21 April 2017 why the any voluntary winding-up implemented in terms of section 351 of the Companies Act 61 of 1973, in respect of the respondent, should not be set aside.

4. this order shall be served forthwith upon the respondent at its registered office address and on the appointed provisional liquidator.

5. this order shall be published within 21 days from date of this order once in the Government Gazette and the Times newspaper.



K. La M. Manamela

Acting Judge of the High Court

09 December 2016

Appearances/Representation	:	
For the Applicant	:	Kruger & Scharf Attorneys Hazelwood, Pretoria
For the Respondent	:	No appearance & opposing affidavit Senekal Simmonds Inc., Johannesburg c/o MP Koekemoer Attorneys Clydesdale, Pretoria