


THE REPUBLIC OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

17/9/16

Case no: 4766/16

REPORTABLE: YES
✓ OF INTEREST TO OTHERS JUDGES: YES/
✓ REVISED
DATE: 16 September 2016
SIGNATURE 

In the matter between:

GIDEON DANIEL VAN TONDER

APPLICANT

AND

THE MASTER OF THE HIGH COURT, PRETORIA

FIRST RESPONDENT

P.W. ENGELBRECHT NO

SECOND RESPONDENT

KOBUS VAN DER WESTHUIZEN NO

THIRD RESPONDENT

LYNN WARRICKER NO

FOURTH RESPONDENT

DUST-A-SIDE (PTY) LTD

FIFTH RESPONDENT

Heard: 15 August 2016

Delivered: ¹⁹September 2016.

Summary: Application to review the decision of the Master, taking control of the administrative and insolvency procedures of a Co-operative incorporated in terms of the Co-operatives Act of 2005. Interpretation of section 337 of the Companies Act 2008. The provisions section 337 of the Companies Act not applicable to Co-operatives incorporated in terms of the Co-operatives Act of 2005.

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is a review application of the decision of the first respondent, the Master of the High Court ("the Master") in appointing the third and fourth respondents as co-liquidators in the estate of Serendipity Support Services Secondary Co-operative (Pty) Ltd (Serendipity). The other decision, which the applicant seeks to review is the directive by

the Master for an inquiry to be conducted into the affairs of Serendipity in terms of ss 417 and 418 of the Companies Act 61 of 1973 (the 1973 Companies Act).

[2] The issue in the present matter arose from the order made by this court on 19 March 2015, in terms of which Serendipity was declared insolvent.

[3] The application is opposed by the fifth respondent only.

The parties

[4] The applicant was the managing director of Serendipity before its winding up.

[5] The first respondent, is the Master of the High Court, Pretoria appointed as such in terms of the Administration of Estate Act,¹ The second, third and fourth respondents are cited in this matter in their respective official capacities.

[6] The fifth respondent, Dust-A-Side (Pty) Ltd, is a private company registered in terms of the company laws of South Africa. The fifth respondent was the applicant in the liquidation proceedings which were instituted against the Serendipity, including the application for an inquiry into its affairs in terms of ss 417 and 418 of the Companies Act. The fifth respondent is also a creditor of Serendipity.

¹ 66 of 1965.

Background facts

[7] Serendipity was prior to its liquidation registered in terms of the Co-operation Act.² It was established as secondary co-operative by three primary co-operations namely:

- a. The Arrivals Primary Co-operative,
- b. The Isizakele Specialised Services Works Primary Co-operative and
- c. The Universal Services Events Primary Co-operative.

[8] As a secondary co-operative, Serendipity was established to provide sectoral services to the above three primary co-operatives.

[9] On 1 August 2014 the fifth respondent issued an urgent application in terms of which it sought provisional winding up of Serendipity under case 56919/14. In terms of paragraph 4.1 of the founding affidavit in the liquidation application, the winding-up was in terms of s72 (1) of the Co-operation Act of 2005 (the 2005 Co-operative Act).

[10] After the liquidation the Master seized control of the administrative matters of Serendipity and issued a certificate of provisional liquidation on 12 September 2014 under reference number T21494/14. In this regard the third and fourth respondents were appointed as co-liquidators in the insolvent estate and that was done in terms of s71 of the 2005 Co-operatives Act.

² Act number 14 of 2005.

[11] The appointment of a liquidator/s in the winding-up of Co-operatives was previously dealt with by s195 of the repealed Co-operatives Act, (the 1981 Co-operatives Act).³ Section 195 of that Act read as follows:

“(1)(a) The registrar shall appoint one or more liquidators in respect of a co-operative being wound up.

(b) If a liquidator ceases to hold office the registrar shall, if such liquidator was the only liquidator, or may, if such liquidator was one of a plurality of liquidators, appoint any person to fill the vacancy.

[12] As indicated above the 1981 Co-operatives Act was repealed by the 2005 Co-operatives Act. The procedure for winding-up of a co-operative under that Act is dealt with under Chapter 9, and specifically between ss 71 to 76 thereof. The 2005 Co-operative Act unlike the 1981 Act, is silent as to the appointment of a liquidator/s in a case of winding-up of a Co-operative.⁴ The relevant purposes for introducing the 200 Co-operatives Act are to; provide for the formation and registration of co-operatives, the winding up of co-operatives, the repeal of Act 91 of 1981.

³ Act number 91 of 1981.

⁴⁴ There is recognition of this lacuna and efforts are underway to address it. See Government Gazette 39019 of 24 July 2015, volume 601, page 42, notice 643 the Co-Operative Administration Regulations, 2015 draft was published. Items 78 to 92 deals specifically with the appointment of a liquidator by the Registrar and sets out the functions and powers of the Liquidator.

The grounds of review

- [13] The applicant contends that the decision of the Master, in taking control of the administrative affairs of Serendipity and overseeing its liquidation in terms of the Companies Act is void as he/she did not in law have such powers. In this respect the applicant submitted that Serendipity is a legal entity that is not a body corporate as envisaged by s 337 of the 1973 Companies Act. In other words the provisions of s 337 of the 1973 Companies Act does not apply to registered co-operatives.
- [14] The powers to control and deal with liquidations of Co-operatives according to the applicant is vested in the registrar of Co-operatives. It was also for this reason that the applicant contended that the Master does not have the power to conduct the inquiry in terms ss 417 and 418 of the 1973 Companies Act.
- [15] The fifth respondent in opposing the review application contended that the concept “body co-operate” in s 337 of the Companies Act, refers to associations of natural persons with the characteristics that it should be cable of owning property apart from its members and should have perpetual succession.
- [16] It was argued, based on the above by the fifth respondent that Serendipity qualifies as a “body co-operate” and was therefore governed by the provisions of s 337 of the 1973 Companies Act.⁵

⁵ The powers of the Master as provided for in chapter 14 of the 1973 Companies Act, has been kept operational despite the repeal of that Act by the provisions of Item 9(1) of Schedule 5 of the Companies Act 2008.

The decision of the Master

[17] The Master has not proffered any reason for his decision. It however, would appear that the decision is based on averments made by the fifth respondent at paragraph 7 of the founding affidavit in the application for the liquidation of the applicant. Paragraph 7 of the founding affidavit reads as follows:

- “ 7.1 The Applicant is advised that Section 337 of the Companies Act, 1973 provides that the expression "company" as used in Chapter 14 of the said Companies Act 1973 also means any other body co-operate.
- 7.2 The applicant is also advised that the provisions of section 2 and 8 of the Co-operatives 2005, confirm that the Respondent is a body co-operate.
- 7.3 In the premises, the Applicant is advised that the provisions of this Chapter 14 applies *mutatis mutandis* to the winding-up of the respondent also.
- 7.4 The Applicant is also advised that, if the provisions of the Companies Act, 1973 do not directly apply to the winding-up of the Respondent, it would in any event be a good practice to deal procedurally with this application in a similar manner that

an application for winding-up of a company would be dealt with."

The issue for determination

[18] The key issue for determination in this matter is concisely set out in the applicant's heads of argument in the following terms:

- "1. The pivotal issue that informs the consideration of all the sets of the relief sought in the present application concerns the question whether the provisions of chapter 14 of the Companies Act,⁶ ("the 1973 Companies Act) find application in the eventuality of the liquidation of a Co-operative that is formed, registered and managed in terms of the Co-operatives 14 of 2005 ("the Co-operatives Act").
2. If the answer to the said question is in the affirmative, the relief sought is unfounded."

Evaluation/ Analysis

[19] The question of whether the provisions of Chapter 14 of the 1973 Companies Act, find application in the eventuality of the liquidation of a Co-operative finds answer in the rules governing interpretation of statutes. The approach to adopt when dealing with the

⁶ Act number 61 1973.

issue of interpretation of any document is set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁷ as follows:

"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence, whatever the nature the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike result or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statutes or statutory instrument is to cross the divide between interpretation and legislation. A contractual context is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the

⁷ 2012 (4) SA 593 (SCA) at para 18.

language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[20] It appears to me, from the above that, key to the interpretation of a statute is the text and the context of the legislation to be interpreted.

[21] It was argued on behalf of the fifth respondent that the Master has the power to appoint the liquidator/s to liquidate Serendipity in terms of Chapter 14 of the 1973 Companies Act. The power arises specifically from s 337 which defines the word "company" to include body corporate which accordingly covers Serendipity, according to the fifth respondent. Section 337 provides as follows:

"Company" includes a company, external company and any other body corporate."⁸

[22] It is common cause that ss 74 to 76 of the 2005 Co-operatives Act, which deals with the winding up of a co-operate entity does not make provision for the appointment of a liquidator.

[23] In appointing the two liquidators the Master exercised public power. The basic principle of our law is that the exercise of public power must be authorised by the law.

⁸ The word co-operative is defined in the Companies Act as follows: "a juristic person as defined in the Co-operative Act 2005."

As stated by Hoexter in Administrative Law in South Africa,⁹ administrators do not have inherent powers. This means every time an administrator exercise power such a power must have its source in law. Any decision or action taken by an administrator that has no basis in law is illegal and thus offend the principle of legality and the rule of law.

[24] In the present instance it has to be noted that the office of the Master is a creature of statute created in terms of s 2 read with s 3 of the Administration of Estate Act. The powers and function of the Master are, however found in various other statutes.¹⁰

[25] In my view s 337 of the Companies Act cannot be read to give the Master the power to appoint a liquidator/s in the case of the winding-up of a co-operative incorporated in terms of the 2005 Co-operatives Act when regard is had to the provisions of s 3 of the Companies Act, which provides as follows:

“(1) The provisions of the this Act shall not apply-

(a) With reference to any company the formation, registration and management whereof are governed by the provisions of any law relating to friendly societies, including pension funds, within the meaning of the Pension Funds Act, 1956 (Act 24 of 1956), trade

⁹ Hoexter, Administrative Law in South Africa, second edition page 255.

¹⁰ The powers and functions of the Master are amongst others found in the Administration of Estates Act 66 of 1965, the Insolvency Act 24 of 1936, the Companies Act 61 of 1973, and the Close Corporations Act 69 of 1984.

unions and employers' organisations, or co-operative societies or companies, save in so far as may be otherwise provided in such law."

[26] It is clear from the simple grammatical reading of the above section that the provisions of the Companies Act do not apply to co-operative societies, the formation of which, registration and management whereof are governed by the provisions of the 2005 Co-operatives Act. This would mean that the word "body corporate" in s 337 of the Companies Act, does not include those co-operatives that are registered and managed in terms of the 2005 Co-operatives Act.

[27] Henochsberg on Companies Act, in dealing with the provisions of s 337 of the 2008 Companies Act, says the following:

"To certain statutory bodies cooperate, however, all or some of the provisions of Chapter XIV do not apply, unless the law under which it is constituted provide otherwise."

[28] In the present matter it is common cause that Serendipity was at the time a co-operative registered in terms of 2005 Co-operate Act. The 2005 Co-operative Act has no provision incorporating the liquidation procedure of the Companies Act. It follows from this that the Master does not have the powers to appoint liquidator/s in the event of the winding-up of a co-operative registered under the 2005 Co-operatives Act. It also

follows from this interpretation that the Master did not have the power to seize control and oversee the insolvency procedure of Serendipity in terms of the Companies Act.

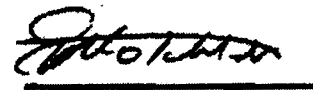
[29] In light of the above analysis, I find that the applicant has made out a case for the review and setting aside the decision of the Master to seize control and oversee the insolvency process of Serendipity including the appointment of the two liquidators. I further see no reason why costs should not follow the results.

Order

[30] In the premises the following order is made:

1. The decision of the First Respondent to seize control and oversee the insolvency procedure of Serendipity Support Services Second Co-Operative (Pty) Ltd, is reviewed and set aside.
2. The Certificate of Appointment of provisional co-liquidators issued by the First Respondent on 12 September 2014 under the reference number T 21594/14 is reviewed and set aside.
3. The appointment of the Third and Fourth Respondents as the provisional co-liquidators in the estate of Serendipity Support Services Secondary Co-Operative (Pty) Ltd, Registration No: 2010/00 7509/25 is reviewed and set aside.

4. The directive issued by the First Respondent dated 13th of January 2015 that an enquiry be held into the affairs of Serendipity Support Secondary Co-operative (Pty) Ltd in terms of Section 417 and 418 of the Companies Act, act 61 of 1973 is reviewed and set aside.
5. The First Respondent's directive dated 13th January 2015 appointing the Second Respondent as a Commissioner in the enquiry of Serendipity Support Secondary Co-operative (Pty) Ltd is reviewed and set aside;
6. That the subpoena issued by the Second Respondent and served upon the Applicant dated the 20th January 2015 directing them to appear at the enquiry is reviewed and set aside.



Molahlehi E

Judge of the Gauteng Division,
Pretoria.

Appearances:

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