

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

CASE NO 8579/2014

In the matter between:

BASFOUR 3752 (PTY) LTD First Applicant

(REF. NO. 2009/014830/07)

KAREN JAMES ODELL N.O. Second Applicant

ANDREW JAMES ODELL N.O. Third Applicant

PATRICIA MARY SCHROEDER N.O. Fourth Applicant

And

KVL DEVELOPMENTS First Respondent

(CK NO.: 2004/051833/23)

ADRIAN VENGADENSAN N.O. Second Respondent

RANJITH CHOONILALL N.O. Third Respondent

**THE MASTER OF THE KZN HIGH COURT,
PIETERMARITZBURG** Fourth Respondent

JUDGMENT Delivered on: 19 May 2015

NTSHANGASE J

Introduction

[1] This is an application for rescission of the orders of this court in case 2050/2014 in terms of which, on 7 April 2014 and 19 May 2014 the applicant was placed under provisional and final liquidation respectively.

[2] The essence of the first applicant's case is that it was unaware of the process which culminated in the final liquidation order. It became aware thereof only on 21 May 2014. The first applicant claims to have a bona fide defence which will disprove that the failure to pay to the first respondent the amount it claims is a consequence of inability to pay its debts.

Background

[3] In the unopposed proceedings in case 2050/2014 the present first respondent successfully applied for the order which placed the present first applicant under final liquidation upon an alleged failure to pay its debt of R563 853.96 to the first respondent, According to the first applicant it became aware of the orders for the first time on 21 May 2014 when Andrew Odell, the husband of Karen Patricia Odell, the deponent to the founding affidavit, received an "SMS" communication from an individual who identified himself as Adrian Vengadesan (the second respondent) informing him that he and the third respondent had been appointed as joint liquidators of the first applicant.

The issue for determination

[4] The first applicant contends that neither the demand to pay the alleged amount nor the process which brought the application was served on it. On the contrary the first respondent avers that service of the demand and application papers was effected on the first applicant by leaving same at First Floor, 4 MRM Office Park, 10 Village Road, Kloof, (4 MRM), the first applicant's registered address as procured from the records of the Companies and Intellectual Property Commission (CIPC).

[5] The first respondent avers that even as at June 2014 when liquidation proceedings were instituted in case 2050/2014, 4 MRM served as the first applicant's registered address and refers to annexure "RVL 1" to its answering affidavit to show that the change of the first applicant's registered address from MRM TO "6 MRM Office Park, 10 Village Road, Kloof (6

MRM) was effective from 31 July 2014 which was after the liquidation proceedings had been instituted.

[6] The first applicant, in this regard, refers to annexure “KOP -1” to its founding affidavit to show that a notice of change of registered address (CoR 21.1) from 4 MRM to 6 MRM dated 22 February 2012 was delivered to the CIPC following upon a discovery ‘during or around February 2012’ that the CIPC’s records reflected an incorrect address of the registered office of the first applicant. Annexure “KOP 2” shows that the notice of change of the registered address from 4 MRM to 6 MRM was received by the CIPC on 15 June 2012.

[7] The first respondent argues that the purported notice of change is not proof that the change was effected as the CIPC would not have accepted the first applicant’s CoR 21.1 by reason of the first applicant’s failure to comply with Regulation 21 of the Companies Act 71 of 2008 which provides that a company must notify the CIPC of a change in its registered address, indicating the effective date of the change which must be at least five business days after the date on which the notice is filed. The relevant part of the first applicant’s CoR 21.1 reads:

‘The above named company, or external company advises that it has or will change its registered office in the Republic on (*insert date*) to the following address:’
(Properly designed the CoR 21.1 would have read “... has changed or will change ...”).

The applicant’s CoR 21.1 further reflects the following:

‘Effective date being a date at least five business days after filing.’

[8] The first respondent contends that insofar as the spaces for dates on CoR 21.1 have been left blank the notice is defective and cannot serve as proof that the change was effected. It is clear from the design of the form that it contemplates that the company might notify the CIPC that it “has ...” already “change(d)” or “will change” its registered office.

Without a deletion of the inapplicable it is difficult, to say the least, to determine whether the message on the first applicant's CoR 21.1 seeks to convey that the address of the registered office had been or would be changed.

[9] I deal now with the first applicant's failure, on its CoR 21.1 to appoint the effective date of change. It appears to me that s 23 of the Companies Act 71 of 2008 (the Act) itself does envisage a notice of change of registered office with no stated date. This, in my view, appears clearly from s 23(4)(a) and (b) of the Act which stipulates that the change takes effect from a date, if any, on the notice or if there be no such date, five business days after filing of the notice with the CIPC. In the former instance the date of effect of change is determined by the date, if any, on the notice. In the latter instance the date of effect of change is determined with reference to the date on which the notice was filed. The relevant part of s 23 of the Act reads:

- '(3) Each company or external company must –
 - (a) ...
 - (b) register the address of its office or its principal office if it has more than one office –
 - (i) ...
 - (aa) ...
 - (bb) ... and
 - (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee –
- (4) A change contemplated in subsection (3)(b)(ii) takes effect as from the later of –
 - (a) the date, if any, stated in the notice (my underlining); or
 - (b) five business days after the date on which the notice was filed.'

[10] In the present case the change took effect five business days after the recorded date of receipt of the notice by CIPC, namely 15 June 2012, in terms of s 23(4)(b) of the Act. The fact that dates were omitted from CoR 21.1 does not, in my view, detract from its status as a notice of change of address of the first applicant's registered office to an identified address. The notice of change of the registered office of the first applicant to 6MRM was properly filed with CIPC. The information on CoR 21.1 was sufficient for the CIPC to effect the change. The first applicant is correct in stating that it ought not to be prejudiced by the remissness of the CIPC in its failure to record the change. The CoR 21.1 substantially achieves and serves the purpose of communicating to the CPIC that 6 MRM was to serve as the first applicant's registered address, also as to where the first applicant would be found, the place where its business would be conducted and where court processes would be served as from a date contemplated in s 23(4)(b) of the Act.

[11] The demand and the liquidation application papers were served at a wrong address, the address of Autotrak. There was, in consequence a failure to alert the first applicant of the demand and the institution of liquidation proceedings which prejudicially denied the first applicant the opportunity to be heard in court on the matter.

The nature of the first applicant's defence

[12] The first applicant denies that it is indebted to the first respondent under the building and construction contract between them. While the first applicant admits that there is an unpaid balance on the amount agreed to be paid to the first respondent on the building and construction works it performed, it denies that the first respondent is entitled thereto, the reason being that 'the reasonable and necessary costs to the first applicant in respect of the completion of the outstanding work and the remedying of defective work substantially exceeds the unpaid balance of the contract price.' In fact, so avers the first applicant, 'the reasonable and necessary costs to the first applicant of realising the contractual prestation to which it was entitled renders the first respondent liable for payment of damages.'

[13] The first respondent, on the other hand contends that 'the entire works had been handed over to the applicants and same had been completed and that the first respondent had vacated the site for the reason that it had completed the works but returned periodically for small snags.' The first respondent refers to various completion certificates annexed as 'RVL 3 to 9' to its answering affidavit to demonstrate completion of the project in all respects.

[14] The first applicant 'reject(s) Van Lingen's contention that the said certificates demonstrate due completion of the building project in all respects in accordance with the first respondent's obligations under its building contract with the first applicant.' (Mr Rory van Lingen is a member of the first respondent and the deponent to the first respondent's answering affidavit). The first applicant refers to what it proffers as a quantification of the reasonable cost of the work to bring the project to completion as amounting to R737 516.00. The quantification annexed as "KOP-11" to the first applicant's replying affidavit was done by Mr Jean-Marc Masson of Home Inspection Services in conjunction with Mr Alan Harris, a specialist building contractor.

[15] In my view the foregoing provides a reasonable and acceptable explanation for the applicants' default and evinces the existence of a *bona fide* defence on the aspect of the first applicant's alleged indebtedness to the first respondent. Consequently the application must succeed.

[16] The applicant has applied for an order awarding costs to it on an attorney and client scale. In my view the facts of this case, which indicate that the first respondent had relied on incorrect records of the CIPC for the failed service of the demand and the application papers, do not call for a punitive costs order.

The order

In the circumstances it is ordered –

1. that the orders granted by this court under case number 2050/2014 on 7 April 2014 and 19 May 2014 in terms of which, on 7 April 2014, the first applicant was placed under provisional liquidation and on 19 May 2014 under final liquidation be and are hereby rescinded.
2. The first applicant is directed to deliver its answering affidavits in the winding up application under case number 2050/2014 within 15 (fifteen) days of the grant of this order.
3. The first respondent is directed to pay the costs of this application on the scale as between party and party.

DATE OF HEARING: 23 March 2015

DATE OF JUDGMENT: 19 May 2015

FOR THE APPLICANTS: Mr C J Snyman SC, instructed by Atkinson Turner & De Wet locally represented by A K Essack Morgan Naidoo & Company.

FOR THE FIRST RESPONDENT: Ms P Hunt instructed by Bernhard Attorneys.