THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 313/13

Reportable

In the matter between:

Enver Mohammed Motala	First Appellant
Mathole Serofo Motshekga	Second Appellant
Khathazile Simon Mahlango	Third Appellant
Gail Lyn Warricker	Fourth Appellant
and	
Master of the High Court (North Gauteng)	First Respondent
The Registrar of Companies	Second Respondent
The Receiver of Revenue	Third Respondent
The Minister of Finance	Fourth Respondent
Boake Incorporated	Fifth Respondent
Kevin Peter Wiles	Sixth Respondent
Master of the High Court (South Gauteng)	Seventh Respondent

Neutral citation: *Motala* v *The Master* (313/13)[2013] ZASCA 185 (29 November 2013)

Coram: BRAND, TSHIQI, WALLIS and WILLIS JJA and VAN DER MERWE AJA.

Heard: 22 November 2013

Delivered: 29 November 2013

Summary: Company – dissolution in terms of s 419 of Companies Act 61 of 1973 – application to declare dissolution void in terms of s 420 of Companies Act – effect of – court's discretion to declare dissolution void – exercise of.

ORDER

On appeal from: South Gauteng High Court (Vermeulen AJ sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of the applications for condonation, and are to be paid by the appellants jointly and severally, the one paying the other to be absolved.

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JUDGMENT

WALLIS JA (BRAND, TSHIQI and WILLIS JJA and VAN DER MERWE AJA concurring)

[1] On 28 July 2003 the first appellant, Mr Motala, was appointed jointly with three colleagues as the liquidator of Cement Board Industries (Pty) Ltd (CBI). In February 2005 the liquidators instituted an action before the South Gauteng High Court against the fifth respondent, Boake Incorporated (Boake Inc), a firm of accountants and auditors, and the sixth respondent, Mr Kevin Wiles. That action proceeded at a snail's pace and, from a procedural perspective, was still ongoing in August 2010,

when Mr Wiles' attorney discovered that CBI had been dissolved in terms of s 419 of the Companies Act 61 of 1973 (the Act). That revelation prompted this application, in terms of s 420 of the Act, for a declaration that the dissolution was void and ancillary relief. The application was opposed by Boake Inc and Mr Wiles and dismissed by Vermeulen AJ in the South Gauteng High Court. This appeal is with his leave.

[2] In his founding affidavit Mr Motala explained rather tersely the circumstances in which CBI came to be dissolved, notwithstanding the fact that its liquidators were engaged in litigation against Boake Inc and Mr Wiles. Apparently the joint liquidators arranged among themselves for a firm in which one of them had an interest to undertake the day to day administrative work involved in the liquidation. Mr Murray, the employee of that firm who was dealing with CBI wrote to the Master of the High Court (the Master) on 8 February 2006 attaching certain documents and saying:

'We confirm that we have no objection to the Section 419 Certificate being issued.'

He added a request that the securities furnished by the liquidators be released. The Master acceded to this request and, on 14 September 2006, released the securities and issued a certificate of dissolution in respect of CBI.

[3] Although challenged to provide a fuller explanation Mr Motala did not do so. Nor, beyond a standard form confirmatory affidavit, did Mr Murray. This was notwithstanding the fact that annexed to Mr Wiles' answering affidavit was the amended first and final liquidation account lodged with the Master and supported by affidavits by all four joint liquidators, sworn at various times between 18 May 2005 and 12 July

2005. This last affidavit was Mr Motala's and it attested to the finality of the liquidation process.

[4] The sole purpose of the application was to enable the litigation between the liquidators on the one hand and Boake Inc and Mr Wiles on the other to resume from where it left off after the discovery in September 2010 that CBI had been dissolved or at least from the stage it had reached in September 2006 when CBI was dissolved. Unless it could achieve that there was no purpose in pursuing the application. In the result two points were argued before the court below and before us. They were, first, that as a matter of law an order declaring the dissolution of a company void in terms of s 420 of the Act would not have the effect of reviving the action and, second, that in the exercise of its discretion the court should refuse the application. The court below upheld both arguments.

[5] The first point is one of considerable difficulty. Section 420 of the Act provides that:

'When a company has been dissolved, the Court may at any time on application … make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.'

The predecessor to this section was s 191(1) of the Companies Act 46 of 1926, which in turn was derived from s 223(1) of the English Companies (Consolidation) Act 1908 (8 Edw 7, c 69). There are two differences in wording between s 420 and its predecessors. The one of lesser relevance is that the earlier provisions provided that an application to declare a dissolution void had to be brought within two years of the dissolution, whereas s 420 is not subject to any time limit. The more significant

change lies in the closing words. The two earlier sections provided that the court could declare the dissolution void:

'… and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.'

The Act restricts this provision to proceedings 'against the company' whereas in its original form the section did not draw any distinction between proceedings by and proceedings against the company

[6] The House of Lords considered Section 223(1) of the English Act in *Morris v Harris*.[1] Harris had commenced arbitration proceedings claiming damages against a company. After the arbitrator had been appointed it came to the attention of his solicitors that a new company had been formed to take over the assets of the original company. Assurances were given that this did not matter and that, if an award was made in his favour, the new company would discharge the award. On the strength of that he pursued the arbitration and obtained a substantial award. The new company did not satisfy the award because it had got into financial difficulties. In the meantime the old company had been dissolved before any of the arbitration meetings took place and before the award was made. An order avoiding the dissolution was granted under s 223(1) and Harris sought to prove a claim under the arbitration award against the company in liquidation. The claim was rejected by the liquidator and by a court of first instance, but upheld by the Court of Appeal. On further appeal to the House of Lords it was held by a narrow majority[2] that Harris was entitled to prove in the liquidation for such claims as he could establish, but not in terms of the arbitration award.

[1] *Morris v Harris* [1927] AC 252 (HL).

[2] The principle dissentient was Lord Wrenbury who, as Buckley LJ, was responsible for the first seven editions of *Buckley on the Companies Act.*

[7] Lord Sumner, giving the leading speech, said that the closing words of s 223(1) pointed to the removal of a bar to proceedings that had existed as a result of the dissolution, but did not affect the validity of anything done during the period of dissolution. In the result he said, in regard to Mr Harris' entitlement to prove a claim under the arbitration award, that:

'The object of the provision was, I think, to give a fresh start to proceedings, which owing to the dissolution had been impossible and had not been taken, and thereupon it was to be open to those concerned to take them in the future as if the dissolution had not happened. In my opinion most of the proceedings in the arbitration in this case, and, above all, the award itself, are null, for they were taken and made against a company which did not exist, and no subsequent validity has been or could be given to them. The respondent must therefore prove his claim afresh in proceedings, to which the appellant will be a party.'

[8] When this court considered s 191(1) in *Pieterse v Kramer NO*,[3] it came to the same conclusion so far as the effect of the section on steps taken on behalf of the company during the period of dissolution was concerned. It accordingly held that a summons issued by the liquidator of a company after the company had been dissolved and prior to the dissolution being avoided was a nullity. In so doing it followed the decision in *Morris v Harris* but specifically left open the question of the impact of an order avoiding the dissolution on proceedings commenced prior to the dissolution.

[9] There is authority in England that the dissolution of a company has the effect of bringing any legal proceedings extant at the time of dissolution to an end.[4] A similar conclusion has been reached in two

[3] *Pieterse v Kramer NO* 1977 (1) SA 589 (A).
[4] *Foster Yates and Thom Ltd v HW Edgehill Equipment Ltd* (1978) 122 Sol J 860.

decisions in South African courts under s 420.[5] These decisions were followed by the court below in this case. There are, however, two dissentient voices.[6] The judge in the first of those cases reasoned that as the dissolution was declared void *ab initio* in terms of the court order that meant that corporate activity prior to dissolution, including the commencement of legal proceedings were revived by the avoiding order.

[10] It is tempting in the light of this conflict of authority and the fact that s 83(4) of the Companies Act 71 of 2008 retains this provision in substantially unaltered form to decide which of these conflicting views is correct. However, I propose to refrain from doing so. First, it involves a consideration of the effect of a decision by the House of Lords where the language of the leading speech seems ambiguous and, as the authorities cited by Holmes JA in *Pieterse v Kramer NO*[7] show, there are different views in that jurisdiction as to its effect. I have read the speech of Lord Sumner with care and am by no means satisfied that it has the effect attributed to it by Megaw LJ in the *Foster Yates* case. There is little other relevant learning on the matter in England and the provisions of s 1032(1) of the Companies Act, 2006 (2006, c 46) mean that no further assistance will be derived from that jurisdiction. Nor have we been referred to the understanding of the section in other jurisdictions, such as Australia and New Zealand that have, or had, equivalently worded sections in their statutes governing companies. Second, there is the difficulty that in 1973 the words 'against the company' were introduced into the section and neither counsel, nor any of the South African writers on company law that I have consulted, proffer a helpful explanation of the reasons for its

[5] *Ebrahim v Evans NO* 1990 (4) SA 424 (D) and *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd & another* 1993 (2) SA 323 (W).
[6] *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 (3) SA 846 (W) and *Pieterse NO & another v The Master & another* 2004 (3) SA 593 (C) at 598F.
[7] Supra at 601D-H.

inclusion in the section or its effect on the meaning of the section as a whole. Third, the implications of a decision either way seem to me to extend beyond the particular circumstances of the present case to matters such as contractual rights existing prior to the dissolution and we were not addressed on these points.

[11] In those circumstances and since I am clear that, even if the first question were to be answered in favour of the appellants, the appeal must fail on the basis that the court below correctly exercised the undoubted discretion that s 420 vests in the court by refusing the application, I prefer to leave these difficult issues to be determined on another more appropriate occasion.

[12] Section 420 exists for certain specific and well-established reasons. In *Goodman v Suburban Estates Ltd (In Liquidation) & others*,[8] Mason J said:

'…it seems to me that the Court ought not to avoid a dissolution unless some unforeseen event such as the discovery of new assets has occurred or unless there has been some fraud or concealment practised or unless the dissolution has become either by reason of surrounding circumstances or through some contrivance of parties the instrument of injustice.'

To similar effect Hoffmann LJ, in the leading English case of *Re Forte's (Manufacturing)*,[9] said:

'… ordinarily the purposes of s 651 [the successor to s 223(1)] are either to enable the liquidator to distribute an overlooked asset or a creditor to make a claim which he has not previously made.'

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[8] *Goodman v Suburban Estates Ltd (In Liquidation) & others* 1915 WLD 15 at 26. See also *Cronje NO & others v Hillcrest Village (Pty) Ltd & another* 2009 (6) SA 12 (SCA) para 36.

[9] *Re Forte's (Manufacturing) Ltd: Stanhope Pension Trust Ltd v Registrar of Companies* [1994] BCC 84 (CA) at 86.

[13] The present application is directed at the first of these purposes, but stands at one remove from it inasmuch as the asset is a claim that is the subject of strenuously contested litigation. Accordingly it is not simply a matter of avoiding the dissolution, taking possession of and possibly realising an asset and making a further distribution to creditors. Here the very existence of the asset is disputed. That means that the application is to some measure at least speculative. To adopt the words of Hoffmann LJ in *Re Forte's (Manufacturing)*[10] it is a 'shadowy' claim.

[14] It is not the function of liquidators to speculate. They are there to pursue the interests of creditors and members,[11] which in the case of a company unable to pay its debts means its creditors. That is doubly important in the present case because the only source of finance to pursue the present litigation is the creditors of the company. But they are conspicuous by their complete absence from these proceedings. The founding affidavit identifies two creditors for whose benefit it is said that the litigation should be pursued. They are respectively Findevco (Pty) Ltd (Findevco), which is seeking to recover some R9.5 million and Fabcos Holding Company Ltd (Fabcos), with a claim of R4.7 million. However, neither proved claims in the liquidation of CBI and neither has put up an affidavit supporting the application. Indeed there is no indication that they are aware of what has happened to CBI or of the litigation against Boake Incorporated and Mr Wiles or of this application. There is accordingly nothing to show that this application is being pursued in the interests of creditors and with a view to recovering an asset for their benefit.

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[10] At 90A-B.
[11] *Cronje NO & others v Hillcrest Village (Pty) Ltd & another*, supra, para 25.

[15] That consideration alone is in my view sufficient to warrant the court refusing the application. But that conclusion is reinforced by a number of other features. First, it is unclear whether Mr Motala has the support of his fellow liquidators in bringing this application. He claims to have such support but no supporting affidavits from his colleagues were presented. When evidence was tendered that the fourth appellant, Ms Warricker, claimed to have no knowledge of the application, no affidavit contradicting this was delivered in reply. Second, it is unclear how long the proposed litigation against Boake Inc and Mr Wiles will take to bring to completion. It had been underway for five years before the discovery that CBI had been dissolved, without much progress having been made. According to the affidavits, shortly before the dissolution there was a substantial amendment to the particulars of claim. Not only will several years of pleading have to be redone, but it is plain from this that the action will not be ready for trial for some considerable period.

[16] That brings me to the third point, which is that Boake Inc and Mr Wiles have had this litigation hanging over them since 2005 in relation to events that took place in 1999. The manifest prejudice to them of avoiding the dissolution and having the action resume is not countered by any indications that the case against them is overwhelming. In those circumstances the prejudice to them must count strongly against the grant of an avoiding order.

[17] Lastly there is the complete absence of any explanation of how the company came to be dissolved when the action was still ongoing. Mr Motala says simply that this was the result of an administrative error by Mr Murray, but does not explain how that error occurred. The factual position is that a final liquidation and distribution account was prepared,

advertised and lodged with the Master. All four liquidators signed affidavits saying that this account was a true and correct account of their administration, that 'all assets and liabilities are reflected herein' and that all claims had been investigated. The account does not mention Findevco or Fabcos or the action against Boake Incorporated and Mr Wiles. That is extraordinary considering that the action had been commenced in February 2005 and the affidavits were signed in June and July 2005. As Mr Murray had been delegated responsibility for the day to day administration of the winding-up of CBI he must have been aware of the action. Yet he gives no explanation of his oversight in submitting the final liquidation and distribution account in the face of that action. In addition the action followed upon an enquiry in terms of sections 417 and 418 so it was hardly a minor matter, as the amounts involved demonstrate.

[18] After lodging the account with the Master, Mr Murray went on to seek the release of the security provided by the liquidators by way of a letter despatched in August 2005. The response came a year later in September 2006. At no stage during this entire period, even though the action was ongoing and pleadings were being filed, did Mr Murray or any of the liquidators notice that they had erred. Nor indeed did they do so after they were informed of the dissolution in September 2006. It is unnecessary to speculate about the reasons for this. What is plain is that the liquidators deliberately sought the dissolution of the company and continued with the litigation notwithstanding. It would require powerful reasons in those circumstances for the court to exercise its discretion in their favour by avoiding the dissolution.

[19] In the result the appeal must be dismissed with costs, such costs to include the costs of the applications for condonation granted at the commencement of the hearing. On any footing the liquidators have been discharged from office as a result of the dissolution of the company. It follows that the costs order must lie against them personally and should be joint and several.

[20] It is ordered that the appeal is dismissed with costs, such costs to include the costs of the applications for condonation, and to be paid by the appellants jointly and severally, the one paying the other to be absolved.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	P J van Blerk SC (with him O Mooki) Instructed by: Mchunu Attorneys, Johannesburg; Bokwa Attorneys, Bloemfontein
For fifth respondent:	I P Green Instructed by: Webber Wentzel, Johannesburg; Matsepes Inc, Bloemfontein.
For sixth respondent:	E A Limberis SC Fluxmans, Inc, Johannesburg; Lovius Block, Bloemfontein.