

# REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CIRCUIT LOCAL DIVISION OF THE WESTERN CAPE HIGH COURT,  
HELD AT GEORGE)

Before the Hon Mr Justice NJ Yekiso

CASE NO: 16625/2011  
H200/11

In the matter between:

**HUNTER MITCHELL PROJECTS CC (IN LIQUIDATION)**

Applicant

And

**ALL ALUMINIUM CC**

1<sup>st</sup> Respondent

**GOUSSARD ATTORNEYS**

2<sup>nd</sup> Respondent

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Coram: **NJ Yekiso, J**

Judgment by: **NJ Yekiso, J**

Counsel for Applicant: **Adv DJ Badenhorst, George**

Attorneys for Plaintiffs: **Haycock Attorneys, George**

Counsel for 1<sup>st</sup> Defendant: **Adv DL van der Merwe, George**

Attorneys for 1<sup>st</sup> Defendant: **Goussard Attorneys, George**

Dates of Hearing: **18 November 2011**

Date of Judgment: **23 January 2012**



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Coram: Yekiso, J

Delivered: 23 January 2012

Summary:

Continuation of legal proceedings:- service of a court process on a garnishee for attachment of emoluments due to a corporate entity in liquidation, after commencement of winding up proceedings, constitutes continuation of civil proceedings in violation of the provisions of section 359(1)(a) of the Companies Act, 61 of 1973.

Execution put in force:- Procurement of emoluments due to a corporate entity in liquidation from a garnishee, pursuant to an emoluments attachment order, after commencement of winding up proceedings, constitutes execution put in force after commencement of winding up proceedings in violation of the provisions of section 359(1)(b) of the Companies Act, 61 of 1973.



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**JUDGMENT DELIVERED ON 23 JANUARY 2012**

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**YEKISO, J**

[1] By way of a notice of motion issued out of the Eastern Circuit Local Division of the Western Cape High Court, held at George, the applicant, Hunter Mitchell Projects CC (in liquidation) instituted proceedings against the first and the second respondents for the relief in the following terms:

[1.1.] That the first respondent be ordered to pay an amount of R133,808.57 to the applicant;

[1.2.] Interest on the aforementioned amount from date of demand to date of final payment thereof at the rate of 15.5% per annum;

[1.3.] *Alternatively*, that the amount of R133,808.57 or any portion thereof held by the second respondent in trust, be paid over to the applicant together with any interest accrued on the amount;

[1.4.] That the first respondent be ordered to pay the costs of the application, alternatively, that the first and second respondents be ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved only in the event of the second respondent opposing the proceedings so instituted.

### **THE PARTIES**

[2] The applicant is Hunter Mitchell Project CC (in liquidation), a close corporation incorporated in terms of the provisions of the Close Corporation Act, 69 of 1984. The applicant was provisionally liquidated pursuant to a provisional liquidation order issued on the 1<sup>st</sup> February 2011 out of the magistrate's court for the magisterial district of George, held at George, returnable on the 15<sup>th</sup> February 2011. On the latter date the provisional liquidation order was confirmed and made final. These proceedings have been instituted by the joint liquidators of the applicant on the basis of the powers vested in them in terms of section 386(1) of the Companies Act, 61 of 1973.

[3] The second respondent is All Aluminium cc, similarly a close corporation incorporated in terms of the provisions of the Close Corporation Act, 69 of 1984, having its registered office and place of business at Sandkraal Road, George Industria, George, in the province of the Western Cape.

[4] The second respondent is Goussard Attorneys, a firm of attorneys practising as such under the name and style of Goussard Attorneys at 33 Victoria Street, George in the province of the Western Cape.

[5] The second respondent is joined in the proceedings by reason of the fact that it represented the first respondent in the application for and the execution of a garnishee order and that the amount of R133,808.57 which forms the subject matter of these proceedings was paid into the trust account of the second respondent. No costs order is sought against the second respondent unless the second respondent were to elect to oppose the relief sought.

### **FACTUAL BACKGROUND**

[6] By way of a summons issued out of the magistrate's court for the district of George, the first respondent instituted an action against the applicant for recovery of an amount of R133,308.57, ostensibly being in respect of services rendered and material supplied by the first respondent to the applicant at the latter's special instance and request. After service of the summons on the applicant, the latter did not enter an appearance to defend the action so instituted. By reason of such default in appearance, the first respondent obtained default judgment against the applicant in the aforementioned amount of R133,308.57 claimed inclusive of costs. Judgment in default of appearance was granted against the applicant on the 26<sup>th</sup> November 2010.

[7] At the time the first respondent instituted an action and ultimately obtained judgment against the applicant, an entity by the name of Kingswood Golf Estate (Pty) Ltd was indebted to the applicant in an amount of R603,446.67 ostensibly due and payable to the applicant by Kingswood Golf Estate in respect of services rendered and material supplied by the applicant to Kingswood Golf Estate at the latter's special instance and request.

[8] By way of an application brought on an *ex parte* basis and on the strength of default judgment granted in its favour in the aforementioned amount of R133,308.57, the first respondent applied for and obtained a garnishee order against Kingswood Golf Estate for the attachment of an amount of R133,308.57 being portion of emoluments due to the applicant by Kingswood Golf Estate arising out of the latter's indebtedness to the applicant. The garnishee order, in the form of a rule *nisi* returnable on the 18<sup>th</sup> January 2011, was obtained on the 10<sup>th</sup> December 2010. The garnishee order was served by the sheriff on Kingswood Golf Estate on the 13<sup>th</sup> December 2010.

[9] On the 17<sup>th</sup> January 2011 the applicant notified the first respondent's legal representatives that the applicant intended to oppose confirmation of the garnishee order obtained on the 10<sup>th</sup> December 2010. On the 18<sup>th</sup> January 2011 the garnishee order, ostensibly per agreement between the parties, was extended to the 1<sup>st</sup> February 2011.

[10] On the 18<sup>th</sup> January 2011 the applicant's legal representatives lodged with the clerk of the court, magistrate's court, George an application for the winding up of the applicant. Shortly after the application for the winding up of the applicant was lodged with the clerk of the court, the first respondent gave its notice to intervene and, in effect, to oppose the winding up order sought by the applicant. On the 26<sup>th</sup> January 2011 the applicant's and the first respondent's legal representatives reached an agreement in terms of which the first respondent would not persist with the intended intervention and the opposition of the winding up order sought whilst the applicant, on the other hand, agreed to withdraw its opposition to the confirmation of the garnishee order.

[11] On the 1<sup>st</sup> February 2011 and at about 09h40 the garnishee order was confirmed whilst at about 09h50 on the 1<sup>st</sup> February 2011, an order for the provisional liquidation of the applicant was granted, returnable on the 15<sup>th</sup> February 2011. The applicant was finally placed in liquidation on the 15<sup>th</sup> February 2011.

[12] On the 7<sup>th</sup> February 2011, after the granting of the provisional order of liquidation, Kingswood Golf Estate paid over an amount of R133,084.01 to the sheriff of the magistrate's court, George. On the 14<sup>th</sup> February 2011 the sheriff of the magistrate's court, George, in turn, paid the aforementioned amount of R133,084.01 to the second respondent. The second respondent, in turn, electronically transferred the aforementioned amount to the first respondent.

[13] At the time the provisional liquidation order was granted, the interim garnishee order had already been confirmed, same having been confirmed at 09h40 on the 1<sup>st</sup> February 2011 whilst the provisional liquidation order was granted 10 minutes later, at 09h50 on the 1<sup>st</sup> February 2011. The attached emoluments were paid over by Kingswood Golf Estate to the sheriff of the magistrate's court, George on the 7<sup>th</sup> February 2011. Such payment was made pursuant to a garnishee order which was confirmed on the 1<sup>st</sup> February 2011 and on steps taken by the sheriff, subsequent to confirmation of the garnishee order, to procure payment from Kingswood Golf Estate in satisfaction of the first respondent's claim. The order granted on the 10<sup>th</sup> December 2010 was merely a provisional order; it had no final effect hence there is no evidence to suggest that it was acted upon. Service of that interim order on the garnishee on the 13<sup>th</sup> December 2010 merely served to notify the garnishee of the existence thereof. As a party to the proceedings in the magistrate's court, the garnishee could have opposed it if it would have elected to do so. It is common cause that the garnishee order, on basis of which Kingswood Golf Estate paid over an amount of R133,084.01 to the sheriff of the magistrate's court, George was in satisfaction of a judgment debt obtained against the applicant prior to its provisional liquidation on the 1<sup>st</sup> February 2011.

### **EVALUATION**

[14] *Mr Badenhorst*, for the applicant, makes a point in his submissions and indeed in argument before me that steps taken to procure payment of the attached emolument from Kingswood Golf Estate on the 7<sup>th</sup> February 2011, somewhat six days after granting of the order placing the applicant under provisionally liquidation, constitute an execution



process put in force against the estate or assets of the applicant after the commencement of the winding-up proceedings and that, in view thereof, such payment is void as contemplated in section 359(1)(b) of the Companies Act, 61 of 1973 relying on such authority as *Pols v R Pols – Bouers en Ingenieurs (Edms) Beperk* 1953 (3) SA 107 (T) at 110 amongst other authorities relied upon. *Mr Badenhorst* argued, in the alternative, that steps taken to procure such payment constitute civil proceedings against the applicant and that, the steps so taken, amount to a violation of the provisions of s 359(1)(a) of the Companies Act to the extent that such steps were taken before the appointment of a liquidator and in circumstances where the liquidator was not informed of the first respondent's intention to continue with such proceedings as contemplated in s 359(1)(a) of the Companies Act.

[15] Section 359 of the Companies Act provides as follows under the heading "Legal proceedings suspended and attachments void":-

"359 . Legal proceedings suspended and attachments void –

- (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –
  - (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
  - (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.
- (2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every

person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

- (b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs."

[16] In the light of the observations I make in paragraph [13] of this judgment as regards the granting of the interim garnishee order, all that I am required to determine, in my view, is whether steps taken by the first respondent to procure payment of the attached emoluments after the granting of the provisional order of liquidation, constitute execution put in force against the estate or assets of the company after the commencement of winding-up proceedings or, in the alternative, whether the steps so taken can be construed as continuation of legal proceedings in violation of the provisions of s 359(1)(a) of the Companies Act.

[17] Confirmation of the emoluments attachment order on the 1<sup>st</sup> February 2011 is not, in itself, a final process. Such confirmation, at best, in my view, constitutes a basis for enforcement of a claim against the applicant, based on an emoluments attachment order, for payment over to the first respondent of the attached emoluments. Evidence tends to suggest that the first respondent's claim, based as it is on a confirmed emolument attachment order, was enforced after the commencement of the winding-up proceedings. Such payment, in my view, constitutes preference of one creditor over

other creditors. Once a company goes in liquidation, the assets of the company in liquidation ought to be administered in an orderly fashion for the benefit of all creditors and that no particular creditor should obtain advantage over and above other creditors by either bringing proceedings against the company in liquidation or by way of levying execution against the assets of the company in liquidation. [*Langley Constructions Brixham Ltd v Wells* [1969] All ER 46 (CA) at 47] In *South African Transport Services v Joubert N.O.* 1986 (2) SA 395 (C) this Court held that proceedings for provisional sentence against the company, even if at the commencement of its winding-up proceedings has already been granted but has not yet become a final judgment, are in violation of the provisions of s 359(1)(a) of the Companies Act.

[18] As has already been pointed out in paragraph (8) of this judgment, the interim garnishee order was served on Kingswood Gold Estate on 13 December 2010. *Mr Van der Merwe*, for the first respondent, both in his submissions and in argument, sought to persuade me that the service of the interim garnishee order on Kingswood Golf Estate on 13 December 2010 amounts to an attachment and execution put in force against the estate or assets of the applicant long before the commencement of the winding-up proceedings. In doing so *Mr Van der Merwe* relies on the observations made by Clayden J in *Pols v R Pols – Bouers & Ingenieurs (Edms) Bpk*, supra, at 110H. The amount in dispute in *Pols v R Pols – Bouers & Ingenieurs*, supra, related to a cheque forwarded to the sheriff with specific instructions that it be paid to the Registrar. The cheque was for payment of a capital amount inclusive of taxed costs in respect of a matter that had been adjudicated upon and finalised before the commencement of the

winding-up proceedings. I am not persuaded that the facts in *Pol's v R Pol's – Bouers & Ingenieurs*, supra, are apposite to the matter before me. In the matter before me, the confirmation of the garnishee order on the 1<sup>st</sup> February 2011 did not bring about the finality of the matter. Steps still had to be taken to enforce of the attachment order by way of procuring payment in satisfaction of the attachment order and for payment to the first respondent.

[19] Payment of the attached emoluments by Kingswood Golf Estate to the sheriff on 7 February 2011 was in response to service on it of the final emoluments attachment order. Payment was in response to service on Kingswood Golf Estate of a court process served on it after the commencement of the winding up proceedings. The service of a court process on Kingswood Gold Estate, after the winding –up proceedings had commenced, constitutes continuation of civil proceedings instituted before the commencement of the winding up proceedings. In my view, it also constitutes execution put in force against the estate or the assets of the company after the commencement of the winding-up proceedings. I therefore determine that the service of a court process, in the form of the final emoluments attachment order, on Kingswood Golf Estate, to procure payment in satisfaction of the first respondent's claim, constitutes a continuation of civil proceedings in violation of section 359(1)(a) of the Companies Act. Furthermore, service of such a process and the ensuing payment, constitutes execution put in force against the estate or the assets of the applicant after the commencement of the winding-up proceedings in violation of the provisions of section 359(1)(b) of the Companies Act.

[20] In the result I make the following order:

[20.1.] Service of a court process, in the form of an emoluments attachment order, on Kingswood Golf Estate on the 7<sup>th</sup> February 2011, constitutes a continuation of civil proceedings instituted before the commencement of the winding-up proceedings of the applicant in violation of the provisions of section 359(1)(a) of the Companies Act, 61 of 1973.

[20.2.] Further, the service of a court process, in the form of the emoluments attachment order, on Kingswood Golf Estate on the 7<sup>th</sup> February 2011, constitutes execution put in force on the estate or the assets of the applicant after the commencement of the winding-up proceedings in violation of the provisions of section 359(1)(b) of the Companies Act, 61 of 1973, and, accordingly, void.

[20.3.] The first respondent is ordered to pay to the applicant an amount of R133,808.57 together with interest thereon at the rate of 15.5% per annum, from date of demand up to date of payment, within seven(7) days of the granting of this order.

[20.4.] The first respondent is ordered to pay applicant's costs, on a party and party scale, duly taxed or as agreed.



N J Yekiso, J