THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 586/18

In the matter between:

PAUL BERNARD JOSEPH **Applicant**

and

KILLARNEY ENGINEERING (Andrew Mentis) **First Respondent**

THE MEIBC **Second Respondent**

COMMISSIONER D NZAMA **Third Respondent**

Heard : 18 February 2020

Delivered: In view of the measures implemented as a result of the Covid-19 pandemic, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 22 January 2021.

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Summary: The legal effect of a liquidated company on pending proceedings.

JUDGMENT

NHLAPO, AJ

Introduction

[1] This is an application to review and set aside the decision of the third respondent on the grounds that the dismissal of the applicant was procedurally and substantively fair. The application is opposed by the first respondent.

[2] The applicant was dismissed for poor work performance whilst on probation. The third respondent found the dismissal to be both substantively and procedurally fair.

[3] The view I take in this matter makes it unnecessary to determine the merits of the application. This is due to the provisions of section 359 of the Companies Act[1] read with item 9 of Schedule 5 of the Companies Act[2] (New Companies Act).

Background facts

[4] This matter is rather unique given the circumstances that were mentioned in open court at the end of the parties' submissions. I was informed by both parties that the first respondent was liquidated on 1 July 2019.

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[1] No. 61 of 1973.

[2] No. 71 of 2008. Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3)

[5] The first respondent was a private company registered as such under the company laws of South Africa with registration number 1988/006925/07. Its registered address was 1 Webb Street, Jet Park, Boksburg, 1459.

[6] The first respondent was managed and controlled by Andrew Mentis (Pty) Ltd, which is a separate legal entity with registration number: 1960/002319/07. Its registered address is 147 North Reef Road, Elandsfontein, Germiston, 1406.

[7] It is important to mention that Andrew Mentis (Pty) Ltd was not cited at the arbitration proceedings sought to be reviewed in these proceedings. However, the name "*Andrew Mentis*" appears in brackets together with that of the first respondent. Furthermore, "*Andrew Mentis*" appears not to have been served with the papers in its own capacity as a legal persona. Be that as it may, my concern is whether or not I can adjudicate upon this matter given the fact that the first respondent has been liquidated.

[8] This is even more important given the provisions of the Companies Act as well as the statutory remedies of the Labour Relations Act[3] (LRA) for unfair dismissals given the effect of deregistration.

[9] The arbitration award is dated 23 February 2018. The review application was lodged on 4 May 2018. The first respondent was liquidated on 1 July 2019. I have not been provided with any other facts pertaining to the liquidation proceedings. More importantly, the liquidator is not a party to the current proceedings.

Legislative Framework

[10] Section 359 of the Companies Act provides:

> '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 –

[3] 66 of 1995

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(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 purposes 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.

[11] It is only sub-section (1)(a) that refers to civil proceedings by as well as against the company. The rest of the section deals with proceedings against the company. This is significant as a review application constitutes proceedings that are before this Court.

[12] The object of these provisions is to prevent the liquidator from being inundated with legal proceedings without sufficient time within which to consider whether or not the company should resist them.

[13] The defence accorded to the liquidator is not an absolute defence. This is due to the provisions of sub-section 2(b), which provides that the Court may direct that, notwithstanding non-compliance with sub-section (2)(a), the relevant proceedings are not to be considered to have been abandoned. The applicant will thus be required to lodge a notice within the period contemplated in the section. Failure to do so results in the proceedings being considered to be

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abandoned. A condonation application will then be necessary for the Court to then direct otherwise.

[14] A case in point on this principle is *Van der Hast v Wells NO*[4] where the Court held:

> 'The respondent now takes the attitude that he does not desire to offer any opposition to the order asked for, but adheres to his view that the section in question gives him no power to condone non-compliance with the provisions therein set out. In addition he contends that the Court which has jurisdiction to grant condonation is the Court in which the action is pending, i.e. the Cape Provincial Division and not the Witwatersrand Local Division.
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> Sec. 118 (2) reads as follows:
>
> "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 three weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings; in default thereof the proceedings shall be considered to be abandoned unless the Court finds that there was a reasonable excuse for the default and allows the proceedings to continue or to be commenced on terms or otherwise as it may think fit."
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> The maxim quilibet juri pro se introducto renunciare potest applies also to rights acquired by statute where there is no public policy to be served. It seems to me that the intention of the Legislature in requiring timeous notice to be given as also the provision for three weeks' notice before commencing or continuing proceedings is for the benefit of the liquidator. I can see no other purpose to be served nor did counsel for the respondent suggest that there was any other purpose. This was the view taken by MILLER, J., in Gilbert Hamer & Co. Ltd. v. Icedrome Promotions Ltd., 1962 (3) S.A. 372 (D) at p. 373D-H, with which view I respectfully agree.

[4] [1964] 4 All SA 309 (W) at 311 – 312

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> In my view the contentions advanced are incorrect. There is nothing in sec. 118 (2) which is inconsistent with the definition in the Act. The merits of any particular action or proposed action are not in issue. The sole issue is whether there is reasonable excuse for the default and it is eminently reasonable that the Court which in matters generally under the Companies Act has jurisdiction should likewise deal with this particular question. It is not a question of one Court being involved in the procedural aspects of a case being conducted in another Court. The result is that I find that the applicants have placed their petition in the proper forum.

Analysis

[15] In my view the Labour Court does not have the jurisdiction to determine the review application as the review application meets the definitional requirements of proceedings contemplated in section 359(2)(a) of the Companies Act.

[16] The lack of jurisdiction emanates from the fact that no notice was given to the liquidator before continuing with the proceedings.[5] Furthermore, no condonation was sought and granted as contemplated in section 359(2)(b) of the Companies Act. The effect of this is that the current proceedings are considered to be abandoned.

[17] Even if this Court was presented with a condonation application contemplated in section 359(2)(b) of the Companies Act, I am of the view that this Court lacks the requisite jurisdiction to entertain the condonation application as this is an aspect that is provided for within the Companies Act and not the LRA.

[18] There is also another difficulty presented by the liquidation and subsequent deregistration of a company. Once such a company is deregistered, it is deprived of its legal existence. Deregistration puts an end to the existence of a company. Its corporate personality ends in the same way that a natural person ceases to exist on death. Once there has been deregistration there is

[5] Section 359(2)(a) of the 1973 Act provides that 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.

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obviously no purpose in a corporate post-mortem and no one would have the authority to conduct one. [6]

[19] I must mention that I am not aware of its current status and as such will not pronounce on this aspect.

[20] In the premises, the current application falls to be dismissed for lack of jurisdiction. This is due to the applicant's failure to comply with the provisions of section 359(2) of the Companies Act as read with item 9 of Schedule 5 of the new Companies Act.

Costs

[21] In view of the fact that this is a very unusual circumstance not provided for in the LRA, and more so in that both parties are not legal representatives, I deem it appropriate that no order as to costs should be made.

Order

1. The application is dismissed due to lack of jurisdiction.
2. There is no order as to costs.

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S B Nhlapo

Acting Judge of the Labour Court of South Africa

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[6] *Nafcoc Investment Holdings Co Ltd & Others* 2010 (6) SA 390 (SCA) at para 11

Appearances:

For Applicant: PB Joseph

For the Third Respondent: S Mthenjana

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