

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 9114/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE	05 May 2023
SIGNATURE	

In the matter between:

THE LINKS BODY CORPORATE

Applicant

and,

LIEBESHEIM BOUERS CC

Respondent

ORDER

The application for *leave to appeal* is dismissed with costs.

NEUTRAL CITATION: *The Links Body Corporate v Liebesheim Bouers CC* (Case NO: 9114/2021) [2023] ZAGP JHC 385 (04 May 2023)

LEAVE TO APPEAL JUDGMENT

FISHER J:

Introduction

[1] This is an application for leave to appeal a final liquidation order. I shall refer to the parties as in the main application.

Grounds

[2] Two grounds of appeal are posited by the respondent; the first is that the liquidation order was fatally flawed for want of compliance with section 9(3)(b) of the Insolvency Act read with section 346(3) of the 1973 Companies Act; the second is that the indebtedness was disputed on reasonable grounds.

Dispute of indebtedness

[3] The second ground is easily disposed of. It is not disputed that the respondent has failed to pay its levies and that it is substantially in arrears. I did not understand counsel for the respondent to press the second ground with any conviction. There is no basis for leave to appeal in respect of this ground.

[4] The first ground however was more vigorously pressed by the respondent. I turn to deal with this ground.

The section 9(3)(b) security provision

[5] Section 9(3)(b) of the Insolvency Act (the Act) which reads in relevant part as follows:

(b) '...the petition shall be accompanied by a certificate of the Master **given not more than ten days before the date of such petition** that sufficient security has been given...' (Emphasis added.)

[6] It is settled law that section 9(3)(b) of the Act requires that the certificate must have been issued not more than ten days before the date of signature of the notice of motion.¹

[7] In this case, the certificate was issued within the 10 days. It was, however, issued subsequent to the date of the notice of motion.

[8] The contention on behalf of the respondent is that section 9(3)(b) means that the certificate may not be issued after the date on the notice of motion.

[9] In support of this contention, the respondent's counsel had resort to the decision of *Arnawil Investments (Pty) Ltd v Stamelman*² which he argued was still good law in this division.

[10] In that case, which dealt with two liquidation applications, the original security certificates had been issued outside of 10 days and were thus considered 'stale'. The applicants sought to use freshly issued certificates at the hearing.

[11] It was held in *Arnawil* that the purpose of the provision was to discourage frivolous or vexatious proceedings against solvent persons and to safeguard such persons against monetary loss where such proceedings were nevertheless brought.³

[12] For this reason, the Court the court held that the security had to be furnished at a stage prior to the incurring of costs by the respondent which it reasoned would be reached before the service of the application. The Court held further that it was in this context that the statute required that the certificate of security 'accompany' the application.⁴

¹ See: *Anthony Black Films v Beyl* 1982 (2) SA 478 (W).

² *Arnawil Investments (Pty) Ltd v Stamelman* 1972 (2) SA 13 (W).

³ Id at pp 13 H to 14G.

⁴ Id at p 14A.

[13] The respondent's counsel neglected however to draw the attention of the court to the prevailing authority on the point which is directly to the contrary position – being *Court v Standard Bank of SA Ltd; Court v Bester No and Others*.⁵

[14] In *Court* the Appellate Division (AD) preferred the view expressed in divisions other than the Transvaal to the effect that the purpose of the security was not to protect the respondent but rather was for the costs of the administration of the Master and the Sheriff.⁶

[15] Counsel for the respondent argues that the issue for determination in *Court* was whether the certificate was required to accompany the application and not whether it could be given post the date of the application. He argues thus that any pronouncements by the AD as to whether the certificate could be given after the application date are obiter. He argues further that such obiter dicta should not influence the determination of the point in this matter, being whether the security certificate had to predate the date on the application.

[16] I disagree. In *Court*, the AD held on a purposive interpretation of section 9(3)(b) that the certificate did not need to be attached to the application when it was served and, more importantly for the purposes of this matter, that it did not even have to be in existence when the application was served.⁷

[17] The Court expressly rejected the approach taken in *Arnawil*. It held that the security to be provided in section 9(3)(b) is to cover the costs of the Master, Sheriff and other costs of the administration and that it was not security for the respondent's costs of opposition.

⁵ *Court v Standard Bank of SA Ltd; Court v Bester NO and Others* 1995 (3) SA 123 (A).

⁶ The Court in this respect approved the decisions of *Rennies Consolidated (Transvaal) (Pty) Ltd v Cooper* 1975 (1) SA 165 (T) at 166E-H; *Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk; Mafeking Creamery Bpk v Van Jaarsveld* 1980 (2) SA 776 (NC) at 781C and *De Wet NO v Mandelie (Edms) Bpk* 1983 (1) SA 544 (T) at 546C-D.

⁷ *Court* at p123.

[18] The purpose of the security is obviously a vital determinant of the time for its furnishing. Were the security meant to protect the respondent then it would make sense that it be furnished together with service on the respondent. However, if the security has nothing to do with the respondent's costs, then it would make sense that the certificate merely be available to the court prior to the hearing.

[19] The AD held in *Court* that the certificate of security did not have to be served and that provided the certificate was given by the Master during a period which commenced ten days before the date of the application and was available when the matter was heard, then the subsection is complied with.⁸

[20] The respondent has no interest in whether there is security for these administrative costs save a derivative interest in whether the application is granted or refused with reference to the certificate.

[21] Thus, all that a court hearing a liquidation or sequestration need be satisfied of under section 9(3) (b) is that a valid security certificate from the Master is in place as at the date of hearing. This was the case here.

Conclusion

[22] To my mind, *Court* is directly on point in relation to the issue of whether the certificate may validly be issued after the date of the application and this pronouncement is not obiter.

⁸ Id at p131.

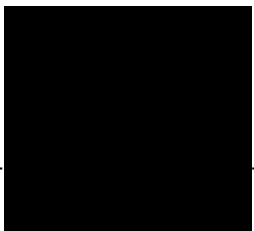
[23] In any event, even if it were obiter, it is of such a persuasive nature that there is, to my mind, no prospect that the SCA would not follow it.

[24] Leave to appeal may only be given, when the appeal would have reasonable prospects of success.

[25] In light of the analysis above there is no prospect of another court reaching a different conclusion.

Order

[26] I thus order that the application for *leave to appeal* is dismissed with costs.


D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING: 25 April 2023

DATE OF JUDGMENT: 5 May 2023

APPEARANCES

For the Applicant: Adv. T Carstens

Instructed by: AJ Van Rensburg Inc

For the Respondent: Adv. R Du Plessis SC

Instructed by: Kapp Attorneys Inc