

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 24265/01

In the matter between:

CLIPSAL SOUTH AFRICA (PTY) LIMITED
(FORMERLY LUMEX CLIPSAL (PTY) LTD)

APPLICANT

And

CORDERO, LAURO N.O.

THE MASTER OF THE HIGH COURT

RESPONDENT
INTERESTED PARTY

In re:

CLIPSAL SOUTH AFRICA (PTY) LIMITED

PLAINTIFF

And

ENGINEERING 2000 (PTY) LTD T/A LIGHTING PRO 1st DEFENDANT

JANSE VAN RENSBURG; JOHANNES JACOBUS 2nd DEFENDANT

JUDGMENT

MAVUNDLA, J.

- [1] The applicant seeks an order in terms of which the respondent is joined as the third defendant in the main action and the costs of the application only in the event the matter is opposed.
- [2] The application is brought in terms of Rule 15. The respondent is opposing the matter on the grounds that he has since been discharged as the liquidator by the Master after he had finalised the liquidation account.

BACKGROUND

Main Action

- [3] It is common cause that summons in the main action was issued on 13 September 2001 against, inter alia, an entity known as Engineering 2000 (Pty) Ltd trading as Light Pro ("Engineering 2000") under case 2465/2001 (the main action). On 19 October 2002 Engineering 2000 filed a plea and counterclaim in the main action. On 29 October 2002 Engineering 2000 was voluntarily placed under liquidation by special resolution. The respondent was appointed the liquidator of the estate of the first defendant Engineering 2000 on 20

March 2003. On 26 September 2005 the first and final liquidation and distribution account in the estate of Engineering 200 was lodged with the Master and subsequently approved. On the 11 October 2006 the respondent was discharged by the Master in terms of s419(1)¹ in which he certified that the affairs of Engineering 2000 had been completely wound up. The registrar of Companies has since issued a certificate confirming that Engineering 2000 had been “dissolved”.

[4] In my view, for the applicant to succeed in this matter, it must demonstrate to the court that it has a *prima facie* actionable action against the estate of the first defendant, and that the interest of the creditors in the liquidated estate would not be prejudiced by allowing the applicant to proceed with the main action; *vide Warricker & Another NNO v Liberty Life Association of Africa Ltd*².

[5] It is trite that dissolution of a company results in its demise, it comes to an end. Like a human being, after its death, what

¹ Companies Act, No 61 of 1973.

² 2003 (6) SA 272 (WLD) at 276G-H.

remains is the estate to be wound up. The latter process is undertaken by the liquidator who is appointed by the Master of the High Court. In the Commentary on s419 *Henochsberg on Companies Act*³ the learned authors pointed out that: “In the matter of *Bowman NO v Sacks*⁴ Flemming J (as he then was), dealing with the effect of its dissolution on the companies liquidator, stated (at 464) that:

‘When the dissolution of the company took place, the statutory duty of the liquidator towards the creditors came to an end.. the scheme of the Act does not in any way indicate an intention towards a relationship between the liquidator and the company as such, beyond the liquidation—distribution basis...The Legislation in its broad pattern confirms that, once the liquidation and consequent distribution has been completed, the liquidator is to disappear from the scene. He has no further function and may therefore have his security discharged and obtain his release. It would be alien to the pattern if the liquidator was to retain some authority to act not on behalf of the company or for the benefit of creditors or members, in fact in no way related to the process of liquidation – distribution, after the official end of the process of administration.’

³ At Vol 1 899 [issue 27].

⁴ 1986 (4) SA 459 (W).

[6] In the matter of *Pieterse NO v Master*⁵ the Court held that:

“The effect of the issuance of the certificate by the first respondent is that the Registrar of Companies proceeds to have the liquidated company deregistered or dissolved. It is believed that the company has been finally dissolved. As the company has been dissolved the action instituted by the applicant cannot be proceeded with.”

[7] The learned authors *Henochoberg on Companies Act* further pointed out that in the matter of *Brouhton v Manicaland Air Services (Pvt) Ltd*,⁶ where in the action by the respondent company, the pleadings had been closed but the matter had not been set down, in the application for the dismissal of the action with costs of the action on the ground that it had become dissolved, the Court held that it could neither make any of these orders against a company which has ceased to exist: but acting under its inherent powers dismissed the action without any order as to costs.

⁵ 2004 (3) SA 593 (C) at 596E-F para [8].

⁶ 1972 (4) SA 458.

[8] Rule 15 permits an executor or trustee of a legally incapacitated litigant to step in the shoes of such litigant to proceed with it litigation. The respondent was appointed the liquidator of the estate of the Engineering 2000 on 20 March 2003. The effect of this is that the applicant could then bring an application to have the respondent substituted in the main action, through rule 15. However, this rule provides that such substitution must be brought forthwith by notice to such intended person to substitute the incapacitated person.⁷ In my view, the use of the word 'forthwith' in rule 15(2) denotes that such steps as are necessary to substitute must be taken immediately without delay, upon the appointment of the liquidator, or its appointment becoming known by the applicant; *vide City of Cape Town*⁸.

[9] *In casu*, the applicant brought this application during August 2007 to have the respondent joined as the third respondent in the main action that was instituted prior to the winding up. Joinder deals with a situation where the claimant wishes to join

⁷ Vide Rule 15 (2) & (3).

⁸ 2004 (5) SA 39 (CPD) at 65D-F.

in the proceedings a third party if he is not sure which of the parties was liable for the damages. There must be a cause of action against each of the respective wrongdoers; vide *K & S Dry Cleaners Equipment v South African Eagle Insurance*,⁹ The claim against Engineering 2000 in the main claim is in respect of goods sold and delivered to it. The respondent, in my view, cannot be a joint wrongdoer; vide *Randond Investments v FPS (Northern Region) (Pty) Ltd*.¹⁰

[10] In my view, what is contemplated by rule 15, is a situation where one party steps into the boots of another. It denotes one single cause of action. The basis of liability remains the same. The original person who has been incapacitated is merely being substituted by the other person who is brought in the proceedings. The latter person merely steps in the shoes of the initial person; vide *Purnell v Purnell*.¹¹ The fact that the applicant refers to joinder instead to substitution, is semantics which does not cause any prejudice that cannot be cured by a

⁹ 1998 (4) SA 456 (WLD) at 460E-462D.

¹⁰ 1992 (2) SA 608 (WLD) at 615B-H.

¹¹ 1993 (2) SA 662 (AD) at 667A-E.

costs order. It is clear from the papers that the intention is to place the respondent in the shoes of the first defendant in his capacity as liquidator in the main action; *vide O'Sullivan Heads Model Agency CC*¹². The court has a discretion to permit substitution in terms of rule 15 if there would be no prejudice to the other party; *Vide O'Sullivan Heads Model Agency CC*¹³ in which it is cited with approval the matter of *Samente v Minister of Police and Another*.¹⁴

[11] *In casu* the Engineering 2000 was voluntarily placed under liquidation by special resolution on 29 October 2002. The respondent was appointed the liquidator of the estate of the first defendant Engineering 2000 on 20 March 2003. This application was only brought during August 2007, four years and five months later. The application was not brought forthwith, in my view.. This application was brought after the respondent was discharged of his duties when he no longer can

¹² 1995 (4) SA 253 (WLD) at 254H-255.

¹³ *Supra* at 255 D-256B.

¹⁴ 1948 (3) SA 1012 (W) at 1021.

function as a liquidator; *vide Standard Bank of SA Ltd v The Master and Others*.¹⁵

[12] In order for me to exercise my discretion in favour of the applicant, I need to be persuaded that there is no prejudice at all caused by the delay. As pointed out earlier, on 26 September 2005 the first and final liquidation and distribution account in the estate of Engineering 2000 was lodged with the Master and subsequently approved. On the 11 October 2006 the respondent was discharged by the Master in terms of s419(1). The applicant stated that that the respondent would not be prejudiced in the event the order sought is granted.

[13] The application was brought almost thirteen months after the first and final liquidation and distribution account and almost thirteen months after the respondent was discharged from his duties in terms of s419(1). In practical terms it means that Engineering 2000 no longer exists and its estate has been completely winded up, and as such the action cannot be

¹⁵. 1999 (2) SA 257 (SCA) at 266B-D.

proceeded with against the first defendant.¹⁶ The applicant has not advanced any reasonable excuse in the papers as to why the application was not brought much earlier.

[14] It needs to be borne in mind that section 359 suspended any legal action against the first respondent. In the matter of *South African Transport Services v Joubert NO*¹⁷ Howie J (as he then was) referring to s359 said "...once the respondent was appointed liquidator (not provisional liquidator: see *Strydom NO v MGN Construction (Pty) Ltd and Another*: In re Haljen (Pty) (In liquidation) 1983 (1) SA 799 D at 806H-808G), he had to be given written notice of the continuation of any suspended proceedings." Howie J (as he then was) at 400F further said that "Such notice not having been given, the proceedings which were in progress when liquidation supervened, and which were suspended by liquidation, are deemed in terms of s359(2) (b) to have been abandoned. Therefore those proceedings could not,...).

¹⁶ Vide Pieterse NO and Another v The Master and Another (supra) at 596E PARA {8}.

¹⁷ 1986 (2) SA 395 (CPD) at 400B.

[15] Granting the application would require that I should resuscitate the second defendant. It is for the applicant to pursued this court, why it must not be deemed that the main action has been abandoned. The applicant has not advanced any reasonable explanation why there was this inordinate delay in bringing this application. In the circumstances, the deeming provisions of s359 (2) (b) has not been disturbed. I must therefore conclude on that basis that the main action has since been abandoned. This conclusion simply means that the applicant does not have an actionable action against the first defendant.¹⁸

[16] The effect of the order sought by the applicant would require the resuscitation of first defendant. This would require that the first and final liquidation and distribution account should be set aside and redrafted in accordance with the eventual outcome of the main application. This cause, in my view, would be prejudicial to other creditors who have not been cited in these proceedings. Whether they existed at the time of the final

¹⁸ *Vide* [para 8] *supra*.

liquidation is besides the point. It has not been shown by the applicant, in my view, that there would be prejudice to other potential interested parties.

[17] In the light of the authorities cited herein above and the conclusion arrived at, I therefore conclude that the application must be dismissed. I am further of the view that in respect of the main action against the first defendant, by virtue of the fact that it is no more, that action should be dismissed as well.

[18] The respondent was sued in his capacity as the erstwhile liquidator. It is fair that he must not be placed in a situation of having to bear the costs of this application out of his own pocket. As a successful party, he is entitled to be awarded the costs of this application. In the result

[19] I make the following order:

1. That the application is dismissed.
2. That the main action against the first defendant is dismissed;
3. No order as to costs is made in regard to the main action
4. That applicant is ordered to pay the costs of this application on party and party scale.



N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 12/05/2001
APPLICANT'S ATT : R C CHRISTIE INC
APPLICANT'S ADV : MR. C.D ROUX
RESPONDANTS' ATT : DE JADGER- DUPLESSIS
RESPONDANTS ADV : MR. S. BUNN