THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 1534 / 2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
27 September 2022

In the matter between:

PETRUS ZEELIE Nomine Officio **[In his capacity as court appointed** **Administrator of the** **MJEJANE TRUST (IT No. 6334/2004)]**	**APPLICANT**

And

MJEJANE FARM MANAGEMENT **(PTY) LTD (in provisional liquidation)** **(Reg no. 2007/013525/07)**	**FIRST RESPONDENT**
TSHEPO CHARLES RAMPATLA ***Nomine Officio***	**SECOND RESPONDENT**
THEODOR WILHEM VAN DER HEEVER ***Nomine Officio*** **[In their capacities as joint liquidators**	**THIRD RESPONDENT**

of the First Respondent]

PARADISE CREEK INVESTMENTS 34 (PTY) LTD (Reg no. 2002/004158/07)	**INTERESTED PARTY/ INTERVENING PARTY**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 27 September 2022.

[1] This is a judgment in the two applications that were heard together. The main application by Petrus Zeelie (the Applicant), who acts on behalf of Mjejane Trust (the Trust) seeks a final order to provisional liquidation order handed down by this court on 13 November 2021. In terms of that order, Mjejane Farm Management (Pty) Ltd (the First Respondent) was placed under liquidation and interested parties were invited to show cause why it should not be made final. The other application is by Paradise Creek Investments 34 (Pty) Ltd (the Intervening Party / Paradise Creek) for admission as intervening party. In the same set of papers, Paradise Creek opposes the main application. The application by Paradise Creek is opposed by the Applicant for reasons set out below.

[2] Background.

Several court litigations preceded the current applications. Since the outcome of these litigations has a bearing on the current applications, it would be apposite to briefly unpack the relevant history of the Trust leading to where it finds itself today. This judgment is a continuous build up in putting together a picture puzzle surrounding the Trust, constructing on top of the court judgments handed down so far. The judgment would by no means be the last in putting together the scattered pieces of the picture.

[3] The current legal battles have their roots in one of the largest successful land claims in the history of this country known as the Lugedlane land claim. As fully described by Tuchten J in *Makhubela and Others v Silinda and Others*[1], this was the restitution of land following the 1954 forced removal of the Lugedlane community in what is currently known as Mpumalanga Province. The claimed back land covers some 14 788 hectares and includes Ludwichlust and Tenbosch Farms. Following the restoration, the land was registered in the names of Mjejane Trust for the benefit of the Mjejane beneficiaries, who are members of the community that was forcefully removed from there. Trustees are supposed to be elected from the beneficiaries and should be responsible for the management of the Trust.

[4] A trust deed was executed in 2009 and registered with the Master of the High Court, Pretoria. For unexplained reasons, the list of beneficiaries that was supposed to be part of the trust deed remains missing. It has however been established that these would come from the 1300 Lugedlane families. There is however a dispute as to who the true beneficiaries should be. The Gauteng Division of the High Court, Pretoria appointed a group of interim trustees, whose primary responsibility was to develop the list of beneficiaries. Amid accusations of maladministration, corruption and failure to account, the Court granted an order removing the interim trustees and these were replaced by the Applicant who is a chartered accountant, acting as an administrator of the Trust.[2] Although Tuchten J steered away from making a pronouncement on the accusations levelled against the interim trustees, Bam J found merit in them when he granted part B of the application which was a final order in removing the interim trustees of the Trust.[3]

[5] Upon uncovering the maladministration that later formed part of the report presented to Bam J in the matter referred to above, the Applicant, who is a court

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[1] Case no. 43599/2019 handed down on 12 August 2020 by Gauteng Division of the High Court, Pretoria at para 2.
[2] See *Makhubela and Others v Silinda and Others supra.*
[3] See *Makhubela and Others v Thembinkosi NO and Others* case no. 43599/2019 handed down on 07 March 2022 by Gauteng Division of the High Court, Pretoria.

appointed administrator of the Trust approached the court to have his powers expanded, and this was granted in a judgment delivered by Hughes J on 11 November 2020.[4] It suffices for present purpose to state that the powers and duties of the Applicant were expanded to include investigating and ascertaining the nature and extent of the Trust's assets, liabilities and interests and to institute and/or defend all legal proceedings in the interest of the Trust and the protection and recovery of the Trust's assets.[5] It is with this background that the Applicant brought this application.

[6] The application to place the First Respondent under liquidation was launched on 03 May 2021 as a conversion of a voluntary liquidation. This was after the First Respondent was placed under members' voluntary liquidation that was registered with the Companies and Intellectual Property Commission (CIPC) on 15 April 2021. This application was premised on section 346(1)(e) of the Companies Act, no. 61 of 1973 (the Act) which provides,

> "346. Application for winding-up of company
>
> 1. An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made –
>
> …
>
> (e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company; or…"

[7] It is common cause that the Trust is a creditor and a landlord to the First Respondent. It is also common cause that at the time of launching this application, the First Respondent was under voluntary liquidation, registered with the CPIC as stipulated above. The voluntary liquidation was however set aside in a judgment handed down on 28 May 2021 by the Gauteng Division of the High Court, Pretoria,

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[4] See *Zeelie v Silinda NO and Others* case no. 43599/2019 handed down on 11 November 2020 by Gauteng Division of the High Court, Pretoria.
[5] See *Zeelie v Silinda NO and Others* case no. 43599/2019 handed down on 11 November 2020 by Gauteng Division of the High Court, Pretoria per Hughes J at para 1.1 and 1.11 of the order.

per Davis J.[6] This followed an application to set aside the voluntary liquidation by Paradise Creek, the Intervening Party in the current application. The reason the court set aside the voluntary liquidation was as it found, the decision to place the First Respondent under voluntary liquidation was not in line with the provisions of the Act. That decision was taken as a members' decision, however the parties who took it happened to be two of the three directors of the shareholder company of the First Respondent (the father and the son referred to in the judgment as the Jouberts), and that it done without a notice to the other director – Chris Roux (Roux). For their role, the Jouberts were ordered to pay costs on punitive scale.

[8] <u>Paradise Creek as an interested party.</u>

The application by Paradise Creek to intervene in the current proceedings is opposed by the Applicant on two grounds. The first ground is that Paradise Creek is not a shareholder of the First Respondent but a shareholder of a shareholder, being Keysha Investments 187 (Pty) (Ltd) (Keysha). Paradise Creek is a 50% shareholder while the other half is held by Safrican Leisure Properties CC, represented by the Jouberts. Roux and the Jouberts are the three directors of Keysha which is the shareholder of the First Respondent. The Applicant's argument is that a shareholder, even when it is a minority shareholder, is an interested party. A shareholder of a shareholder, so it argued, is too remote to be described as an interested party.

[9] The second ground of opposition is that Paradise Creek was not a creditor to the First Respondent as it ceded all its rights to all the monies due by the First Respondent to Standard Bank Limited in terms of the cession of loan account claims dated 24 January 2013. The affidavit signed by the Applicant in opposition of the intervening application is dated 14 March 2022. The two grounds raised above are the same grounds raised in opposition of the application to set aside the voluntary liquidation before the Gauteng Division of the High Court, Pretoria. At the time of filing the replying affidavit in this case, the Applicant was aware that these grounds had failed before the Gauteng Division of the High Court, Pretoria, and nothing new was advanced to counter that ruling.

[6] See *Paradise Creek Investments 34 (Pty) Ltd v Mjejane Farm Management (Pty) Ltd* (22790/2021 handed down by the Gauteng Division of the High Court, Pretoria on 28 May 2021.

[10] It suffices for present purpose to state that Davis J quoted with approval from the judgment of *Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate t/a Second Hand Rose*[7] where the court made the following remarks regarding the *locus standi* of a party whose claim was ceded *in securitatem debiti*,

> "In the present case, the issue arises as to the *locus standi* of applicant in an application for a *declarator* pursuant to a lease agreement. In this connection the following passage in Joubert (ed) *The Law of South Africa* vol 2(2) (2 ed) at para 55 by Mr Justice Nienaber is dispositive of the argument: 'The cedent, so it is said, retains, after cession, the ownership of the right, its bare *dominium* or a reversionary interest entitling him or her to the reversion of the ceded right on settlement of his or her own indebtedness. In the interim, neither the cedent nor the cedent's trustee or liquidator in insolvency has the *locus standi* to enforce the debt; only the cessionary may do so. But the cedent's reversionary interest does vest him or her with the *locus standi* to exercise voting or other powers in respect of the right and enables the cedent to protect his or her interests by appropriate means, to take advantage of a lien or suretyship, and conceivably, to issue a notice of cancellation. So too he or she has the dual *locus standi* to sue or to be sued and to apply for the sequestration of the estate of the debtor.'

I also align myself with the views expressed above and hold that Paradise Creek established itself as an interested party in the circumstances of this case.

[11] <u>The liquidation application.</u>

A lot has been out of the judgment setting aside the voluntary liquidation to the extent of suggesting that the outcome of this liquidation application was dependent on that outcome. The provisional liquidation needs to be understood in the following background: The Applicant alleges that subsequent to the registration of voluntary liquidation, he learned that Roux, who is one of the First Respondent's directors, was dissipating or attempting to dissipate the assets of the First Respondent. He also stated that he believed that many more assets and money of the First Respondent

[7] 2006 (3) SA 456 (C) at 472C-E.

may have been dissipated during the recent years in circumstances where large parts of it belongs to the Trust or had to be paid out to the Trust.[8]

[12] In light of the above, the Applicant needed an inquiry to be conducted into the affairs of the First Respondent in terms of section 417 and 418 of the Act as he did not have a clear understanding of what happened in its affairs and the dealings it had with the Trust. This situation was made worse because the erstwhile trustees had until then ignored the court orders directing them to hand over documents pertaining to the affairs of the Trust. The envisaged inquiry cannot be done under voluntary liquidation. There are at least two ways of procuring a s 417 enquiry even in a voluntary winding-up. The first is to convert the winding-up into a winding-up by the Court under s 346(1)*(e)*; and the other is an application to Court under section 388 for leave to convene an enquiry.[9] The Applicant *in casu* opted for the first alternative which is a conversion of a voluntary liquidation to a court ordered liquidation.

[13] The impact that the outcome of the application setting aside the voluntary liquidation would have to the current application is dependent on the reason for the granting of the provisional order. If the court granted the order solely because the company was in voluntary liquidation, without inquiring into its solvency; then the order would have to follow the fate of the voluntary liquidation as determined by Davis J of the Gauteng Division of the High Court, Pretoria. However, ordering a liquidation on the basis of a voluntary liquidation would be unwise and not in line with the Act. The word "conversion" is not even used in the statutory provisions. Section 346(1)(e) provides that an application to the Court for the winding-up of a company may, subject to the provisions of this section, be made in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company. [My emphasis].

[14] My understanding of the provisions above is that a creditor may apply for liquidation of a company (even though it is under voluntary liquidation) and would still

[8] See paragraphs 17-18 of the founding affidavit on paginated bundle on p. 10.
[9] See *Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg* 2002 (5) SA 239 (SCA) at para 4. See also *South African Philips (Pty) Ltd and Others* C *v The Master and Others* 2000 (2) SA 841 (N) at 847G.

have to satisfy all the requirements for liquidation. Being on voluntary liquidation is not a requirement for placing a company under liquidation. The creditor still has to prove the indebtedness by the company in an amount not less than R100.00 and that it is unable to pay.[10] In ordering a provisional liquidation of the First Respondent, the court considered an application that detailed how the First Respondent owed substantial amounts to the Applicant and that it was unable to pay after letters of demands were sent to it. In any event, when the said order was handed down on 15 November 2021[11], the voluntary liquidation proceedings had already been set aside by a court and this was made known to it. The court order therefore had to be an independent decision based on evidence presented regarding its solvency as opposed to just being made because the company was under voluntary liquidation. Given the evidence presented in this application, I conclude that the setting aside of the voluntary liquidation by the Gauteng Division of the High Court, Pretoria has no bearing on the outcome of this application.

[15] This however does not mean that the provisional liquidation cannot be discharged. If the provisional order has to be discharged, it shall not be because of the setting aside of the voluntary liquidation. The order will be discharged if the Intervening Party shows that the Second Respondent is solvent or if the Applicant fails to prove that the First Respondent is insolvent.

[16] <u>Is the First Respondent insolvent?</u>

I now proceed to deal with the solvency of the First Respondent as it appears on papers filed in these applications. It may be prudent to first highlight that on 29 May 2021, a day after the date on which voluntary liquidation of the First Respondent was set aside by the Gauteng Division of the High Court, Pretoria (28 May 2021), Roux and Van Oosthuizen, First Respondent's directors, passed a resolution placing the First Respondent under business rescue. This was registered with the CIPC on 31 May 2021 and without any delay, Grant Chittenden was appointed a business rescue practitioner for the First Respondent. The Applicant thereafter approached this court on urgent basis seeking an order setting aside the decision in which the First

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[10] See section 345 of the Act.

[11] See the judgment by Greyling-Coetzer AJ dated 15 November 2021 on p. 363 of the paginated bundle.

Respondent was placed under business rescue. That order was granted on 22 July 2021.[12]

[17] The Applicant averred in the founding affidavit that the First Respondent owed the Trust an amount in excess of R21 000.00. There were developments after the founding affidavit was filed which necessitated the filing of a supplementary founding affidavit. This was done on 25 August 2021. From this affidavit the money due to the Trust is calculated taking into consideration the version of the Intervening Party, by then known through the email correspondence between the Applicant and Roux and/or his legal representative, Esselens Engelbrecht Inc.

[18] Roux who is the deponent to the affidavit filed for the Intervening Party informed the Applicant that the First Respondent could not be liable in the amount claimed as there was a new lease agreement in terms of which the lease was not only extended but the rental amount was also reduced. In a letter dated 01 December 2021, Roux explains that "our lease agreements were renewed by the trust, although we were in arrears and they were aware of our situation."[13] Roux avoided mentioning the amount in arrear in this letter.

[19] The Applicant denies that the lease agreement was validly extended saying the court should make a finding to that effect. The reason for this argument is that at the time the new lease agreement was signed, the resolution was passed by trustees to the exclusion of an independent trustee named Ledwaba. It was submitted that anything done by the trustees without his concurrence as an independent trustee appointed by the Master of the High Court for that purpose, would be null and void. For reason that he was not part of the meeting and that he did not append his signature to a resolution, the lease agreement could not be valid. In the alternative, he submits that the court should accept his cancellation of the lease agreement which was communicated to the First Respondent through his legal representative.

[20] From the supplementary founding affidavit, the amount in arrears for rent was calculated in two separate sheets with revised interest rates. One sheet is for the

[12] See *Zeelie NO v Mjejane Farm Management (Pty) Ltd and Others* case no. 2138/2021 handed down by Mashile J of this Division.
[13] See the letter addressed to the Applicant by Roux on p. 205 of the paginated bundle.

rent based on the old lease which comes to R10 428 273.75. That amount would be R8 688 920.44 as reflected in another sheet, calculated on the reduced rental in line with the disputed new lease agreement. For this reason, I am of the view that it is unnecessary to make a ruling on the validity of the new lease agreement as that would only help determine the amount by which the First Respondent is in arrear as opposed to a determination on whether it is in arrears. For purposes of this application, it would be unnecessary to come out with the figure, for as long as the amount due is above R100.00. Calculating from either of the sheets, the amount is in millions of rands, which is above the minimum required.

[21] In determining whether there is genuine dispute of fact on whether any money is due to the Applicant, the court should not just give heed to the say so of the Intervening Party. The court may have to look at the circumstances as a whole, including the findings by the liquidators, conduct by the First Respondent's directors and what they said in email correspondence as highlighted above. There are several other emails written by Roux in which he acknowledged that the First Respondent owed money to the Trust without delving into the amounts. In the answering affidavit, Roux makes a sweeping blanket denial that in my view, does not meet minimum requirement to be regarded as genuine dispute, given his admissions and the evidence presented by the Applicant.

[22] The denials by the Intervening Party bring to mind the application of the Plascon-Evans rule which was reiterated by the Supreme Court of Appeal in *National Director of Public Prosecution v Zuma*[14] where it held,

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It

[14] 2009 (2) SA 277 (SCA) at para 26.

may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[23] The bare denial referred to above, should be viewed in light of the reports prepared by the liquidators after accessing the First Respondent's documents. They reached a conclusion that the First Respondent was hopelessly insolvent.[15] The First Respondent financial woes are summarised by Davis J in *Paradise Creek Investments 34 (Pty) Ltd v Mjejane Farm Management (Pty)[16] Ltd* judgment as follows:

> "The financial position of MFM appears to be precarious. The most recent financial statements available, is that of the year ending February 2019. It shows that, for the previous year, its assets have decreased buy more than R1 million, its deferred tax has increased by some R4 million, its retained income has decreased by R10 million and its liabilities have increased by more than R1 million. This includes an increase of its overdraft by almost R3 million. Its comprehensive loss for the year, has increased from approximately, R4 million to just over R10 million. In addition, it appears to have some difficulty in paying its creditors timeously, which includes its landlord."

[24] It is important to reiterate at this stage that the voluntary liquidation of the First Respondent was set aside due to fraudulent manner in which the decision placing it under voluntary liquidation was taken, not because it was solvent. After all the court did not have an application for liquidation before it, but the setting aside of a voluntary liquidation, which it ultimately granted.

[25] In light of the above, I conclude that the Intervening Party's dispute can be best described as consisting of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is

[15] See paragraph 15 of the supplementary founding affidavit on p. 262 of the paginated bundle and the liquidator's confirmatory affidavit on p.317 of the paginated bundle.
[16] *Supra*.

justified in rejecting them merely on the papers. It is clear from the evidence presented that the First Respondent is indeed insolvent and that the provisional liquidation should be confirmed.

[26] As for costs, I do not see any reason costs should not follow the outcome in respect of both the intervening and the liquidation applications. I am equally not persuaded that a case for punitive cost order has been made against the unsuccessful parties.

[27] For the aforesaid reasons, I make the following order:

> [27.1] The application for intervention by the Intervening Party (Paradise Creek Investments 34 (Pty) Ltd) is granted with costs.
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> [27.2] The order granted by this court on 15 November 2021 in terms of which the First Respondent (Mjejane Farm Management (Pty) (Ltd)) was placed under liquidation is hereby made final.
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> [27.3] It is further directed that an inquiry in terms of sections 417 and 418 of the Companies Act, no. 61 of 1973 be conducted into the affairs of the First Respondent.
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> [27.3] The Intervening Party is ordered to pay the costs of the main application.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION
MBOMBELA

FOR THE APPLICANT	**: ADV E. THERON SC**
INSTRUCTED BY	**: DU TOIT-SMUTS ATTORNEYS NELSPRUIT**
FOR THE RESPONDENT	**: ADV T.A.L.L. POTGIETER SC**
INSTRUCTED BY	**: WEAVIND & WEAVIND INC C/O GERRIE GROENEWALT ATTORNEYS**
	: MBOMBELA
DATES HEARD	**: 19 JUL, 06 & 22 SEP 2022**
JUDGMENT DELIVERED	**: 27 SEPTEMBER 2022**