



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

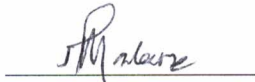
(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2021.03.10

DATE


SIGNATURE

CASE NUMBER: 51113/20

DATE: 10 March 2021

SURFACE PREPERATIONS, EQUIPMENT & COATINGS (PTY) LTD

Applicant

V

SWANSA (PTY) LTD t/a SWAN'S WATER TREATMENT

First Respondent

COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION

Second Respondent

BRETT PETER SWAN

Third Respondent

YVONNE MARISA SWAN

Forth Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Fifth Respondent

JUDGMENT

MABUSE J

[1] This matter came before me as an urgent application. The Applicant seeks:

- “1. That this application be heard as an urgent application in accordance with the provisions of Rule 6(12) and that the requirements pertaining to service and time periods be dispensed with;*
- 2. that the special resolution that was adopted by the Third and Fourth Respondents at a special meeting on 27 August 2020, in terms of which the First Respondent was voluntarily wound-up in accordance with the provisions of s 349 of the Companies Act, No. 61 of 1973, as amended, be rescinded and set aside;*
- 3. that the Second Respondent be directed to restore the First Respondent’s status to “in the business”;*
- 4. that the Third and Fourth Respondents be interdicted and prohibited from adopting a resolution or a decision to voluntarily wind-up the First Respondent, as provided for and envisaged in s 349 of the Companies Act, No. 61 of 1973, as amended, pending the finalisation of the arbitration proceedings, which were initiated by the Applicant against the First Respondent, Coram Adv Graham Girdwood SC;*
- 5. in the alternative to paragraphs 2, 3 and 4 supra:*
 - 5.1 that the liquidation in respect of the First Respondent be stayed pending the arbitration proceedings which were initiated by the Applicant against the First Respondent, Coram Adv Graham Girdwood SC, alternatively that the liquidation of the First Respondent be set aside, as provided for in s 345 of the Companies Act, No. 61 of 1973, as amended;*
- 6. that the Third and Fourth Respondents be ordered to pay the costs of this application jointly and severally, the one to pay, the other to be absolved pro tando on the scale as between attorney and client, including the costs consequent upon the employment of two counsel; and*
- 7. that such further and/or alternative relief be granted to the Applicant which this Court deems reasonable and appropriate under the prevailing circumstances.”*

[2] This application is opposed.

[3] **THE PARTIES**

- 3.1 The Applicant is a private company with limited liability, duly registered in accordance with the provisions of the company statutes of this country with its principal place of business situated at 19 Kurland Road, Perseverance, Port Elizabeth, in the Eastern Cape Province.
- 3.2 The Applicant is represented in this application by its Manager and Director, Mr Arnold Petrus Avenant ("Mr Avenant").
- 3.3 The First Respondent is a private company with limited liability, duly registered in accordance with the company laws of this country with its principal place of business situated at Plot 91, Bartlett Road, Honingklip, Krugersdorp, Gauteng.
- 3.4 The Second Respondent is the Companies and Intellectual Property Commission with its principal place of business and head office situated at 77 Meintjies Street, Sunnypark, Pretoria, Gauteng.
- 3.5 The Third Respondent is Brett Peter Swan, Identity No. 810729 5095 082, an adult businessman residing at 298 Villa Conesa, Furrow Road, Homeshaven Extension 6, Krugersdorp, Gauteng.
- 3.6 The Fourth Respondent is Yvonne Marisa Swan, Identity No. 591010 0268 080, an adult business woman residing at Plot 91, Bartlett Road, Hongingklip, Krugersdorp, Gauteng.
- 3.7 The Fifth Respondent is the Master of the High Court, Pretoria, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.

No relief is sought against the Fifth Respondent.

THE BACKGROUND

- [4] In his capacity as the Applicant's director and managing director, Mr Avenant initiated arbitration proceedings against the First Respondent in which the Applicant claimed damages against the First Respondent in the sum of R7,987,845.19 together with interest and costs. This referral of the Applicant's claim against the First Respondent was made in terms of Clause 12.2(c) of the Sub-Contract Work Agreement. Clause 12.2(c) states that:

“Should a dispute arise between the parties are out or in connection with the contract or it’s application or interpretation, that dispute shall be handled as follows:

- (c) *Should the matter not be resolved by amicable settlement the party wishing to declare a dispute shall refer his dispute in writing to arbitration before a single Arbitrator as applied in terms of the Arbitration Act [42 of 1965, as amended]. The arbitration shall take place in accordance with the Rules for the Conduct of Arbitrations issued by the Association of Arbitrators [South Africa] which is current at the time of the referral to arbitration. The decision of the Arbitrator shall be final and binding on both parties.”*

- [5] In terms of the said Clause 12.2(c), Mr Graham Girdwood SC, a member of the Johannesburg Society of Advocates, was appointed as the Arbitrator. The Arbitration Proceedings were set down for 20 August 2020.
- [6] The Applicant contends that the First Respondent deliberately and intentionally failed or omitted to file any plea or statement of defence in the Arbitration.
- [7] An impression was created in the mind of the Applicant that the First Respondent was playing cat and mouse with the Applicant and the Arbitrator. The Arbitration Proceedings are currently pending before Adv Graham Girdwood SC.
- [8] The First Respondent then applied for the postponement of the Arbitration Proceedings which were scheduled for 20 August 2020. The reasons for the postponement are not known or set out. It is therefore not known why the Arbitrator granted the application for the postponement. Then on 20 August 2020 the arbitration proceedings were postponed to 29 September 2020. They were set down for three days. The Applicant states that it took steps to prepare itself for the Arbitration Proceedings. Such preparations included briefing counsel, Adv Bruce Dyke SC, of the Port Elizabeth Bar, to represent it at the Arbitration Proceedings.

[9] On 29 September 2020 at around 08h15, the Third Respondent sent an email to Adv Graham Girdwood SC. In this email, the Third Respondent informed the said Arbitrator that the First Respondent has been liquidated by reason of “serious financial constraints and the passing of Peter Swan.” I do not understand the reason for the liquidation. In the first place, the liquidation was said to have been launched by the Third Respondent, Brett Peter Swan. One of the reasons given by Brett Peter Swan for the liquidation of the First Respondent was that his father, Peter Ignatius Swan, had passed away. The relevant email stated that:

“Due to serious financial constraints and the passing of Peter Swan we were left with no alternative but to liquidate the company.

We will provide you with details as soon as the nominated liquidator has been appointed.”

This letter was signed by Brett Swan.

[10] On 25 September 2020, Ms Joanne Anthony-Gooden, the Applicant’s attorney sent an email to the Third Respondent in which she requested to be furnished with important information in order to enable her to advise the Applicant properly. The Third Respondent replied to the said email. In his email dated 25 September 2020 the Third Respondent advised the Applicant’s attorney that the First Respondent was wound-up voluntarily. The email was brief. It simply stated that:

“This was the decision for voluntary liquidation.”

Having been informed of the liquidation of the First Respondent, the Arbitrator postponed the Arbitration Proceedings *sine die* and informed the parties accordingly.

[11] The Applicant discovered subsequently that the Third and Fourth Respondent had convened a general meeting of the First Respondent which was held on 27 August 2020. During this meeting, a special resolution was adopted to liquidate the First Respondent voluntarily in terms of the provisions of s 349 of the Companies Act 71 of 1973 (“the Companies Act”). Section 349 of the Companies Act deals with circumstances under which a company may be voluntarily wound-up. It provides as follows:

“A company, not being an external company, may be wound-up voluntarily if the company has, by special resolution resolved that it be wound-up.” A special resolution to wound-up a company voluntarily may provide either for a member’s voluntary winding up, in other words, one effected by the members or for a creditor’s voluntary winding up, in other words, one effected by the creditors in conjunction with the members.

- [12] In terms of s 349, a company may be wound-up voluntarily for any reason. This may happen even if the company is solvent and flourish. It may be so wound-up voluntarily even if bound by obligations which by the winding up it would become unable to perform. See in this regard **South Rand Exploration Co. Ltd v Transvaal Coal Owners Association Ltd 1923 W.L.D. 91 at p. 97:**

“A court will not interfere with a right which the Act gives to the majority, provided of course that the majority supporting the resolution for winding up is sufficient for the effective adoption of a special resolution and that no fraud on the minority is involved.”

- [13] As pointed out properly by the Applicant’s counsel in his heads of argument, this application concerns the manner in which the Third and Fourth Respondents went about in adopting the resolution at a special meeting on 27 August 2020, in terms of which the First Respondent was voluntarily wound-up in terms of the provisions of s 349 of the Companies Act 71 of 1973.

- [14] The question now is what is wrong with the manner in which the Third and Fourth Respondents adopted a resolution at a special meeting on 27 August 2020? The Applicant’s main complaint with the regard to the manner in which the Third and Fourth Respondents adopted the resolution on 27 August 2020 was that the Respondents went about in a clandestine and surreptitious manner by adopting the aforementioned resolution. It is the Applicant’s case that the said resolution was adopted in order to prevent or delay or avoid or to derail the arbitration proceedings which were set down for hearing on 29 September 2020.

- [15] Two very crucial questions arise from the said statement. The first of these two questions is whether the Third and Forth Respondents were obliged in law to notify the Applicant of their intention to voluntarily liquidate the First Respondent? The second question is whether the arbitration proceedings in law prevented the Third and Fourth Respondents from adopting a resolution in terms of which the First Respondent was voluntarily wound-up.
- [16] In the replying affidavit the Applicant states that the Respondents, in other words, the Third and the Fourth Respondents, were duty bound and obliged to at least give notice to the First Respondent's creditors of their intention to adopt the resolution in terms of which the First Respondent was voluntarily wound-up.
- [17] What is the basis of this statement? Is it the Arbitration Agreement or the law? It is so that the parties herein had concluded a Sub-Contractor Work Agreement which contains an Arbitration Clause. This Arbitration Clause is, as already indicated above, contained in Clause 12.2(c) of the said agreement. This is the only clause that deals with or refers to arbitration. There are a few problems in reliance on the Sub-Contractor Work Agreement. Most importantly it does not prevent the parties to the Agreement from jettisoning it and resorting to litigation or court proceedings. Nothing in the Agreement provides for what will happen in the event of one of the parties wanting to resile from Arbitration and what such a party could do and what the other party can do. It would seem that the Arbitration Clause was not binding. One was not compelled to stick to it like a "bosluis" to the skin of cow. In the premises, there was no cause to complain if one of the parties pulled out of the arbitration proceedings even before they could start. The party could not, for one or the other reason, be compelled to stick around until arbitration commenced during its duration and right up to the end. The current rules of the conduct of arbitration issued by the Association of Arbitrators South Africa have not been placed before the Court. As a consequence, the Court has no way of knowing whether these rules contained the rules that prevented a party from abandoning Arbitration Proceedings and opting for current

proceedings. As the Applicant has not alleged that the Respondents are bound by such rules to proceed to finality with Arbitration Proceedings, I will assume, for safety sake, that the Rules concerned contain no such a clause.

[18] I requested the parties to comment on the provisions of ss 3, 5 and 6 of the Arbitration Act. The parties responded accordingly. I am indebted to them. In the first place, counsel for the Applicant pointed out that in terms of s 3(1) of the Arbitration Act, the Arbitration Agreement survives any termination or cancellation of the main agreement. Secondly, he referred me to the provisions of s 359 of the Companies Act and stated that the provisions of s 359 of the Companies Act strike at the heart of this application. His view is that he has every intention to continue and to finalise the pending arbitration proceedings. He states furthermore that it is competent and prudent for the Court to make an order in terms of prayers 1, 2, 3 and 4 of the Notice of Motion. He relies on s 359 of the Companies Act which provides that:

“259(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 the company has been registered in terms of s 200 –

- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of the 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 given the proceedings shall be considered to be abandoned unless the Court otherwise directs.”*

[19] Given an extended meaning Arbitration Proceedings amount to civil proceedings. This was the manner the parties had themselves chosen to resolve their dispute. This was the method that the Applicant had chosen to claim payment of money from the First Respondent. Therefore, any method by which one party claims payment of money from the other including arbitration proceedings, qualifies as civil proceedings. So in terms of s 359(1)(a) of the Companies Act, the arbitration proceedings between the Applicant and the First Respondent were suspended until the appointment, in terms of the Companies Act, of a liquidator.

[20] Once the arbitration proceedings have been suspended in terms of s 359(1)(a) of the Companies Act, and the liquidator has been appointed, it would appear that such proceedings may resume, provided, the creditor shall, within 4 weeks after the appointment of the liquidator, give the liquidator not less than 3 weeks' notice in writing before continuing or commencing the proceedings. This is very clear from s 359(2)(a) of the Companies Act. A creditor cannot prevent a company from taking a resolution in terms of which the company is voluntarily wound-up. If the company cannot be stopped from adopting such a resolution and registering it with the Registrar of Companies as envisaged by s 200 of the Companies Act, it is immaterial whether the creditor is informed or whether, as alleged by the Applicant, the resolution is adopted secretly.

[21] All that the Applicant could do in these circumstances is to wait for the appointment of the liquidator and thereafter to continue with the arbitration proceedings after complying with the provisions of s 359(2) of the Companies Act. S 359(2)(b) of the Companies Act makes it clear that if the creditor or Applicant has not followed the procedure set out in s 359(2)(a) of the Companies Act, he may not continue with the suspended arbitration proceedings. It provides that:

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

[22] The Applicant wants to continue with the suspended arbitration proceedings. I have pointed out that the Applicant may do so provided he has complied with the provisions of s 359(2)(a) of the Companies Act. If any of the Respondents or the liquidator wants to prevent the suspended arbitration proceedings from continuing such a Respondent or liquidator will have to apply to Court in terms of s 6 of the Arbitration Act. Section 6 provides that:

“If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement the Court may make an order staying the proceedings subject to such terms and conditions as it may consider just.”

[23] In the meantime, s 5 of the Arbitration Act deals with the insolvency or winding up of a party to an arbitration agreement. It provides as follows:

“5 Unless the agreement otherwise provides, an arbitration agreement or any appointment of an arbitrator or umpire thereunder shall not be terminated by the sequestration of the estate of any party thereto or if such party be a corporate body by the winding up of the corporate body or the placing of the corporate body under judicial management.”

In other words, the appointment of the Arbitrator in the suspended arbitration proceedings continues. It does not end simply because the First Respondent has been judicially wound-up.

Section 5(2) provides as follows:

“If the estate of any party to an arbitration agreement is sequestrated or if, in the case of a corporate body which is a party to such an agreement, a petition for the winding up of the

corporate body or for placing the corporate body under judicial management is presented or an order for winding up the corporate body or for placing the corporate body under judicial management is made, the provisions of any law relating to the sequestration of insolvent estates or, as the case may be, any law relating to the winding up or judicial management of a corporate body concerned, shall apply in the same manner as if a reference of a dispute to arbitration under the arbitration agreement were an action or proceedings or civil proceedings or legal proceedings or civil legal proceedings within the meaning of any such law.”

Section 5(3) provides that:

“For the purpose of the application of the laws referred to in subsection (2) –

- (a) a reference of a dispute to arbitration shall be deemed to be an action or civil proceedings or legal proceedings or civil legal proceedings by or against any person or corporate body instituted or pending in any court of law having jurisdiction if any party to the dispute has served on the other party or parties thereto a written notice requiring him or them to appoint or to agree to the appointment of an arbitrator, or, where the Arbitrator is named or designated in the arbitration agreement, requiring the dispute to be referred to the arbitrator so named or designated; and*
- (b) a reference of a dispute to arbitration shall be deemed to be an action or proceeding which is being or is about to be instituted against a corporate body, if any party to the dispute is taking steps to serve or is about to serve on the corporate body a written notice such as is referred to in paragraph (a).”*

Section 5(4) provides that:

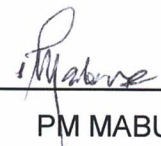
“Any period of time fixed by or under this Act which is interrupted by any stay, suspension or restraint resulting from the application of any law referred to in subsection (2), shall be extended by a period equal to the period of such interruption.”

[24] On the other hand, counsel for the Third and Fourth Respondents contends that the Arbitration Act has no impact on the rights created by the Companies Act. The Arbitration

Act does not prevent a director or directors of a company from proceeding in terms of the Companies Act, as in this instant matter. According to counsel for the Third and Fourth Respondents, s 3 of the Arbitration Act relates to the fact that the agreement between the parties is binding between them. According to him, s 5(1) and (3) of the Arbitration Act specifically provides for the proceedings, that is arbitration proceedings, to continue after an order of liquidation of the company. In this current matter, the liquidator has been appointed.

[25] This Court is disinclined to come to the assistance of the Applicant in respect of prayers 2, 3 and 4 for the reasons set out in paragraph [12] herein *supra*. In my view, there was no need for the Applicant to launch this application. The application can therefore not succeed.

It is accordingly dismissed, with costs.



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv FW Botes SC
Instructed by:	Anthony-Gooden Inc. c/o Gothe Attorneys
Counsel for the Defendant:	Adv LK van der Merwe
Instructed by:	Rudolf van Niekerk Attorneys c/o Cawood Attorneys Inc.
Date on the opposed roll before Mabuse J:	16 November 2020
Date of Judgment:	10 March 2021