IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:12684/2017

16/2/18

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

16/2/2018 ....
DATE SIGNATURE

In the matter between:

JOHANNES JACOBUS MARAIS AND 18 OTHER APPLICANTS — **FIRST APPLICANT**

and

BUY DIRECT WEBSITE SERVICES (PTY) LTD — **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] The applicants seek an order that the respondent company be placed under final winding-up.

[2] The first applicant's founding affidavit is short and comprises of six paragraphs in which he sets out his own particulars and that of the

respondent. He says he has deposed to an extensive affidavit in support of the winding up application of an associate of the respondent viz. Deltrosys (Pty) Ltd. He has attached his founding affidavit in that application and requests 'that it be read herein as grounds for the winding up of [the respondent]'. He says the facts set out in that affidavit show why the respondent in this application should also be wound up.

[3] The first applicant has attached 'supporting affidavits' from eighteen other persons and purports to act together with them as his co-applicants. However, the affidavits do not have headnotes to indicate that each of them was confirming the facts deposed to by the applicant in this matter. There was no reference to the name of the respondent at all. In these circumstances I am of the view that their confirmatory affidavits are to be disregarded. The effect is that the application stands to be determined on the basis of the first applicant's papers only. Hence I will refer to the first applicant merely as 'the applicant'.

[4] The respondent has not filed an answering affidavit. Instead, on 18 May 2017 it delivered a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court in which it raises a number of technical points. However, the notice was delivered out of time without an application for condonation for doing so. As a result, the applicant set the matter down for hearing on 28 May 2017 in the unopposed motion court. The respondent then sought a postponement which was granted and it was ordered to pay the costs of the appearance on that date.

[5] The respondent's legal representatives were again alerted by applicant's counsel, Mr Kruger SC in his heads of argument which were served on the respondent's attorneys on 29 August 2017 and filed at Court on 20 September 2017 about the failure to apply for condonation for the late filing of the Rule 6(5)(d)(iii) notice.

[6] The respondent had also not delivered any heads of argument in the matter. When the matter was called in the opposed motion court on 29

January 2018, I raised this issue with Mr Naudé SC who appeared for the respondent and asked him why I should hear the respondent in these circumstances. No proper explanation for the failure to file heads of argument was forthcoming save that it was submitted that the legal issues were clear and could be addressed without heads of argument. I stood the matter down for hearing the following day.

[7] When the matter was called on 30 January 2018 Mr Naudé SC handed up short heads of argument again without an application for condonation. Applicant's counsel, Mr Kruger SC raised the point again. I decided to accept the respondent's heads and proceeded to hear the matter.

[8] When Mr Naudé addressed the court he did not deal with the fact that no application for condonation for the late filing of the Rule 6(5)(d)(iii) notice was made although Mr Kruger raised it in his heads of argument and again at the hearing of the matter before me.

[9] In *Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292 (SCA) at para [6]* it was once again emphasized that condonation is not to be had merely for the asking. But here it's worse. Despite being alerted as early as 29 August 2017 to the fact that a condonation application has not been filed, the respondent failed to do so. There is thus nothing before me to explain the reason for the late filing of the Rule 6(5)(d)(iii) notice. In these circumstances, the notice was not properly before me and will not be considered.

[10] I have then before me only the founding affidavit of the applicant.

[11] The applicant seeks the final winding up of the respondent. He relies on his allegations against an associate company of the respondent, viz., Deltrosys (Pty) Ltd, which has in the interim been wound up at the instance of another applicant.

[12] The applicant alleges that the respondent is a participant in an elaborate pyramid (ponzi) scheme run by the parties running the FinGroup of companies of which the respondent is one as well as Deltroys (Pty) Ltd. He says the 'minds behind the companies use the various companies to defraud people who have invested in one company, promising an exchange of shares for investment when one company's money runs out, setting up other companies and even promising to list on the Johannesburg Stock Exchange without any of the requirements for a listing being done'.

[13] The applicant says he first heard of the FinGroup of companies when it started a major advertising campaign during 2013 or 2014 to recruit potential investors who would purchase licenses in the companies for a minimum amount of R50 000.00. The details are not necessary for present purposes; suffice to say that the applicant says he was 'duped' into entering into a 'Licence Partner Agreement' with Fincapital (Pty) Ltd trading as Allquotes.co.za. He duly paid an amount of R140 000.00 to the respondent on 18 October 2014 and from time received monthly payments (returns on investment) from it. On 20 October 2014 he received a certificate of licence signed by Rob Weimar a director of the respondent but the name of the respondent does not appear on the certificate.

[14] At the end of March or April 2015 the monthly payments into the applicant's account stopped. He made enquiries at the respondent's offices and was told that FinGroup (Pty) Ltd was in the process of purchasing a "world first patented product" which would be sold to Eskom for billions of Rands.

[15] Despite numerous requests and enquiries over several months he did not receive any further profit share payments of any kind.

[16] In 2016 MiBiz Business Online Services (Pty) Ltd which appeared to operate on a similar business model as the respondent, appeared to take over the role as representative of all companies in the FinGroup of companies. It published a newsletter in the electronic media in which, *inter alia*, it stated that

investors were not receiving any dividends since "the financials must be finalised and as there are currently no profits, there are no profit share/dividends to be made." It also made it clear that the respondent (referred to in the newsletter as BuyDirect) was not in a position to make any payments "until the market has turned". Applicant says the status of the market was not listed as a factor that would determine payments in terms of the agreements between the parties.

[17] In the agreement the address of the respondent is provided but there is no longer any business of any kind related to any of the FinGroup of companies at that address. The applicant challenged the respondent to provide proof that it had offices from where it traded, that annual financial statements are available for inspection or at least books of account, that it had employees and employment records. The respondent failed to do so.

[18] A number of investors in the respondent, including the applicant, caused a notice in terms of s344(h) and s345(1) of the Companies Act No. 61 of 1973 to be delivered to the respondent. Demand had been made in the notices for payment of the various amounts owing to the investors within 21 days of receipt of the letters by the respondent, failing which it would be deemed that it was unable to pay its debts and that application would be made for the liquidation of the respondent. It's attorney responded but, instead of confirming that the respondent was in business he engaged in a diatribe which was merely a denial of the allegations contained in the notices.

[19] The respondent has not paid the applicant. In terms of the s344 and s345 notice the company in my view is deemed to be unable to pay its debts and a proper case for the winding up the respondent has been made.

[20] I am satisfied that the applicant has complied with all the statutory requirements for the granting of the order prayed.

[21] I make the following order:

21.1 The respondent be and is hereby placed under final winding up.

21.2 Costs of the application are to be costs in the winding up application.

RANCHOD J
JUDGE OF THE HIGH COURT

<u>Appearances:</u>

Counsel on behalf of Applicant	: Adv. T.P Kruger SC
Instructed by	: Steenkamp Attorneys
Counsel on behalf of Respondent	: Adv. J.G Naudé SC
Instructed by	: SC Vercueil Attorneys
Date heard	: 30 January 2018
Date delivered	: 16 February 2018