

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 731/2013

In the matter between:

NICOLAS KOUPIS

Applicant

and

UDUMO TRADING 225 CC t/a PLASTIC
REBUILDERS

Respondent

(Registration Number: 2004/099411/23)

HEARD ON: 28 MARCH 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 25 APRIL 2013

INTRODUCTION AND BACKGROUND

- [1] On 22nd February 2013 the applicant secured an order, on an urgent basis, placing the respondent close corporation under provisional liquidation in the hands of the Master and, further, caused a Rule *nisi*, returnable on the 4th April 2013, to issue calling upon all interested parties to show cause, if any, why a final order of liquidation should not be granted against the respondent.

- [2] On the 15th March 2013 a notice was filed in terms of Rule 6(12)(c) of Uniform Rules of Court (the Rule) setting the matter down for reconsideration of the order in question on the basis that it was issued in the absence of the respondent.
- [3] Subsequent to the grant of the order in question the applicant filed elaborate returns of service explaining how copies of the court order were served in respect of, *inter alia*, the respondent's employees and, further, pointing out that no trade union is involved.
- [4] No affidavits were filed in support of the reconsideration and the applicant resists the same on, *inter alia*, the grounds that the form of the reconsideration required and the authority of the only member of the respondent close corporation, who could reasonably possibly be behind the reconsideration, to trigger the process are not apparent *ex facie* the notice filed. The applicant, further, contends, in the heads of argument filed on his behalf, that the application for reconsideration should be dismissed with costs which should be borne by such a member.
- [5] In response to the applicant's contentions it is submitted that the authority of such a member to represent the respondent in the process can only be challenged by invoking the provisions of Rule 7 of the Uniform Rules.

- [6] Mindful of possible costs implications on the respondent close corporation, which is currently under provisional liquidation, on the 5th April 2013 I caused a letter to issue calling on the respondent to furnish proof that it authorised the member in question to subject the relevant order to reconsideration by not later than the 12th April 2013. I, further, invited the parties to submit additional arguments, if so advised, on the authority of such a member to act for the respondent by no later than the 19th April 2013. The parties have since obliged with the respondent having filed an affidavit by the member concerned, one Mr MA Botes, which encloses resolutions *prima facie* authorising and appointing him to, *inter alia*, commence the current process and to run with it.
- [7] In additional submissions the applicant, effectively, attacks the validity of the resolutions and points out that it is not apparent *ex facie* the same that the formalities prescribed by Section 48 of the Close Corporations Act 69 of 1984 (the CCA) were complied with when they were allegedly passed.
- [8] In support of the resolutions it is effectively submitted that the two members who hold majority member's interests of 40% each in the respondent took the relevant decisions and are entitled, by virtue of such extensive interests, to represent the respondent in proceedings such as the present.

- [9] In the light of the view I have taken of the matter, it is not necessary to deal with all the issues raised by the parties and, as such, this judgment is confined to Mr Botes' standing in the reconsideration process.

ISSUES IN DISPUTE

- [10] The parties are *ante omnia* in dispute over whether or not the respondent authorised the present reconsideration process insofar as the applicant questions the process followed in passing the relevant resolutions.

APPLICANT'S CONTENTIONS

- [11] It is effectively contended for the applicant that there exists no evidence that the resolutions were taken in a properly convened meeting of the respondent's members as contemplated by the CCA.
- [12] The applicant, further, submits that the extent of a member's interest held by the respective members in the respondent is not relevant for the purpose of convening a meeting and passing resolutions.
- [13] In the applicant's view, where a corporation has four members, as the position is in the instant matter, three of the four members are required, as the majority, to take a decision for

the respondent to set the matter down for reconsideration.

[14] The applicant's case is that the respondent in the present matter functions through its members as provided by the CCA insofar as the respondent does not have an association agreement.

[15] In conclusion Mr Snellenburg submits for the applicant that the application for reconsideration should be dismissed and that Mr Botes should bear the costs.

RESPONDENT'S SUBMISSIONS

[16] Mr van der Merwe submits, in support of the authority of Mr Botes to trigger the instant process, that it is apparent from the affidavit filed that the resolutions in question were made by the two holders of 80% of member's interests in the respondent.

[17] Members of a close corporation are, in law, entitled to partake in the management of its affairs, so the court is reminded in support of the current process.

[18] In conclusion it is contended, in support of Mr Botes' standing in the instant process, that members in his position are as eligible for bringing the process as the directors of a company which has been provisionally liquidated are entitled and have the residual power to oppose its final liquidation and to appear for it

on the return day as well as to anticipate the same.

APPLICABLE LEGAL PRINCIPLES

[19] Indeed members of a close corporation are all entitled to participate in the carrying on of the business of the corporation as correctly pointed out by Mr van der Merwe. (See section 46(a) of CCA).

[20] Any member of a corporation has the right to call a meeting of members by giving notice of the date, time and venue of such a meeting to every other member and every other person entitled to attend such a meeting of members as effectively contended for the applicant. (See section 48(1) of CCA).

[21] Section 48(3)(b) of CCA provides as follows:

“(b) A resolution in writing, signed by all the members and entered into the minute book, shall be as valid and effective as if it were passed at a meeting of the members duly convened and held.”

[22] It is correct, as submitted in support of Mr Botes’ authority to represent the respondent, that the directors of a company under provisional liquidation retain at least the residual power to oppose its final liquidation. (See **Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (In Provisional Liquidation)** 1983 (3) SA 815 (0) at 822G – 823H.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

[23] Mr Botes relies on resolutions allegedly passed by the respondent, acting through two of its four members, in his contention that he is authorised to represent the respondent in the instant proceedings. He does not rely on any association agreement in support of his deposition that he and his fellow holder of majority member's interests

“signed a resolution stating that the respondent should oppose/defend ... all legal proceedings instituted against the respondent by the applicant”.

Although, on his affidavit, the inference that the resolutions were not passed by a properly convened meeting of the members of the respondent is probable and irresistible, it is not evident from the papers that he and his fellow member were entitled to sign resolutions alone and without any meeting of members having been held. In the absence of any association agreement providing otherwise, the statutory position set out in the CCA prevails, as correctly contended for the applicant. (See generally **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk** 1957 (2) SA 347 (C) at 351D.)

[24] The resolutions are not signed by all the members of the respondent as contemplated in section 48(3)(b) of the CCA and, as such, cannot, as of law, be regarded as

“valid and effective as if [they] were passed at a meeting of members duly convened and held.”

- [25] As correctly and effectively submitted for the applicant, the fact that a member holds majority member's interest in the corporation does not *per se* entitle him to take decisions for the corporation to the exclusion of other members. Such a member is entitled to the number of votes that corresponds with the percentage of his interest in the corporation at any meeting of members. (See section 46(d) of CCA).
- [26] The onus is on Mr Botes to establish his standing to represent the respondent in the reconsideration process. Even a director of a company, which has been provisionally liquidated, needs the authority of the board of directors to oppose final liquidation. I am not satisfied from Mr Botes' affidavit and annexures thereto that he is authorised to bring the instant process. The application, therefore, falls to be dismissed.
- [27] The resolutions cannot be attributed to the respondent insofar as they are not shown to have been passed at a properly convened meeting of the members of the respondent where Mr Botes and his fellow holder of majority member's interest could have exercised their combined massive vote.

COSTS

[28] The applicant is entitled to his costs in line with the practice relative to costs.

[29] The respondent cannot, in all fairness, be saddled with costs where it has not authorised the proceedings as correctly submitted for the applicant.

[30] Mr Botes, as the sponsor of the process, is responsible for such costs in my judgment.

ORDER

[31] The application for reconsideration is dismissed.

[32] Mark Anthony Botes shall pay the applicant's costs.

L. J. LEKALE, J

On behalf of applicant:

Adv N. Snellenburg
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondents:

Adv H.A. van der Merwe
Instructed by:
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