FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4395/2013

In the matter between:

TSHEPEGA CIVIL ENGINEERING (PTY) LTD Applicant

and

THE MEC: FREE STATE PROVINCIAL DEPART-MENT OF POLICE, ROADS AND TRANSPORT	First Respondent
THEODRE WILHELM VAN DEN HEEVER NO	Second Respondent
KGASHANE CHRISTOPHER MONYELA NO	Third Respondent
NANO ABRAM MATLALA NO	Fourth Respondent
NOMVUYO YVONNE SERITI NO	Fifth Respondent
SEGOPTJE SHEILA MPHAHLELE NO	Sixth Respondent

JUDGMENT BY: LEKALE, J

HEARD ON: 5 DECEMBER 2013

DELIVERED ON: 13 DECEMBER 2013

INTRODUCTION AND BACKGROUND

[1] On the 25th October 2012 the applicant launched the instant application in terms of which it moves for, *inter alia*, an order that:

> "**5. The second to sixth respondents be ordered to cede part of their claim against the first respondent to the applicant, such**

claim arising from the settlement negotiated between the first respondent and the second to sixth respondents for work done by Sanyati Civil Engineering & Construction (Pty) Ltd (in liquidation) for construction of the Oliviers Hoek Pass Road, P81/1, and to the amount of R8 773 636,77;

6. Alternatively, to prayer 5, that the first respondent be authorised, directed and ordered to effect payment of the aforementioned amount to the applicant and on strength of the invoice issued by the applicant to the first respondent on 22 October 2012 and appended as annexure "A" to this notice of motion, and to deduct said amount from the total amount to be paid by the first respondent to the second to sixth respondents in terms of the settlement agreement reached between those parties referred to above."

[2] The first respondent is Member of the Executive Council of Free State provincial government responsible for police, roads and transport. He does not oppose the matter and effectively abides the decision of the court. The second to and including the sixth respondents are the liquidators of Sanyati Civil Engineering & Construction (Pty) Ltd (in liquidation) (The "respondents") and they oppose the application on, *inter alia*, the ground that same is, in law, not competent due to failure by the applicant to comply with the provisions of section 359(2) of Companies Act 61 of 1973 (the "Act"). They further seek an order, *inter alia*, declaring the amount paid to them by the first respondent on the 26th October 2012 as deemed to be in their custody and under their control in terms of the Act. First Rand Bank seeks leave to

intervene in the proceedings and the applicant opposes such a move on the basis that it does not have direct and substantial interest in the matter.

[3] Sanyati Civil Engineering and Construction (Pty) Ltd ("Sanyati") was placed under liquidation on the 11th of July 2012 and the respondents were subsequently appointed as its provisional liquidators on the 20th July 2012 and as liquidators on the 12th September 2012.

[4] It is common cause between the parties that the respondents, in their capacity as liquidators, negotiated with the government and settled Sanyati's claim against the first respondent in the amount of R25 773 411,0. The matter was postponed on the 22 November 2012 and costs were directed to be costs in the application. On the 6th December 2012 and the 28th March 2013 the matter was postponed with costs being reserved.

[5] On the 9th July 2013 the applicants' attorneys of record withdrew as such and on the 5th November 2013 the respondents set the matter down for hearing on the 5th December 2013 and duly effected service on their applicant.

[6] On the 5th December 2013 the applicant's present attorneys filed notice of appointment as such and Mr Wessels appeared on the applicant's behalf to move for postponement on the basis that he was not ready for the matter as he only received his brief on the

4th December 2013. Mr Badenhorst, appearing for the respondents, opposes the request on the grounds that there exists no evidence explaining the reason for the late appointment of attorneys and, further, submits that in any event failure by the applicant to give the notice contemplated by section 359(2)(a) of the Act renders, as a matter of law, a postponement futile.

DISPUTE

[7] The parties are in agreement that the preliminary point of non-compliance with section 359(2) of the Act has the potential to dispose of the matter and, as such, falls to be determined *ante omnia*. They are, therefore, *ad idem* that in the event of a finding that the provisions of that section are applicable to the application then and only in that event it would be the end of the matter. I am, however, of the view that such a point *in limine* has the potential to be dispositive of only the applicant's motion and not of the whole matter in so far as the respondent's counter-application is not struck thereby.

[8] Mr Badenhorst submits, with reference to heads of argument filed for and on behalf of the respondents, that it is clear from the applicant's founding papers that its claim relates to fees and disbursements collected by Sanyati on its behalf prior to the winding-up order issued against the latter. It is, as such, patent from the legal provisions in question, according to the respondents, that the applicant was legally obliged to give them,

as liquidators, at least three weeks' notice of its intention to sue for the relevant amount within four weeks of their being appointed as such.

[9] Mr Wessels contends, on behalf of the applicant, that the notice in question is not applicable to the applicant's claim because same relates to the conduct of the respondent liquidators which was exhibited subsequent to the winding-up order when they accepted payment meant for the applicant from the first respondent.

APPLICABLE LEGAL PRINCIPLES

[10] Section 359(2) of the Act provides as follows:

> **"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 so given the proceedings shall be considered to be abandoned unless the court otherwise directs."**

[11] Failure by either the plaintiff or the applicant party to comply with

the provisions of section 359(2)(a) of the Act, where applicable, renders such a party's subsequent proceedings against the liquidators unlawful because the proceedings he instituted against the company prior to its liquidation and which got suspended by the liquidation order are regarded as abandoned and his right to commence proceedings against the liquidators is in effect forfeited. In order for such a party to continue or commence proceedings against the liquidators outside the liquidation scheme provided by the Act he requires leave from the court which may only be secured through a substantive application. (See **Randfontein Extension Ltd v South Randfontein Mines Ltd and Others** [1936] WLD Part 1 and **Furstenburg v Smith en 'n Ander** 1964 (3) SA 810 (O).

[12] In an application for leave to either continue or commence the proceedings against the liquidators the court has unfettered discretion which involves, inter alia, consideration of the interests of all interested parties, being the creditors, liquidators and members of the company in liquidation. (See **Ronbell 108 (Pty) Ltd v Subline Investments (Pty) Ltd** 2010 (2) SA 517 (SCA).)

APPLICATION OF THE LAW AND FINDINGS

[13] The question in the instant matter is whether or not the applicant's claim arose before Sanyati was placed under liquidation. If the answer is in the affirmative then the applicant was obliged, as of law, to give the respondent liquidators the

prescribed notice before it could launch the present application. (See **Brandkor Beleggings (Edms) Bpk v Emerald Sky Trading 157 (Edms) Bpk** [2013] ZAGPPHC 133 on the date of liquidation order as the date of commencement of winding-up for purposes of a section 359(2) notice)

[14] As Mr Badenhorst correctly submits, it is clear from the founding affidavit filed in support of the application that the claim which the applicant effectively seeks to enforce through the instant proceedings relates to Sanyati as opposed to any alleged conduct on the part of the liquidators and arose before the 11th July 2012 in so far as the relevant deposition discloses, *inter alia*, that:

> **"12.6 Prior to the provisional order of liquidation the applicant had issued an invoice to the Department and Sanyati for payment for services rendered up to and until that stage…."**

(See page 30 of paginated bundle of documents)

> **"12.8 The Department had paid this amount over to Sanyati together with certain other payments. I … can safely state to the court that the money that was in actual fact due and owing to the applicant in terms of the invoice, had been paid over by the Department to Sanyati prior to its provisional liquidation."**

(See page 31 of paginated bundle of documents)

> **"13.1 … Sanyati … failed to effect payment of the monies sourced by it as a conduit on behalf of the applicant over to the applicant…"**

(See page 32 of paginated bundle of documents)

[15] For the sake of completeness it is worth noting that in the heads of argument filed for and on behalf of the applicant by its erstwhile attorneys, the applicant contends that the issue of section 359(2) notice relates to prejudice and that the respondent liquidators have not suffered any kind of prejudice because they were aware of the applicant's claim since at least July 2012. In my view the question of prejudice only arises for determination when a party in the position of the applicant approaches the court, by way of substantive application, for it to direct otherwise in terms of section 359(2)(b) of the Act. In the absence of such an application the Act is clear as to the effect of failure to give the prescribed notice. (See **Ronbell 108 (Pty) Ltd v Subline Investment (Pty) Ltd** *(supra)*.)

[16] On the applicant's own version, it is clear that its claim against Sanyati arose before the commencement of the winding-up and, as such, the provisions of section 359(2)(a) of the Act are applicable thereto. The applicant was obliged to give the requisite notice of its intention to commence proceedings against the respondent liquidators in their capacity as such. It failed to do so and, as such, the present proceedings are

incompetent in law to the extent that they have not been sanctioned by the court as no application for leave to commence the same in spite of the provisions of section 359(2)(b) of the Act was ever made and granted.

[17] In conclusion it needs to be pointed out that it is patent, from the papers, that prayer 6 of Part B of Notice of Motion in terms of which the applicant seeks, as an alternative to its claim against the liquidators, relief against the first respondent has in effect been overtaken by events insofar as it is common cause between the parties that payment has already been effected to the respondent liquidators by the first respondent.

ORDER

[18] The application is dismissed with costs inclusive of reserved costs as well as costs relative to employment of senior counsel.

[19] The counter- application is postponed *sine die* and the applicant is ordered to pay wasted costs.

L. J. LEKALE, J

On behalf of applicant:	Adv. M. H. Wessels SC Instructed by: Steyn-Meyer Inc. BLOEMFONTEIN
On behalf of 1st respondent:	No appearance c/o State Attorney BLOEMFONTEIN
On behalf of 2nd, 3rd, 4th, 5th and 6th respondents:	Adv. M. A. Badenhorst SC Instructed by: Symington & De Kok BLOEMFONTEIN

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