Reportable:	YES / NO
Circulate to Judges: YES / NO	
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

15 February 2013

CASE No: 1994/11

TSIU VINCENT MATSEPE N.O	**1ST APPLICANT**
SIMONE LIESEL MARGARDIE N.O	**2ND APPLICANT**
MOLELEKWA ASHWORTH TAU N.O	**3RD APPLICANT**
OTTLIE ANTON NOORDMAN N.O	**4TH APPLICANT**

AND

MR F O LONDON	**1ST RESPONDENT**
MR M P RANTHO	**2ND RESPONDENT**
MR A A JOSEPH	**3RD RESPONDENT**
MR M L MOKWENA	**4RD RESPONDENT**
MS NTABISENG C KEMANE	**5TH RESPONDENT**

JUDGMENT

Tlaletsi J

Introduction

[1] The applicants are the liquidators of a company known as Canton Trading 159 (Pty) limited ("the company") and they are acting in their capacities as such. An order for the provisional winding up of the company was granted by this court on 21 February 2010. The final order for the winding up was subsequently granted by this Court. The respondentswere at all material timesdirectors and shareholders of the company.

[2] The applicants launched these proceedings on notice of motion seeking orders to the effect that dividends paid to the respective respondents as shareholders of the company be repaid to the company plus *mora* interest on the said amounts until date of payment and that each respondent pay the costs of this application separately.

Factual Background

[3] It is common cause that the company was purchased by the respondents in the beginning of the year 2009. They traded as *Nyumbane Investments*. Their respective shareholding in the company is as follows: First respondent 22.5%; Second respondent 35%; Third respondent 5%; Fourth respondent 22.5% and Fifth respondent 15%.

[4] It is further common cause that the respondents received dividends from the company in the following amounts and dates respectively:

4.1 First respondent: *R405 000.00* on 29 June 2009; *R506 250.00* on 21 December 2009; and *R506 250.00* on 21 July 2010. Total received: *R1 417 500.00* .

4.2 Second respondent*: R630 000.00* on 27 June 2009; *R787 500.00* on 22 December 2009 and *R787 500, 00* on 21 July 2010; Total: *R2. 205. 000.00.*

4.3 Third respondent: *R90 000.00* on 29 June 2009; *R112 500.00* on 22 December 2009 and *R112 500.00* on 21 July 2010; Total *R315 000.00.*

4.4 Fourth respondent:*R405 000.00* on 29 June 2009; *R506 250.00* on 18 December 2009. *R506 250.00* on 21 July 2010: Total; *R1. 417. 500.00.*

4.5 Fifth respondent*: R270 000.00* on 27 June 2009, *R337 500.00* on 18 December 2009, *R337 500.00* on 21 July 2010. Total paid: *R945 000.00.*

[5] The applicants are claiming that the above dividends be refunded to the company because the declaration thereof was unjustified, unlawful and contrary to the Articles of Association ("the articles")of the company read with the provisions of the *Companies Act 61 of 1973*.

[6] The applicants' application is premised on the following facts:

6.1 The company commenced trading during January 2009. Only one set of financial statements for the company were prepared by

PricewaterhouseCoopers and were signed by Second and Fifth respondents on behalf of the company on 31 January 2011. The financial statements were for the period ending February 2010 and were approved after the commencement of the liquidation proceedings instituted against the company. The aforesaid financial statements were attached to the founding affidavit as "Annexure E".

6.2 In the financial statements the directors of the company reported, *inter alia*, that:

"Going concern.
The income statements indicate that a loss of R3 894,298.00 was incurred for the 14 months ended 28 February 2010. The entities total liabilities exceeded the total assets with R8 394 298 as at 28 February 2010. Conton Trading 159 (Propietary) Limited's debts are payable on demand and certain creditors have already taken legal action for the provisional liquidation of the company."(sic)

At paragraph 4 of the report, the directors stated the following:

"Reportable irregularity
During the financial period dividends on two separate occasions were declared and paid to the shareholders while the liabilities of the company exceeded the assets of the company, fairly valued. The directors are negotiating with the shareholders to refund these dividends to the company by way of subordinated loans whereby all other creditors will first be paid until such time as the assets of the company, fairly valued exceeds its liabilities. The company has also not held an annual general meeting within nine

months of the company's year-end as is requested by the Companies Act."(sic)

6.3 The relevant provisions of the Articles of Association relied upon by the applicants are:

> *"8.3 The company in annual general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors.*
>
> *8.4 The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.*
>
> *8.5 No dividends shall be paid otherwise than out of profits or bear interest against the company."*

[7] The statutory framework applicable in this case is the *Companies Act 61 of 1973* since the liquidation proceedings against the company were instituted prior 1 May 2011,the latter date being the date on which the new *Companies Act 71 of 2008* came into operation.

[8] It is only Third respondent who is not opposing this application. Fourth respondent deposed to an opposing affidavit on his own behalf and also on behalf of the rest of the respondents. They in the main dispute that the dividends paid by the company to the respondents were not properly paid out. They contend that there is a factual dispute in this regard and that it was inappropriate for the applicants to institute these proceedings by way of notice of motion and that the application should be dismissed on this ground alone.

[9] The respondents have set out a historical background relating to the operations of the company and the circumstances that led to the winding up of the company.

9.1 They state thatduring May 2008 the company presented a tender to the *Northern Cape Department of Transport, Roads and Public Works* ("the department") to provide fleet management services to the Northern Cape Provincial government ("the Province"). The basis of the proposal made was that the company would provide vehicles for the hire and transportation of the employees of the provincial administration and they would also maintain such vehicles. It was anticipated that should such an agreement be concluded, the company would receive substantial remuneration for its services from the department. The company and the department concluded what is known as *Public Private Partnership Fleet Agreement*("the PPPF agreement.")

9.2 During the tender process an *income and cash flow analysis* was drawn up for the company by a team of people who were probably the leading experts in the field of fleet management in South Africa, most of them having worked for a well-known *Imperial Car Hire* company. The team included Third respondent who the company appointed as its Chief Executive Officer ("CEO") and on whom the directors relied heavily in regard to all issues relating to the management of the company and in particular its financial aspects.

9.3 The *income and cash flow analysis*demonstrated that the free residue of funds available on a monthlybasis after all expenses had been paid, was more than adequate to enable the company to make the monthly payments that would be owing to their financiers in terms of the financial agreement. They allege that after a few months of being operational, the company was exceeding the projections of the free residue available after the payment of all creditors including their financier.

9.4 It is the respondents' case that in order for the project to be successful the company was supposed to obtain the finance for the acquisition of the motor vehicles that were to be hired by the department. The company accordingly purchased 588 new vehicles from *Nissan South Africa(Pty) Limited* ("Nissan") *and Toyota Motors South Africa (Pty) Limited*("Toyota") at the purchase prices of *R48 489 498.50* and *R34 531 146* respectively.

9.5 In order to obtain finance for the acquisition of the said vehicles the company found it necessary to cede and assign its right, title and interest in and to the *PPPF*agreement with the department to the financier who would provide the necessary finance. Provision was also made in the*PPPF* agreementwith the department for the company to be able to cede its rights with the consent of the department which consent should not be unreasonably be withheld.

9.6 The respondents aver further that the company approached an entity known as *Infrastructure Finance Corporation Limited(“INCA”)* forfinancial assistance. INCAwas willing to assist. However, the department unreasonably refused to approve the cession to *INCA.* As a result of the actions of the department *INCA* was unable to provide financial assistance for the payment of the motor vehicles provided by *Nissan* and *Toyota* to the company. The company approached other financial institutions.Namely, the *Industrial Development Corporation (“IDC”) and the Development Bank of Southern Africa (“DBSA”)*hoping that the department would cooperate. The two institutions were also willing to assist. However, the department refused to approve the cession to these institutions and as a result financial assistance could not be provided. The respondent contendthat the unreasonable refusal by the department caused the company to be wound up.

9.7 The respondents contends further that despite the conduct of the department, the business of the company was in operation and in a successful and effective manner and substantial profits were generated. Furthermore, the consultant of the company Mr Andries Mulder ("Mulder"), together with the CEO were satisfied that the excess funds available to the company in the course of its business constituted profits which could validly be declared as dividends to shareholders and that such view was objectively correct.

9.8 It is the respondents' contention that none of the parties could have foreseen that the department would not perform in terms of its agreement with the company and that even though the parties realised that there was in the beginning some resistance from the department when the moneys were not paid out timeously as expected, all the parties believed that the department would in due course ultimately perform and the respondents and everybody at the company accordingly went about their business which included the payment of all dividends and creditors as and when they were able to do so.

9.9 As regards the financial statements annexed as annexure "E" the respondents aver that First, Second, Fourth and Fifth respondents were not involved in the drawing up of such financial statements. When the auditors were appointed, before liquidation, the fourth respondent introduced them to the relevant members of staff from whom they could obtain any information as well as documents which they required in order to perform their audit. Fourth respondent was therefore surprised to learn from the auditors' own report that they did not have access to all the documents and information they required. They state that none of the respondents were approached by the auditors to provide the required information. The respondents accordingly dispute the contents of the financial statements and put the applicants to the proof thereof in so far as it relates to the financial viability of the company as well as their opinion expressed in connection therewith.

9.10 The respondents state further that annexure E cannot give this Court any insight into the financial position of the company. They mention that in fact before the declaration of dividends the CEO of the company referred them to Management Accounts which he had drawn, which proved conclusively that the company had made profits and was in a position to declare dividends from the profits, which it in fact did. According to the respondents the company was therefore a viable and highly profitable company which was prevented from achieving its potential by the refusal of the department to comply with its legal obligations.

9.11 The respondents deny that the dividends were declared in contravention of the articles of the company or the Companies Act as they were entitled to declare the dividends. They acted on the basis of express representations made to them by Third respondent and Mulder that the company had earned profits and that the said representations were correct. They maintain that it was appropriate that dividends be declared as recommended.

Analysis

[10] Section 90 of the *Companies Act, 61 of 1973* which is applicable in this case reads thus:

(1) A company may make payments to its shareholders subject to the provisions of this section and if authorized thereto by its articles.

(2) A company shall not make any payment in whatever form to its shareholders if there are reasonable grounds for believing that-

(a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or

(b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company.

(3) For the purposes of this section 'payment' includes any direct or indirect payment or transfer of money or other property to a shareholder of the company by virtue of the shareholder's shareholding in the company, but excludes an acquisition of shares in terms of section 85, a redemption of redeemable preference shares in terms of section 98, any acquisition of shares in terms of an order of Court and the issue of capitalisation shares in the company.

(4) A shareholder shall be liable to the company for any payment received contrary to the provisions of subsection (2).”

In so far as these are motion proceedings, any dispute of fact would be decided in line with the authoritative approach adopted in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*.

[11] The legal position applicable is was that the company could make payment of interim dividends to its shareholders provided the requirements set out in subsection (2) are met and also if authorised by the articles of the company. As shown above clause 8.4 of the articles of the company authorised the directors to pay to members such interim dividends as appear to the directors to be justified by the profits of the company. Clause 8.5 of the articles prohibit payment of dividends from any source other than the profits or bear interest against the company. Section 90(4) imposes liability on the shareholder to the company for any payment received contrary to the provisions of section 90(2).

[12] There are two fundamental issues that require determination in this matter, namely, whether the company had made a profit at the time when the interim dividends were declared and secondly, whether the respondents acted reasonably in declaring the interim dividends. The determination of these issues has a bearing on the question whether the interim dividends were properly and or legally declared by the respondents.

[13] It is evident that the company started its business during January 2009 and five months later, in June 2009, declared its first interim dividend. Subsequent interim dividends were declared in December 2009 and July 2010. When these interim dividends were declared the company had already created a debt with *Nissan* and *Toyota* and had not obtained any financial assistance from any of the financial institutions it had approached.These facts were known to the directors who happen to be the sole shareholders of the company at the time when dividends were declared. It was expected of the respondents to keep these factors in mind when taking the decision to declare dividends at the respective times.

[14] In my view the respondents' defence that they do not accept the contents of the financial statements prepared by PricewaterhouseCoopers because they were not involved in the compilation thereof is untenable. It is the respondents who appointed PricewaterhouseCoopers to prepare the financial statements. The said financial statements weresigned and approved by Second and Fifth respondents on behalf of the company. The contention therefore that the respondents have no knowledge of the financial statements cannot be true.

[15] It is significant to note that the respondents themselves acknowledged that they were not supposed to have declared the interim dividends and took a resolution on 10 November 2010, long before the liquidation application was brought against the company, to negotiate with the recipients of the dividends *"to refund these dividends to the company by way of subordinated loans."*This resolution is not without consequence and was to be implemented by the company. The acknowledgment can only mean that the respondent knew that the dividends were not supposed to have been declared and paid out since the company had not made any profit at the time. Put differently, the directors knew that the financial position of the company did not justify the declaration and payment of the dividends and in order to correct this reportable irregularity, resolved to negotiate refunds with the shareholders.

[16] The applicants have stated in their replying affidavit that the company lodged a claim for *inter alia*, value added tax with the *South African Revenue Services (SARS)* to claim the refund of the value added tax on the motor vehicles obtained from *Nissan* and *Toyota* when in fact they had not paid the purchase price. An amount of R12 138 906-22 was paid by SARS to the company before the first dividend was declared and the applicants suggest that this money was used to finance the interim dividends. I am unable and it is also not necessary to decide this issue for present purposes. However, the seriousness of this allegation, if correct, cannot be ignored.

[17] With regard to the contention by the respondents that they relied on the adviseand the representations made by itsCEO and Mulder, I find it strange that the respondents have not filed affidavits by the two to confirm the allegations attributed to them. It is also not disclosed whether the said representations were verbal or in writing and if in writing a copy thereof is not provided. The respondents merely make a vaguestatement that they were advised that the company was viable. Even if one was to accept that the representations were made the respondents were expected to apply their minds to the advise and not just merely accept and act on the representations especially when they knew of the debt to Nissan and Toyota.

[18] The income and cash flow figures that the respondents are relying on to support the contention that the businessman of the company was viable at the time are not reliable since they were mere projections intended for the tendering process. The respondents were supposed to have relied on the true position of the company's financial position at the relevant times. The cashflow projections are not and cannot be regarded as profits made by the company. They may have been prepared by a team of experts in the motor vehicle hire business. However, this aspect does not advance the respondents case since these expects worked on the basis of the company successfully obtaining financial backing and not a company with a debt of among others, ±*R83 million.*

[19] The respondents as directors of the company could not have had a reasonable belief that the company was a viable and profitable company and that the dividends could be declared out of the profits. Theydid not act reasonably and in good faith when the dividends were declared because they were already armedwith the knowledge of the existence of debt at the time and theytried all they could to get the department to approve the cession.

[20] It was contended on behalf of the respondents that there is no basis in law obliging the respondents to repay the dividends under thesecircumstances. As authority for this submission, counsel relied on the decision of *Lord Alverstone*, *CJ* in *Lucas and Other v Fitzgerald and Others (1903) 20 TLR 16 (KB)* where it was held, inter alia, that *"a director who receives money innocently cannot be compelled to refund it, either under section 165 of the*

Companies Act, 1862, which is similar to section 10(1) of the Companies (Winding Up) Act, 1890, or as money had and received, or on any other grounds." Although counsel could not submit that the provisions of the 1890 legislation applicable in that case are or were similar to the provisions of our 1973 Companies Act as well as the articles of association, I still find that case distinguishable from the facts and the circumstances of this case. Unlike in this case, the two directors *qua* shareholders who were absolved from refunding the dividends paid to them, were not present at the meeting when the dividends were declared. At a subsequent meeting when the minutes of the previous meeting were confirmed they were present and before the confirmatory resolution was taken they asked the chairman whether he had consulted the managing director, and the chairman answered emphathically in the affirmative. The *Lord Chief Justice* held that:

> "*these two defendants must be taken to have believed that a proper investigation which justified the payment had taken place, and there was nothing to suggest to them that a perfectly just expectation of profits had not been formed*."

And that:

> "*Upon the evidence I come to the conclusion that there was nothing which [the defendants] knew or ought to have known to suggest to him that the directors had acted otherwise than properly in declaring the dividend. The declaration of interim dividends depends much more upon estimates and opinions than the declaration of a final dividend which is made upon the information contained in a formal balance-sheet*."

Of great importance is that it was further held that there had to be a profit available for the dividend and if not, the interim dividend was an *ultra vires* payment.

[21] In *casu*, the respondents were at all times aware that the company had created a huge liability by obtaining motor vehicles from Nissan and Toyota without any payment. They, as it was expected of them, did all that was necessary to obtain financial backing. They tried all what they could to persuade the department to approve the required cessions without success. They were all present at the meetings where dividends were declared. There is no averment on their papers to suggest that they made the necessary enquiries to confirm that the declaration was justified. There is therefore no suggestion that there was an attempt to apply their minds to the viability of the company and its declaration of the dividends. Furthermore the CEO and Mulder who are said to have made the representations on the availability of the profits and advised them to declare the dividends have not confirmed what is attributed to them. The fact that the CEO who is the third respondent elected not to oppose the application and contradict the averments made by the applicant is significant.

[22] The defence that there is a dispute of fact is in my view more a matter of perception than genuine. It is common cause that the dividends were declared; that there were no profits at the time; that there was a liability to *Nissan* and *Toyota* which was not being serviced; the directors signed and approved the financial statements; they resolved to refund the dividends paid and the shareholders have not refunded the dividends despite the resolution and the demand from the applicants.

[23] There is no indication on the papers as to the kind of evidence that would be tendered by the respondents if the matter is referred to trial to show that the respondents applied their minds to the alleged representations made to them by Mulder and Third respondent. There is no explanation why this said evidence cannot be placed before this Court at this stage. There is also no mention or suggestion that third respondent and Mulder will be called as witnesses by the respondents. On the respondents' own version, they cannot trace the records of the company as well as the management accounts.

[24] The only document that is available is the income and case flow analysis projections which is in my view irrelevant to the issue at hand. The analysis itself indicate that a profit of R632 527.26 would be made during the second year. Furthermore a profit of over a million rand would have been made only after a period of three years according to the projections. However, contrary to the projections, the respondents declared a dividend of over one million rand within five months of operation.

[25] It was submitted that Fourth respondent should not be ordered to repay the dividends he received because he was no longer a director of the company at the time of declaration of the dividends,as he resigned as a director shortly after the company was obtained. That cannot be the case because s 90(4) of the *Companies Act*, 1973 creates a liability to the company by a *shareholder* who has received any payment contrary to the provisions of subsection (2). It is also notable that the same respondent was employed by the company as a fleet manager playing an active role in the activities of the company. He has also deposed to the answering affidavit on behalf of all the respondents who are opposing the application thereby demonstrating his in depth knowledge of the activities of the company.

[26] The third respondent is not opposing the application despite being duly served. There is no reason why an order should not be made against him as well.

[27] I am satisfied that in the circumstances of this case the use of motion proceedings was appropriate. The procedure adopted by the applicants has expedited the proceedings and done away with the unnecessary delays associated with action proceedings. The respondents had an opportunity to place their case before this Court. They have done so without being prejudiced. There are no disputes of facts warranting a referred of this matter to trial or oral evidence.

[28] The late filing of the Replying Affidavit by the applicants has been explained and the explanation is reasonable. The respondents have, in my view not been prejudiced by the short delay. The delay should therefore be condoned.

[29] There is no reason why the costs should not follow the result. I am however not persuaded that this is a matter where the respondents should be ordered to pay the costs separately. The application was instituted against all the respondents and those who opposed filed their papers jointly. The third respondent who chose not to oppose the application should be absolved from paying the costs of an opposed application.

<u>Order</u>

In the result the following order is made:

1. **The late filing of the replying affidavit is condoned.**

2. **First respondent is ordered to pay to the applicant an amount of R1, 417, 500.00.**

3. **Second respondent is ordered to pay to the applicants an amount of R2, 205, 000,00.**

4. **Third respondent is ordered to pay to the applicants an amount of R315, 000,00.**

5. **Fourth respondent is ordered to pay to the applicants an amount of R1, 417, 500,00.**

6. **Fifth respondent is ordered to pay to the applicants an amount of R945, 000,00.**

7. **Each respondent is ordered to pay interest on the aforesaid amount at the rate of 15.5% a *temporemorae*.**

8. **Third respondents is to pay the costs on an unopposed basis.**

9. **The First, Second, Fourth and Fifth respondents are ordered to pay the costs of the application jointly and severally the one paying the others to be absolved.**

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TLALETSI, J

NORTHEN CAPE HIGH COURT, KIMBERLEY

Appearances:

For the applicants:	Adv P Zietsman
Instructed by:	Van De Wall &Vennote
For the respondents:	Adv N Segal
Instructed by:	Cranco Karp &Vennote