

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

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

☒ REVISED.

In the matter between: 29/8/12

DATE SIGNATURE

Case number 6962/2011 →

15956/2012

31/8/2012

THOMAS MBONAKULU MABASO & 236 OTHERS

APPLICANTS

and

BARNARD, HENDRIK JACOBUS RUST N.O.

& 9 OTHERS

RESPONDENTS

JUDGMENT

J.W LOUW, J:

- [1] The applicants are 237 erstwhile employees of Sawina Logistics (Pty) Ltd (Sawina) which went into final liquidation on 27 June 2006. I shall

refer to the applicants as the employees. The first to ninth respondents are the appointed liquidators of Sawina.

- [2] A directive was issued in this matter by the Deputy Judge President which provides that the further affidavits which needed to be filed, had to be filed by the dates which were agreed upon. Certain of the applicants' affidavits were filed late. It was submitted on behalf of the respondents that, in the absence of a substantive application for condonation, those affidavits should not be allowed. Applicants' counsel applied for condonation from the bar and explained that it was difficult to get the affidavits filed in time due to the large number of applicants and because they were not within easy reach. In my view, those affidavits should be allowed in the interests of justice.
- [3] The employees have brought a number of applications against the respondents and the respondents have, in turn, brought a number of applications against the employees. These applications are briefly the following:
- (a) An application by the employees under case no. 6962/2011 in which they claim an order that the liquidators produce accounting records and bank statements of the insolvent estate of Sawina, an order freezing the bank accounts, an order claiming payment of the employees' claims out of the free residue in the estate and an order suspending or barring the liquidators from being appointed or nominated as liquidators or directors of any company in South Africa ("the main application").

- (b) An application by the liquidators to rescind an order taken by the employees in the main application on 15 March 2011 ("the liquidators' rescission application"). The order, which was granted on 15 March 2011 in the absence of the liquidators, ordered the liquidators to comply with all their duties towards the Master and ordered the Master to enforce the provisions of s. 394 against the liquidators.
- (c) An application by the employees to rescind the rescission order obtained by the liquidators and for payment of their claims ("the employees rescission application"). The order granted by Goodey AJ on 13 March 2012, again in the absence of the liquidators, did not rescind the rescission order obtained by the liquidators, but ordered them to pay the employees' claims and to comply with their duties to the Master.
- (d) An urgent ex parte application brought by the employees in terms whereof a rule nisi was granted freezing the liquidators' business, trust, personal and investment accounts ("the employees' rule nisi application").
- (e) An urgent application by the liquidators to suspend the operation and execution of the rule nisi and of the order taken in their absence in the employees' rescission application, pending the return date of the employees' rule nisi application ("the liquidators' urgent application").
- (f) An application by the employees to anticipate the order obtained by the liquidators in the urgent application ("the employees' anticipation application").

- (g) An application by the liquidators to vary or rescind the order granted in the employees' rescission application ("the liquidators' variation/rescission application").

- [4] I shall deal firstly with the liquidators' variation/rescission application. The basis of the application is that the order granted in the employees' rescission application was erroneously sought and granted in the absence of the liquidators. As previously mentioned, the order granted by Goodey AJ was not for the rescission of the liquidators' rescission application. Instead, the liquidators were ordered to pay the employees' claims and to comply with their duties to the Master.
- [5] The liquidators' explanation for their absence is that the application had a history of being set down on short notice to their attorneys' Pretoria correspondents. On the occasion when the order was granted, the application was set down on four days' notice. Mr. Levy from the correspondent attorneys attended court on the day of the hearing and looked for the matter on the motion court roll. The matter did not appear on the roll. He then enquired at the registrar's office where the staff confirmed that the matter was not on the roll. Mr. Levy did not find this surprising in view of the history of the matter, and returned to his office. The explanation for the liquidators' absence is clearly reasonable in the circumstances and must be accepted.
- [6] The defence of the liquidators which has been set out in their founding affidavit filed in support of the variation/rescission application, and

which is not disputed, is the following. They have and continue to comply with their statutory duties. The employees have not pointed out any non-compliance in their papers. As far as payment of the employees' claims is concerned, the liquidators point out that there is no free residue in Sawina's estate. The first liquidation and distribution account reflected a deficit of approximately R12 million. Since then, there has been a surplus in 135 of the encumbered asset accounts which has resulted in a reduction of the deficit to R5 894 936,00 which is reflected in the draft second liquidation and distribution account. In order for preferent creditors such as the employees to have some prospect of payment there must be a surplus in the account after payment of the costs specified in the Insolvency Act. The liquidators were on the verge of submitting the second account when they learnt of the court order. The account will now have to be amended to provide for the additional costs which have been incurred as a result of the present litigation. The defence put up by the liquidators is clearly bona fide and has prospects of success.

- [7] It follows that the liquidators are entitled to the relief sought in paragraphs 2.1 and 2.2 of the notice of motion in the variation/rescission application.
- [8] The following further facts appear from the liquidators' founding affidavit in the variation/rescission application. The liquidators became aware of the court order of Goodey AJ when it was delivered to their attorneys' correspondents' offices on 23 March 2012. It was delivered with the court order granted by Vorster AJ on 19 March 2012 in the employees rule nisi application. The relief granted by Vorster AJ

against the liquidators was to freeze their business, trust, personal and investment accounts pending the return date of 24 April 2012. Similar relief is claimed against them in the main application. The liquidators have filed answering papers opposing the confirmation of the rule nisi.

- [9] The order granted in the employees' rule nisi application resulted in the bringing of the liquidators' urgent application. That application resulted in a court order by Claassen J in terms whereof the immediate effect of the court order of Goodey AJ and the rule nisi was suspended pending the return date, the employees being entitled to anticipate the return date "within" 48 hours' notice. The employees anticipated the order with one and a half hour's notice to the liquidators. The employees' anticipation application was heard by Tuchten J. During the hearing of that application, the employees applied for Tuchten J's recusal. The recusal application was refused and the employees then withdrew their anticipation application.
- [10] What therefore remains to be decided are the main application and the employees' rule nisi application. The principal relief claimed by the employees in the main application is for payment of their preferent claims out of the free residue of Sawina's insolvent estate. The other relief which is claimed is ancillary thereto. The argument on behalf of the employees only concerned their claim for payment. That was also the approach of counsel for the liquidators.
- [11] In terms of item 9 of schedule 5 of the Companies Act, 71 of 2008, the winding-up and liquidation of companies continue to be governed by

the provisions of the previous Companies Act, 61 of 1973. In terms of s. 391 of the previous Act, a liquidator shall proceed to recover and take possession of all the assets and property of the company in liquidation and shall apply same in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto. In terms of s. 342, the assets shall be so applied as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency.

- [12] The Insolvency Act, 24 of 1936, provides that the effect of a winding-up order is to suspend any contracts of service of employees with effect from the date of granting of the winding-up order (s. 38(1)). In terms of s. 38(2)(a) an employee whose contract is suspended is not required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract. A liquidator may terminate the contract of service of employees (s. 38(4)). Unless the liquidator and the employee have agreed on continued employment, all suspended contracts of service terminate 45 days after the appointment of the liquidator (s. 38(9)(a)). In terms of s. 38(11), an employee whose contract of service has been terminated is entitled to claim severance benefits from the insolvent estate in accordance with s. 41 of the Basic Conditions of Employment Act, 75 of 1997. In terms of s. 98A(1)(a)(iv) of the Insolvency Act, a claim by an employee who was employed by the company in liquidation for payment of severance or retrenchment pay due to the employee shall be paid out of the free residue of the insolvent estate. The free residue is that portion of the estate which is not subject to the rights of secured creditors (s. 2)). The claims that may be made against the free residue, and how they

rank, are specified in ss. 96 to 102 of the Insolvency Act and are referred to as preferent claims. Employees' claims for severance and leave pay are paid from the free residue after defraying the costs of liquidation and of execution. The employees' claims are therefore preferent claims which rank before the claims of concurrent creditors.

[13] Sawina had 421 employees when it was liquidated in June 2006. The contracts of service of all those employees were, as a result, suspended. The liquidators subsequently sold the business of Sawina as a going concern to a company called Calshelf Investments (Pty) Ltd. Part of the transaction was that the contracts of a number of the employees, referred to as "operationally necessary employees", would be transferred to Calshelf. The present employees did not fall within that category. Their services were terminated by the liquidators.

[14] One of the complaints of the employees is that the liquidators made a so-called *ex gratia* payment of some R1,5 million to the operationally necessary employees. The liquidators say that these employees were necessary for the continuation of the business of Calshelf. The payment was made as a cost of administration and that the provision for the payment is reflected in the first liquidation and distribution account which has been approved by the Master. Whether or not the payment was correctly made is not the subject matter of the present application. The applicants' entitlement to payment is dealt with below.

[15] The liquidators do not dispute that the claims of the employees, to the extent that they are for severance and leave pay, are preferent claims against the insolvent estate. What they say is that they are not entitled to make any such payment before the final liquidation and distribution account has been approved by the Master and that, as matters presently stand, which position is reflected in the draft second liquidation and distribution account, there will be no free residue from which the employees' preferent claims can be paid. The account reflects a shortfall of some R5,8 million.

[16] Section 40(1)(a) of the previous Companies Act provides that a liquidator shall, unless he receives an extension of time, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution. This is generally referred to as a liquidation and distribution account. Section 403(1)(b) provides for the lodging of further accounts if the first account is not a final account. Section 405 empowers the Master to approach the court if a liquidator fails to lodge an account or to perform his or her duties. In terms of s. 406, an account lodged by a liquidator shall lie open for inspection for not less than 14 days and in terms of s. 407 any person having an interest in the company being wound up may lodge an objection against the account, stating the reasons for the objection. Section 408 provides for confirmation of the account by the Master if no objection has been lodged or if an objection has been lodged and the account has been amended as directed by the Master or if the objection has been withdrawn. Section 409 provides that, immediately after confirmation of any account the

liquidator shall proceed to distribute the assets in the estate in accordance with the account or to collect from the creditors and contributories liable to contribute thereunder the amounts for which they may be liable.

[17] It is clear from the foregoing that the employees' claims for payment of their preferent claims are premature. They are not entitled to claim payment before a final liquidation and distribution account has been approved by the Master. Once such account has been approved, they will also only be entitled to payment of their claims if there is a sufficient free residue from which the claims can be paid. If not, they will not receive payment. The remedy of the employees at this stage is to object to the second liquidation and distribution account, once filed, if they are dissatisfied with its contents. If the liquidators fail to file the second or final account, the employees can approach the court in terms of s. 404(2) for an order directing the liquidators to file such account. There are also further remedies in the Act which they can utilize.

[18] In the result, the main application falls to be dismissed.

[19] What remains, is the employees' rule nisi application for the freezing of the liquidators' banking accounts. If the employees are not entitled to an order for payment of their claims by the liquidators, as I have found, it follows that they are also not entitled to an order freezing the liquidators' banking accounts. The rule nisi must therefore be discharged.

[20] In the result, I make the following orders:

- (a) In the first to ninth respondents' application (the variation/rescission application) in case no. 6962/2011, an order is granted in terms of prayers 2.1 and 2.2 of the notice of motion.
- (b) The applicants' application in case no. 6962/2011 (the main application) is dismissed with costs.
- (c) The rule nisi granted in case no. 15956/2012 is discharged and the application is dismissed with costs.
- (d) The aforesaid costs orders will include the costs of two counsel where two counsel were employed.

Applicants' counsel: Adv. S.R.P. Masango

Respondents' counsel: Adv. C.Q. Leech
Adv. E. De Lange

Applicants' attorneys: Ledwaba Attorneys, c/o Motloba Attorneys, Pretoria

Respondents' attorneys: Rothbart Inc, c/o Jacobson & Levy Inc, Pretoria