1/12/2009

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 30436/09

In the matter between:

MARIA ALETTA MARAIS Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

01/12/09
DATE
SIGNATURE

JAMES GALLOWAY NO

in his capacity as liquidator of LEDIG

MINERALEREGTE 909JQ (PTY) LTD First Respondent

THE MASTER OF THE HIGH COURT

OF SOUTH AFRICA (NORTH GAUTENG

PROVINCIAL DIVISION, PRETORIA) Second Respondent

JUDGMENT

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1 This is an application to convert, as that term is used in *Corrigrain Trading SA v Resora (Pty) Limited* 2004 2 SA 348 W, a voluntary winding-up into a winding-up by the court of Ledig Minerale Regte

909JQ ("the company") and for an order in terms of s 417 read with s 388(1) of the Companies Act, 61 of 1973 authorising an examination and enquiry into the winding-up of the company with particular reference to the conduct of the company's attorney, Ms Laäs, to whom I shall refer as the attorney.

2 The company passed a special resolution on 25 August 2007. The terms of the resolution read as follows:

> Daar word besluit dat, in die lig daarvan date die Maatskappy sy doelwit bereik het, naamlik die realisering van die minerale regte van die lede van die Maatskappy:
>
> 1 dat die Maatskappy vrywillig deur die lede gelikwideer word;
>
> 2 die bevoegdhede van die Direkteure, kragtens die bepalings van die Maatskappyewet, Wet 61 van 1973, sal voortduur ten einde toe te sien tot die uitvoering van die ooreenkomste deur die Maatskappy gesluit en om die likwidateur in alle opsigte ten aansien van die afhandeling van die Maatskappy se sake by te staan.

3 The special resolution was registered on 3 December 2007. The first respondent was appointed as the liquidator of the company.

4 The current situation is thus that the company is in the process of a members' winding-up. Under s 350 of the Companies Act, a members'

winding-up is only competent in respect of a company which has no debts.

5 The applicant has cited as respondents the liquidator of the company in voluntary liquidation and the Master, neither of who oppose the application. However, certain of the directors of the company gave notice of their intention to oppose the application and, although they did not file any papers at all, they have appeared through counsel to contend for locus standi (which is challenged by the applicant) and a concomitant right to address me on the merits.

6 At the hearing, I asked counsel for the directors for whom precisely he appears. Counsel informed me that he represented Messrs DJ Gouws, M du Plessis, G Strydom, D Spangenberg and J Kirsten.

7 The directors contend that they have standing because the control of a company in voluntary liquidation vests in its members. This to my mind is precisely why the directors do not have standing to oppose the setting aside of the voluntary winding-up order. In *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 1 SA 553 T at 558A, the court came to the conclusion that the directors of a company subject to an order for winding-up by the court had certain

residual powers because, amongst other reasons, there was "no provision like s 353 inserted in the case of a winding up by the Court".

8 Section 353 of the Act in terms provides that in a voluntary winding-up by members, all the powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned by the liquidator or the company in general meeting.

9 Under paragraph 2 of the special resolution, the members in general meeting purportedly conferred powers on the directors to ensure the proper execution of the agreements concluded by the company and to assist the liquidator in all aspects regarding finalisation of the affairs of the company. Nothing in the special resolution gives the directors power to represent the company in litigation during the currency and in respect of matters falling within the ambit of the voluntary winding-up.

10 Counsel for the directors submitted that the powers accorded the directors in the special resolution should be read as being very wide and that the specific references to the two situations in which the directors' powers were to be preserved were mere surplusage. I disagree. The clear language of the resolution does not allow for the construction urged upon me by counsel.

11 Furthermore, it seems to me, the powers conferred on the directors are not powers conferred "in the voluntary winding-up" because the meeting which passed the special resolution took place before the voluntary winding-up commenced.

12 Unless powers are conferred on the directors under s 353(2)(b) of the Act by the liquidator or by the company in general meeting *in* the members' voluntary winding-up, the effect of s 353(2) is to divest the directors of all their powers as from the commencement of the voluntary winding-up. The powers purportedly conferred on the directors in the special resolution were conferred in a meeting which *preceded* the voluntary winding-up. So the special resolution was ineffectual in conferring any powers at all on the directors in the voluntary winding-up. Whether the terms of the special resolution limited the exercise of powers by the liquidator under s 350(3) is a question I need not decide.

13 The claim in this application for the winding-up of the company by the court and the claim for an enquiry is on a different footing. It is trite that the directors do have residual powers to represent the company to oppose such a winding-up. I find that in regard to those claims, the directors are entitled to be heard.

14 Counsel for the directors submitted that the company had not been cited. He suggested that the second respondent should have been cited as the company in liquidation represented by the liquidator rather than, as the applicant did, as the liquidator representing the company. There may be substance in the point on a technical level but it is not necessary to me to decide it because counsel for the directors acknowledged, correctly in my view, that in substance (if not in form) the person vested with the control over the liquidation, ie the liquidator, had received notice of the application and had elected not to oppose it.

15 The application is exceptionally badly drawn. It is incoherent and prolix. I received heads of argument drawn by the applicant's attorney which were entirely unhelpful. Fortunately, after I had made these views known to the attorney, senior counsel was briefed to argue the matter for the applicant. I stood the matter down to enable counsel for the applicant and counsel for the directors to provide me with heads of argument. Counsels' heads of argument have been most helpful.

16 The applicant comes to court as both a creditor and a member of the company. She has thus, on the papers before me, locus under s 346(1)(e) of the Act. The applicant has the support of 22 named members out of the total of 33 members of the company.

17 No affidavits have been filed in response to the founding papers and the allegations of the applicant stand uncontradicted. The thrust of the application is briefly this:

17.1 Various persons held mineral rights in respect of a number of farms in the Pilanesberg area. They did not have the know how to turn their rights to account.

17.2 They retained the professional services of the attorney, an attorney of the firm Laäs Doman Inc of Pretoria, to assist them.

17.3 The allegation is that the attorney conducted herself contrary to the duties of good faith owed by an attorney to her clients and, by a process of financial and administrative manipulation, the mineral rights were disposed of to a listed company formerly called Exaco Holdings Limited and now called Wesiswe Platinum Limited ("Wesiswe") in such a manner that the attorney and her associate, Ms Karen Venter, directly or through vehicles owned or controlled by them, emerged with a substantial portion of the money and shares paid by Wesiswe to acquire the rights in question.

18 Thus, according to the applicant:

18.1 All matters of administration regarding the rights were left to the attorney who played a dominant role in the affairs of the company and overbore and stifled debate on any suggestions conflicting with her own ideas.

18.2 The attorney and Ms Venter incorporated a company called Our Mining Venture (Pty) Ltd ("OMV") which apparently held the shares in Bakubung Minerals (Pty) Ltd ("BM").

18.3 The mineral rights over certain portions of the farm Ledig 909 J.Q. belonging to some of the people who consulted the attorney were transferred to the company with the intention that the company would function as the vehicle to turn these rights to account for the benefit of the people in question.

18.4 The mineral rights of the company were valued by the attorney's husband, who is not a geologist and who describes himself as an associate valuer, in the sum of R66 million as at 28 February 2003.

18.5 As a result of endeavours to which the attorney was party, in October 2005 the company sold its rights to Wesiswe for a consideration consisting of R31,5 million to be paid in instalments and 7 million Wesiswe shares amounting to 2% of Wesiswe's issued share capital at that stage.

18.6 In its pre-listing statement, Wesiswe described OMV as one of the "vendors" from whom Wesiswe acquired the rights.

18.7 During the course of the deliberations of the members of the company prior to the conclusion of the transaction with Wesiswe, the attorney admitted that she had interests in the transaction which conflicted with her duty to her clients but asserted that this conflict of interest caused no prejudice to any of the parties.

18.8 BM acquired an interest in the mineral rights in the portions of the farm Ledig 909 J.Q. which it sold to Wesiswe for R10 million. In addition the attorney and her associate (through a trust) received 200 000 shares in Wesiswe and Wesiswe lent BM R58,5 million without fixed repayment terms for what Wesiswe described as "exploration activities".

19 As far as the applicant's claim is concerned, the following:

19.1 The applicant had a claim against the company for commission in the sum of R1,126 million. In his heads of argument, counsel for the applicant submitted that it is at this stage unclear whether any portion has been paid.

19.2 The voluntary winding-up was obtained on the strength of affidavits by the directors of the company in which they said that at the time they applied for the voluntary winding-up, August 2007, the company had no debts.

19.3 The applicant sought to persuade the Master to admit her claim at a meeting called under the provisions of s 386 of the Act. In heads of argument dated 28 November 2008 submitted to the Master by the attorney purporting to act on behalf of the members of the company, the attorney submitted that in fact the applicant's claim had been settled in the sum of R675 000 and paid, thereby extinguishing her claim.

19.4 The applicant denies the settlement and says that she accepted the cheque as tendered on account and under protest.

19.5 The applicant would thus appear to be a creditor of the company for at least R451 000.

20 On the papers before me, the allegation by the directors that the company was free of debt at the date of its voluntary winding-up was thus a material misrepresentation.

21 Furthermore, according to the applicant, an analysis of the ledger account of the company obtained from the attorney revealed substantial payments into and out of the company which have never been explained.

22 I conclude that the present members' voluntary winding-up cannot be allowed to continue because one of the prerequisites for that situation, that the company sought to be placed under members' voluntary winding-up has no debts was, at the time the voluntary winding-up commenced, not present.

23 The inference appears to be inescapable that the directors have allowed themselves to be manipulated by the attorney, to the detriment of the company.

24 The applicant's claim aside, it seems to me that the difference between the powers accorded the liquidator in this members' voluntary winding-up as opposed to those vested in a liquidator appointed in a winding-up by the court must be decisive in regard to the exercise of the discretion conferred upon me by s 354(1) of the Act. Under s 350(3) of the Act, the liquidator in a members' voluntary winding-up such as the present must exercise the powers conferred on a liquidator by the Act subject to such directions as may be given by the company in general meeting, ie by the members. A liquidator appointed pursuant to a winding-up by the court must, under s 387, merely have regard to any directions given by creditors and members or contributories. Furthermore, in the present voluntary winding-up, the directors are, because of the terms of the special resolution, vested with certain powers which, to say the least, are inappropriate in the circumstances disclosed on the papers.

25 There is in my view a strong possibility, if not a likelihood, that substantial injustices could be caused if a majority of members or of directors is persuaded, in the continuation of the voluntary winding-up, to approve, or not to approve, a particular course of action.

26 Counsel for the directors submitted that I should not grant final relief in relation to the attack on the continuation of the voluntary winding-

up. I disagree. All the parties who should have had notice of the claim for this relief have received notice. No interested party has sought to intervene, despite the lengthy period between the launching of the application and its hearing before me.

27 The directors urge me, through their counsel's heads of argument, to believe that they have not filed papers in this application because the applicant had chosen procedurally to attack the notice of intention to oppose under the provisions of Rule 30. The applicant delivered a notice under Rule 30(2)(b) on 14 July 2009 requesting that the perceived irregularity in relation to the notice of intention to oppose be corrected by the withdrawal of the notice. Under Rule 30(2) an application to set aside an irregular step may be made "only if" the application is delivered within 15 days after the expiry of the ten day period mentioned in the notice affording his opponent an opportunity to remove the cause of complaint.

28 As no application to set aside the alleged irregular step was ever made, the notice of intention to oppose stood, for what it was worth. This must have been made known to the directors. I find that the directors had no basis upon which to delay filing papers in opposition to the relief sought with or without an appropriate application for leave

to intervene. There is thus no basis for a rule rather than final relief in relation to the claim to set aside the voluntary winding-up.

29 Although it would be open to me to grant an order for the winding-up of the company by the court without setting aside the voluntary winding-up, I have decided in the exercise of my discretion that it would be appropriate to set the voluntary winding up aside. Section 354 makes reference to the "continuance of any voluntary winding-up" and it seems to me proper for me to make clear that the voluntary winding-up should not continue at all.

30 I shall therefore come to the relief of the applicant pursuant to her claim for the voluntary winding-up to be set aside.

31 In my view the applicant has made out a case for a winding-up under s 344(h) of the Act, that it is just and equitable that the company should be wound up. This case in my view is distinguishable from the situations considered in *Rand Air (Pty) Ltd v Rat Bester Investments (Pty) Ltd* 1985 2 SA 345 W. In *Rand Air*, the issue was *whether* the respondent company should be wound up. In this case the issue is not whether but *under which statutory regime* the company should be wound up.

32 In order to cater for interested parties who have not as yet had their say on the issue of the winding-up by the court, I have decided in the exercise of my discretion to grant a provisional winding up order with an extended return day and directions for appropriate publication.

33 I decline to grant relief in relation to the prayer for an enquiry under s 417 of the Act. These are my reasons:

33.1 The relief sought is predicated upon the continuation of the voluntary winding-up, which I propose to set aside.

33.2 Such an enquiry can only competently be ordered under s 417 in relation to a company which is unable to pay its debts. That has not been shown to be the case.

33.3 The request for an enquiry is thus premature. It may be renewed in due course if a proper basis can be established.

34 Finally, I record for the sake of clarity that I would have exercised my discretion in regard to costs (subject to correction or variation on the return day in general and with particular reference to the shortcomings in relation to the presentation of the applicant's case before counsel was briefed, which I described above) to award costs to the applicant

in respect of the entire application, ie not merely that portion relating to the prayer for winding-up by the court.

35 I make the following order:

35.1 The winding-up proceedings in Ledig Minerale Regte 909 J.Q. (Pty) Limited (in voluntary liquidation) under Master's reference number T2729/2007 are hereby set aside;

35.2 A provisional winding-up order will issue calling upon Ledig Minerale Regte 909 J.Q. (Pty) Limited and all other interested parties to show cause on 8 March 2010, at 10h00 or so soon thereafter as the matter may be heard, why:

35.2.1 the provisional winding-up order should not be made final; and

35.2.2 the applicant's costs in respect of the entire application, taxed on the basis that the employment of senior counsel was justified, should not be made costs in the liquidation subject to what follows below;

35.2.3 in determining the quantum of the costs to be awarded to the applicant, the taxing master should not disallow two thirds of all the costs related to the preparation of the applicant's founding affidavit;

35.3 The provisional winding-up order must be served on Ledig Minerale Regte 909 J.Q. (Pty) Limited at its registered office and published once in the Beeld newspaper;

35.4 The claim for an order for an enquiry under s 417 of the Companies Act, 1973 is refused.

NB Tuchten
Acting judge of
the High Court
1 December 2009

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