

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED:

23 September 2024
 DATE


 SIGNATURE

CASE NO: 3024/2018

In the matter between:

DCL INTERIORS CC (IN LIQUIDATION)

Applicant

and

WEAVIND & WEAVIND INC

1st Respondent

DENNIS CHRISTOPHER LOUW N O

2nd Respondent

MELANIE LOUW N O

3rd Respondent

PASQUALINO LATTUCA N O

4th Respondent

JUDGMENT

(The matter was heard in open court but judgment was handed down electronically by uploading it onto the electronic file of the matter on CaseLines and electronically submitted to the legal representatives of the parties by uploading the judgment onto CaseLines. The date of the judgment is deemed to be the date of uploading thereof onto CaseLines).

BEFORE: HOLLAND-MUTER J:

[1] The applicant, DCL Interiors CC ("DCL") was wound-up on the grounds that it was unable to pay its debts. A provisional winding-up order was granted on 11 March 2016 by Louw J and the rule nisi was confirmed on 18 April 2016 when the final winding up order was granted. The Master of the High Court appointed Mss Khammissa and Sefanyetso as joint liquidators of DCL.

[2] The first respondent is the firm of attorneys who acted on behalf of DCL in property transactions and assisting DCL in opposing the then application for the winding-up of DCL. The second to fourth respondents are the trustees of the CQC Trust, the trust a recipient of a payment made to it by the first respondent prior to the final winding-up of DCL.

BACKGROUND:

[3] To fully appreciate the matter which led to the application brought against the Respondents, a background summary is given.

[4] During July 2014 DCL purchased an immovable property situated at Erf 1159 Waterkloof from Lighthouse Investments ("Lighthouse") for an amount of R 3,3 million. Weavind & Weavind Attorneys (the First Respondent referred to as "W&W") was appointed to represent DCL in the transaction. DCL took

occupation of the property on 1 September 2014, and had to pay occupational rent to Lighthouse in the amount of R 25 000,00.

[5] On 27 November 2014 W&W, acting on behalf of DCL, provided Lighthouse with a written undertaking stating that *"We hereby furnish you with our firm's undertaking to pay your firm an amount of R 2 400 000-00 upon registration of the transfer of portion 1 of Erf 1159 Waterkloof into the name of DCL CC"*.

[6] W&W furnished Lighthouse's attorneys with a bank guarantee from Standard Bank in the amount of R 2 400 000-00 as security for part of the purchase price for Erf 1159. The bank security provided that *"Acting upon the request of and under instructions received from DCL we advise that we are holding the sum of R2 400 000-00 ... at your disposal on behalf of DCL..."*.

[7] Lighthouse applied for the winding-up of DCL on 11 March 2015 inter alia in terms of section 344 (f) of the Companies Act (Coy-Act) for its frequent failure to make the monthly occupational rental payments. The proposed sale of property agreement between DCL and Lighthouse failed to materialise leading up to the winding-up application.

[8] On 6 May 2015 W&W, acting on behalf of DCL, delivered an answering affidavit opposing the winding-up application. On 7 May 2015 W&W, acting on instructions of DCL, cancelled the guarantee and proceeded to make payments from the R 2,4 million as follows:

8.1 Payment of R 401 830-92 on 8 May 2015 towards the **Dewina Group**, and

8.2 After retaining the balance of R 2 014 247-45, until payment thereof on 4 August 2015 on behalf of the **CQC Trust**, in a transaction when CQC purchased

an immovable property in Muckleneuk. The second to fourth respondents are trustees of the CQC Trust. It later turned out that the payment was made for a loan account DCL had towards CQC.

[9] On 11 March 2016 DCL was provisionally wound-up with return date on 18 April 2016 when a final winding-up order was granted against DCL.

[10] The Master of the High Court appointed Mss Khammissa and Sefanyetso as the joint liquidators of DCL on 19 May 2016.

THE PRESENT APPLICATION:

[11] The liquidators issued this application against the respondents on 19 January 2018. W&W responded by delivering a Third Party Notice in terms of Rule 13(8) of the Uniform Rules of Court (Rules of Court) claiming a contribution or indemnification from CQC.

[12] Without becoming entangled in the chronology of affidavits that followed, it is safe to state that the parties exchanged various affidavits in the normal sequence in the main application. W&W filed a conditional counter-application seeking an order that should the court find that there has been a disposition of DCL's property within the ambit of section 341(2) of the Coy-act, that the disposition is not void.

[13] CQC delivered an answering affidavit followed by a replying affidavit to CQC's answering affidavit by DCL. W&W delivered a further affidavit dealing with the contents of DCL's supplementary founding affidavit

[14] W&W delivered a Rule 30 Notice objecting to DCL's supplementary founding affidavit. DCL launched a formal application requesting the Court to condone the delivery of the supplementary founding affidavit. Both the Rule 30 Notice and the Condonation Application went astray from Casellines but W&W responded to the supplementary application and it is clear that W&W is not prejudiced by the admitting of the supplementary affidavit. It can safely be accepted that W&W were no longer objecting to the delivery of the supplementary founding affidavit and therefore condonation is granted.

[15] W&W launched an urgent application against the CQC Trust seeking an order interdicting CQC from alienating or otherwise disposing of the Muckleneuk property, the subject of a transaction between the Trust and CQC. W&W also filed an answering affidavit with regard to the supplementary founding affidavit. The issue of the Rule 30 Notice did not proceed further. It is safe to accept that for W&W to reply to the further supplementary affidavit, it amounted to an admission that W&W suffered no prejudice.

MERITS:

[16] Each of the respondents' cases will be dealt with below to determine whether the defences raised have any merits.

W&W's CASE:

[17] DCL was wound-up because it was unable to pay its debts. Section 348 of the Coy-act provides that the winding-up of a company shall be deemed to commence at the time when the application was presented to the court on 11 March 2015 when the application to wind-up was filed with the Registrar of the Court.

[18] In terms of section 348 of the Coy-Act *“the winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up”*. This has been the subject of several cases and the commencement of winding-up is of considerable importance to effected parties.

[19] The retrospective nature of the section was discussed in **Development Bank of Southern Africa Ltd v Van Rensburg NNO 20022 (5) SA 425 (SCA)**. It was held for the retrospectively application of the section applies only when a winding-up order was granted. This was echoed several cases thereafter (**Henocheberg on the Company Act Vol 1 740(2)**). In view thereof that a final winding-up order was granted against DCL, the retrospective nature of section 348 applies to this matter to determine when the winding-up process commenced.

[20] The purpose of section 348 is to nullify any *“attempt by a dishonest company, or directors, or creditors or others, to snatch unfair advantage during the period between the presentation of the application for the winding-up order and the granting of that order by the court”*; **Lief NO v Western Credit (Africa) (Pty) Ltd 1966 (3) SA 344 (W) at 347**-this was with reference to the similar provisions of section 115 of the 1926 Company Act. Also see **Henocheberg supra 740(3)**.

[21] The effect of this section is to make the commencement of the winding-up retrospective to the time of the presentation to the court of the application, ie when it is lodged with the Registrar of the Court.

[22] W&W paid **Dewina Group** R 401 830-92 on 8 May 2015 and the retained balance of R 2 014 247-45 on 4 August 2015 to **CQC Trust**. Both payments were made after 11 March 2015 (date of presentation of the application to the Court) and W&W and CQC do not dispute that these payments were made by

W&W to the Dewina Group and CQC Trust. These payments were made post the date of the application being presented to court as set out in section 348.

[23] Section 341(2) of the Coy-Act provides that every disposition of property of a company being wound-up is void. The purpose of section 341 (2) is to prevent a company being wound-up from dissipating its assets which results in the frustration of creditors' claims. **Pride Milling Company (Pty) Ltd v Bekker NO 2022 (2) SA 410 (SCA)** at [30] *"The provisions of section 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound up is void. ... It is to prevent a company from dissipating its assets and thereby frustrating the claims of its creditors"*.

[24] The payments made by W&W supra are clearly void. The question is whether W&W's act of making the payments creates liability for W&W as in section 341(2).

[25] W&W advanced various "defences" against the relief sought against it by the Liquidators. These defences will be considered here below.

[26] The *first defence* raised by W&W is that the two payments made (identified and admitted supra) do not amount to *"dispositions within the ambit of section 341 (2) of the Coy-act"* and is *"thus not void"*.

[27] The term '*disposition*' means *"any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation, or any contract provided therefore"* in section 2 of the Insolvency Act 24 of 1936 as amended. See **Hockley's Insolvency Law by Sharrock et al 6th Ed p 101**. There is no doubt that the payments made by W&W amounts to dispositions subject to the width of section 341(2) of the Coy-Act and the provisions of the Insolvency Act. This defence is bad at law.

[28] The *second defence* raised by W&W is that *“even if the said payments were void dispositions...it was not the recipient of such payments”*. W&W contend that these payments ought to be repaid by Dewina and CQC, the recipients of the payments. However, if the provisions of section 341(2) are considered, it is clear that section 341(2) deals with the conduct of the person making the payment and not the conduct of the recipient of such payment. Section 341(2) is clear that *“Every disposition of its property by any company being wound-up and unable to pay its debts made after commencement of the winding-up, shall be void unless the court otherwise orders”*. This was held in **Stander NO v De Bruin & Partners Inc 2011 JDR 0916 (GNP) at [14]**, *“Accordingly it is the conduct of the company that pays out the money and not the company that receives it that determines whether or not such disposition is tainted by the provisions of section 341(2)..;”* .

[29] This defence by W&W fails to come out of the blocks at all.

[30] The next defence raised by W&W is reliant on the provisions of section 78(7) of the Attorneys Act 53 of 1979 (“Att Act”). The reliance on the Att Act is because the payments were made before the new Legal Practice Act (LPA) came into operation in 2018. Any possible sanction or action should be entertained under the provisions of the previous act.

[31] W&W aver that the amount of R 2,4 million in its trust account belonged to DCL and that it was obliged to act on instructions of DCL regarding the payments made. The first payment made to the Dewina Group was on instruction whilst it was expressly instructed by DCL to credit CQC Trust with the amount of R 2 014 247-45 in consequence of the repayment of a loan that DCL allegedly owed CQC.

[32] It is clear from the provisions of section 78(7) of the Att Act that monies held in the trust account by an attorney belong to the depositor and not the attorney. The essence of a trust fund is the absence of risk and the confidence created thereby. Such money is held in the trust by a practitioner on behalf of another person. The attorney may only deal with that such money as instructed by the depositor. This is underlying in many applications by the Legal Practitioners Council and its predecessor for the disciplinary action against practitioners where the practitioner misappropriated trust money for reason that the money is that of the depositor and not the practitioner.

[33] It is further clear that two different attorneys at W&W attended to the different mandates received from DCL. Mr van Rensburg held the mandate to assist DCL in opposing the winding-up application while Mr Manley was mandated to assist DCL in the acquisition of property matters.

[34] The question to be answered is whether W&W attracted liability with regard to the payment of trust money held on behalf of DCL on instruction by one section of W&W whilst another section of W&W attended to the drafting/settling of answering affidavit on behalf of DCL in the winding-up application. I could not find any indication that the two attorneys at W&W were aware of the fact that they both represented DCL at the same time but for different matters.

[35] In assisting DCL settling the answering affidavit in opposition of the winding-up application, W&W's Van Rensburg had full knowledge of the pending winding-up application but he did not authorise the two disputed payments. In the answering affidavit DCL asserted to have sufficient funds to pay its debts. For some undisclosed reason no mention is made of an alleged loan to the CQC Trust.

[36] The other attorney who authorised the payments was not aware of the pending winding-up application and acted in good faith when mandated to make the two payments. There is no indication that Manley's actions were in bad faith. Manley acted in terms of an instruction from client when authorising the payments.

[37] I am reluctant to find that W&W can be held liable for the payments made on behalf of DCL.

CQC TRUST's CASE:

[38] CQC's main thrust against the claim of the liquidators against the trust is the lack of authority by the liquidators to act in terms of section 386 (4) of the Coy Act and other non-compliances with peremptory provisions. Section 386(3) states that *"The liquidator of a company (a) in a winding-up by the court, with the authority granted by meetings of creditors and members or contributories or on the direction of the Master given under section 387 shall have the powers mentioned in subsection (4).*

[39] Section 386(3) is subject to section 387 and section 386(4) is subject to section 386(3). The above is subject to the then procedural compliance with section 78 of the Close Corporation Act, 1984. The gist hereof is that the liquidators need the direction/authority of the creditors by resolution or of members or contributories; and the liquidator(s) may apply to the Master for directions or in last instance apply to the court for directions.

[40] It has to be noted that the Insolvency Act, the Coy Act and the Close Corporation Act 69 Of 1984 ("CC-Act") have various peremptory provisions and time periods to be complied with during the liquidation process. It may be that a party making application or taking some other step in terms of these acts will

omit prescribed details, or fail to act within time stipulated, or commit some other procedural breach. When this happens, it becomes important to establish whether the breach of non-compliance is invalid by reason of the defect or irregularity.

[41] The Insolvency Act starts in section 157(1) by stating that *“nothing done under the Act will be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been done thereby, which cannot in the opinion of the court be remedied by any other order of court”*.

[42] Section 9(1) in Schedule 5 of the 2008 Coy- Act provides for the continued application of the previous act (the 1973 Coy-Act) with respect to the winding-up and liquidation of companies under the act as if the 1973 act has not been repealed regarding subject to sub-items (2) and (3). The exclusions do not impact on the current matter before court.

[43] To determine whether any non-compliance with prescribed issues, or formal defect or irregularity caused a substantial injustice, each individual matter needs separate scrutiny. If no substantial injustice is caused, the procedural step is valid. **Ex Parte Cowley 1950(4) SA 161 (GW).**

[44] If the formal defect caused an injustice, but the prejudice, in the opinion of the court, be remedied by an appropriate order, the defect is not fatal. **Ex Parte Van Rensburg 1955 (1) SA 570 (O).**

[45] If the defect caused substantial injustice and the prejudice towards creditors cannot be cured by any order of the court, the procedural step is invalid. **Hockley supra p 8.**

[46] A formal defect was defined in **Ex Parte Slabbert 1960 (4) SA 677 (T) at 681-2**. It was held to mean a departure from a prescribed or established procedure. **Ex Parte Anderson 1995 (1) SA 40 (SE) at 43**.

[47] Further guidelines are to be found in **Ex Parte Immelman 1941 CPD 369** where it was held that if the deviations were so slight as to fall within the maxim *de minimus non curat lex* or where all the interested parties waived compliance as in **Ex Parte Nel 1960 (3) SA 715 GW** the procedural defect can be overlooked or condoned.

[48] In the present matter CQC's defence is that there were many formal defects rendering the procedure invalid. The following issues were raised by CQC:

* Section 78(1) of the CC-Act provides that a liquidator **shall** (my underlining) ... but not later than one month after a final winding-up order was granted ... summon a meeting of the creditors of the corporation for the purpose of considering the statement as to the affairs of the corporation.;; the proving of claims... etc. the final winding-up order was granted on 18 April 2018 and the First Meeting of Creditors was convened on 8 July 2018, at least two and a half months after the final order was granted.

* The locus standi of the Applicant was questioned by CQC in its answering affidavit but the Applicant avoided to reply. (CaseLines 005-6).

*The First Meeting of Creditors was at least two months late and none of the interested parties (CQC) was given notice of the meeting. A meeting held past the prescribed time is unlawful unless the applicant can show that the belatedness did not influence the decisions taken at the meeting **Ex Parte Henning 1981 (3) SA 843 (O) at 852E-853A**.

* In view of what should transpire at such First Meeting; ie to prove claims, to obtain directions from creditors, to consider the affairs of the corporation in the prescribed manner, etc.

* The applicants held a meeting at the Master's office on 30 January 2016 for proof of claims and the liquidators' report. This meeting was held *before* the provisional order was granted on 13 March 2016.

* At the First and Second Meeting of creditors held by the Master on 16 June 2018, more than one month after the final order was granted, no claims were lodged and there is no indication in the minutes of the meeting that and creditor or interested parties were given notice of the meeting. This allegation on behalf of the second to fourth respondents was not dealt with in the replying affidavit.

[49] I am aware that non-compliances with prescribed formalities in some cases can be condoned and that it was held in **Lynn NO and Another v Coreejes NO 2011 (6) SA 507 SCA at [12]** held that *"... if a liquidator litigates without the prescribed authority, the court may refuse to allow him his costs out of the company's assets and he may have to pay such costs himself. The litigation is not a nullity, it merely has the potential adverse costs implications for the liquidator. And there is ample authority that a person against whom the unauthorised litigator is litigating may not object to such lack of authorisation, for it is a matter between the liquidator and the creditors. Retrospective sanction of unauthorised litigation is available to the liquidator in appropriate instances, either from the creditors or members under section 386(3) or, if refused, from the Master under section 387(2) and, if the Master refuses, from the court under section 386(5) read with section 387(3)".*

[50] In view of the above I am not convinced that the procedural and formal defects are of such nature to hold that it does not amount to a substantial injustice towards the second to fourth respondents.

DEREGISTRATION OF THE APPLICANT:

[51] The Companies and Intellectual Properties Commission ("CIPC") for some undisclosed reason or request therefore, deregistered the Applicant on 30 March 2023. It was done in terms of section 26 of the CC-Act, read with section 82(3)(i) and (ii) of the CC-Act. Deregistration puts an end to the existence of a company/close corporation. **Miller and Others v Nafroc Investment Holdings Company Ltd [2010] 4 All SA 44 (SCA) at [11]**. Such deregistered entity cannot mandate any other person to act.

[52] The CIPC may delegate any of its powers and duties to any officer/employee in the Commission. Any deregistration of a company/close corporation puts an end to the existence of the entity and it ceases to exist. There is no indication of any delegation of kind. The deregistration amounts to an administrative act, and, even invalid, remains in force until reviewed or dealt with in accordance of section 82(4) and 83(4) of the Coy-Act.

[53] It was held in **Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others {2014} All SA 664 (SCA) in [17]** that *"The final deregistration of a close corporation after it was finally liquidated is incompetent, unlawful and invalid... and deregistration is an administrative act performed by an official and is therefore susceptible to being set aside on review"*.

[54] The Coy-Act provides for two additional processes to overturn the deregistration. Section 82(4) of the Coy-Act provides that if the CIPC deregisters a company as contemplated in section 82(3), any interested person

may apply in the prescribed manner and form to the CIPC to reinstate the company, or in section 83(4) the liquidator or any interested person may apply to a court declaring the dissolution to be void.

[55] The court postponed the matter on 28 August 2023 to grant the applicant the opportunity to supplement its affidavit in response of the First Respondent's Rule 7 Notice, and if necessary, to bring an application in regard to the matters raised in the Rule 7 Notice on or before 22 September 2023. The applicant elected not to bring an application to review the deregistration of the applicant and no application in terms of sections 82(3) and 83(4) of the Coy-Act was brought.

[56] It is common cause that this has not happened in any way. All that has happened was that the liquidator co-operated with an official at the CIPC to change the contents of the register (*'correct the records' as stated by the Applicant in its Supplementary Affidavit on CaseLines Part 019, para 5,6 and 7, pages 019-27 to 019-28*). There is no provision for such 'correcting' of the register.

[57] The so-called "correcting of the register" is invalid and there is no authority for the official to 'correct' the record. In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004(6) SA 222 (SCA)** [37] it was held that *"...the rule of law dictates that the coercive power of the State cannot generally be used against an individual unless the initiating act is legally valid. And this case illustrates that a public authority cannot justify it to perform its duty by relying on the invalidity of the originating administrative act; it is required to take action to have it set aside"*. In this application it clearly dictates that the liquidators cannot act on behalf of the deregistered close corporation unless the deregistration was attended to. The CIPC cannot merely 'correct' the incorrect deregistration by an entry into its registers. The purported "upliftment" of the deregistration of the applicant by the liquidators was unlawful and without any force.

[58] At present the liquidators have no mandate from the deregistered close corporation. The liquidators were granted the opportunity in the court order dated 23 August 2023 to resolve the issue, but failed to do so. The circumstances the liquidators have no mandate to proceed with the application.

[59] Under the circumstances the following order is made:

ORDER:

The application is dismissed with costs, such costs to be taxed on Scale C as contained in Rule 69(7) of the Uniform Rules of Court.

Signed at Pretoria on 23 September 2024




J HOLLAND-MUTER

JUDGE OF THE PRETORIA HIGH COURT

Matter was heard on 6 June 2024

Judgement handed down onto Case Lines on 23 September 2024

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