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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 117119/2023

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: 02 October 2024 Signature: _____

In the matter between:

VAN DER MERWE AND ASSOCIATES INCORPORATED

Applicant

[Registration No.;2006/0155908/21]

And

LIZANNE CHANTAL MULLER N.O.

First Claimant

JOSHUA MUTHANYI N.O.

Second Claimant

MARYNA ESTELLE SYMES N.O.

Third Claimant

(The First to Third Claimants act in their capacity as the duly appointed liquidators for the insolvent estate of Hencetrade 35 (Pty) Ltd t/a Gemini Electrical [in liquidation])

ALBERT JOHANNES VILJOEN

Fourth Claimant

[Identity No.: 8[...]]

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] These are interpleader proceedings in terms of Rule 58 of the uniform rules of Court pursuant to a notice filed by the Applicant, Van der Merwe Incorporated, a law firm, who holds in its trust account funds on which the four claimants herein have competing claims.

B. BACKGROUND

[2] The Fourth Claimant ("Mr Viljoen") was an employee of Hencetrade 35 (Pty) Ltd t/a Gemini Electrical (in liquidation) ("the insolvent company") until his dismissal in December 2018.

[3] Subsequent to his dismissal, Mr Viljoen referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA").

[4] On 11 September 2020, the CCMA ruled in Mr Viljoen's favour and granted an award in terms of which the insolvent company was to pay Mr Viljoen compensation in the sum of R385,000.00.

[5] On 30 September 2020, the insolvent company, who was represented by JC Uys Attorneys ("JC Uys") at the time, launched an application in the Labour Court to have the decision of the CCMA reviewed.

[6] On 24 October 2020, the insolvent company tendered security in terms of section 145(7) of the Labour Relations Act by depositing the sum of R375,000.00 into the trust account of JC Uys.

[7] On 29 November 2022, an application for the winding-up of the insolvent company was launched.

[8] On 4 May 2023, the insolvent company was finally liquidated.

[9] On 7 September 2023, the First to Third Claimants ("the liquidators"), after having resolved not to pursue the review application, instructed Van der Merwe Inc, who was representing the liquidators at the time, to demand payment of the relevant funds from JC Uys.

[10] On 21 September 2023, JC Uys made payment of the funds into Van der Merwe Inc's trust account.

[11] On 13 November 2023, Van der Merwe Inc delivered an interpleader notice on the basis that Mr Viljoen and the liquidators have competing claims to the R375,000.00.

C. ISSUE FOR DETERMINATION BY THE COURT.

[12] Whether the funds held in trust by the Applicant should be paid to the First to Third Claimants or to the Fourth Claimant.

The liquidators' claim:

[13] The liquidators lay claim on the funds by relying, firstly, on Section 342(1) of the Companies Act, 61 of 1973 ("the 1973 Companies Act") which provides that:

"(1) In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, subject to the provisions of section 435(1)(b), the claims of creditors 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 and, unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company."

[14] Secondly, Section 361(1) of the 1973 Companies Act provides as follows:

"(1) In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office."

[15] Thirdly, section 391 of the 1973 Companies Act provides that:

"A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend 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."

[16] Mr Louw on behalf of the liquidators contended that the effect of the aforesaid provisions is that the liquidators are obliged to recover and realise all the assets and property of the company being wound up, and to apply the proceeds of such realisation, first in discharge of the costs of liquidation, and thereafter in payment of the claims of creditors in accordance with the relevant provisions of the law relating to insolvency.

[17] Mr Louw further submitted that the liquidators' duties must be discharged consistently with the position which they occupy in relation to the members and creditors of the insolvent company, and it is of the utmost importance that the liquidators should, as officers of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. The liquidators cannot be seen to act for or against any individual whatsoever. The liquidators owe a duty to the whole body of shareholder and the whole body of creditors.

[18] Lastly, liquidators are required to act in the best interest of creditors. Liquidators should also be wholly independent and should regard equally the interests of all creditors.

[19] Mr Louw concluded by submitting that Mr Viljoen merely has a claim against the insolvent company. He must submit a claim against the insolvent company like all creditors are required to do. It matters not whether Mr Viljoen is a preferent or concurrent creditor. Even a preferent creditor receives payment only after the costs of liquidation have been settled. It is exclusively the liquidators who are empowered to make payment of whatever amount Mr Viljoen is entitled to.

[20] Reference was made to the matter of *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549, where the Court held that under the statutory provisions then in force, an execution creditor enjoyed no preference over goods of a company which had been attached but which had not yet been sold when the company was subsequently placed under a winding-up order.

[21] Mr Louw further referenced the matter of *Liquidator, Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd*¹, where an execution creditor had received payment from the sheriff as a consequence of a sale in execution of the assets of the judgment debtor (a company). Because the company had been liquidated, after judgment but

¹ 1982 (4) SA 607 (W).

before the sale in execution took place, the liquidator claimed repayment of the amount paid to the judgment creditor. The liquidator contended that the funds formed part of the assets of the company in liquidation, whilst the execution creditor argued that it did not. Mr Louw argued that this dispute was similar to the one in this case.

[22] Mr Louw then concluded that the funds that are held by the applicant herein, should be paid to the liquidators and Mr Viljoen be ordered to pay the liquidators' costs on a normal scale as there is no evidence that the liquidators acted recklessly in any way.

Mr Viljoen's claim:

[23] Mr Lotter submitted that whilst section 391 provides that the liquidators must collect property of the company concerned for distribution to the creditors in accordance with the statutory ranking order, the liquidators cannot collect property which does not belong to the estate or was ringfenced prior to the establishment of the *concursum creditorum*.²

[24] Relying on the matter of *Booi v Wesley Pretorius & Associates*,³ Mr Lotter contended that once the review application is dismissed by the Labour Court **or abandoned**, Mr Viljoen was entitled to have the security paid over to him within fifteen days of the dismissal/abandonment of the review application".⁴ [emphasis added].

[25] Mr Lotter then dealt with the unfair dismissal being an injury to the personality of the employee and that the CCMA award falls within the ambit of *contumelia*.

² Fourth claimant's heads of argument para 2.8 and 2.9.

³ (EL 1212/2020) [2021] ZAECELLC 19 at [26].

⁴ Fourth claimant's heads of argument (supra) para 2.12.

[26] Mr Lotter sought to rely on the following cases as authority: *South African Reserve Bank v Leathern*,⁵ *State Bank of India v Denel SOC Limited*,⁶ *Agu v Krige & Others*⁷ as well as *Muller NO v Community Medical Aid Scheme*.⁸

[27] Mr Louw countered the utility or relevance of these matters in his reply. I am inclined to agree with him as they are not helpful in this matter. The first deals with a review of blocking orders issued by the Reserve Bank in terms of applicable regulations, the second case relates to irrevocable documentary guarantees, the third case deals with conveyancers' trust accounts and whilst the fourth case involves insolvency and their claim for medical aid contributions, that is how far the similarity between it and the instant application before me.

[28] Mr Lotter then submitted that security by its nature cannot be an asset in the estate. He referred to annexure "AJV 3"⁹ as an irrevocable guarantee of payment and undertaking to the Labour Court by the JC Uys Attorneys (who initially represented the company (in liquidation) in the event of the company losing the review, or the review being abandoned, to pay the amount over to Mr Viljoen.

[29] Mr Lotter's submitted conclusion was that the applicant has an obligation to pay over the funds held in the applicant's trust account to Mr Viljoen. The fourth claimant was not persisting with its original view that the liquidators be saddled with a punitive cost order *de bonis propriis*.

D. DISCUSSION AND ANALYSIS

[30] Section 359(1) of the 1973 Companies Act provides that where the court has made an order winding-up a company, all civil proceedings by or against the company

⁵ 2021 (5) SA 543 (SCA).

⁶ 2014 JDR 2586 (SCA).

⁷ 2019 JOL 41840 (WCC).

⁸ 2012 (2) SA 286 (SCA).

⁹ Filed under caselines 03-27.

concerned are suspended until the appointment of a liquidator, and any attachment or execution put in force after the commencement of the winding-up shall be void.

[31] An example is that a sale in execution of property attached prior to the commencement of the winding-up is suspended in terms of section 359(1)(a) until the appointment of a liquidator. Thereafter, the liquidator, in light of the provisions of sections 342(1) and 391, is bound and entitled to claim the property from the execution officer who must deliver it to him.¹⁰

[32] *“...And if, despite the institution of the winding-up, the execution creditor causes the sale to proceed, the proceeds of such sale must be released to the liquidator by the execution officer if held by him and must be repaid to the liquidator by the execution creditor if they were paid to him subject only to the preference enjoyed by the execution creditor for costs of execution...”*¹¹

[33] This therefore contemplates a situation where in the Fourth Claimant having been paid the amount under discussion here, would be expected to pay it on to the liquidators. It is beyond argument by now that Mr Viljoen is a judgment creditor of the company in liquidation.

[34] The amount of money being held in trust is, in my view, akin to property attached by the Sheriff prior to the commencement of the winding-up. The execution creditor does not have the preference or *pignus judiciale* to which under the common law an attachment of property in execution gives rise.¹²

¹⁰ Strydom NO v MGN Construction (Pty) Ltd and Another: In re Haljen (Pty) Ltd (In Liquidation) 1983 (1) SA 799 (D); Henochsberg on the Companies Act Vol. 1 (Service Issue 10 P.759.

¹¹ Henochsberg *ibid* 759 para 3.

¹² *Ibid* 759 where reference is made to the matter of *Liquidators Union & Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558-559, 562-563.

[35] Margo J's finding was therefore that an execution creditor had no entitlement to attached property in execution (apart from the costs of execution) and that such assets vest in the insolvent company.

[36] Similarly, in the *Strydom NO v MGN Construction*¹³ matter the Court held at 807H as follows:

"It is clear that, in terms of s 391 of Act 61 of 1973, a liquidator is required to recover and reduce into his possession all the assets and property of the company and then apply the same in satisfaction of the costs of winding-up the claims of creditors and to distribute the balance amongst those who are entitled thereto. He is therefore under a duty to claim from an execution officer any property of the company still in his hands at the time of winding-up. Section 342 of the Act provides that in every winding-up of a company its assets must be applied in payment of the costs, charges and expenses incurred in the winding-up."

[37] The legal position therefore is that an execution creditor does not have an entitlement to assets which have been attached pursuant to a judgment granted against a company which is subsequently wound-up. Such assets form part of the assets of the company in liquidation.

[38] In the instant case, the property/money is being held in trust, having been deposited by the company in liquidation. There was at no stage any transfer to the possession or ownership. While the property remains in trust (attached), it still forms part of the debtor's insolvent estate.¹⁴

¹³ Supra footnote 6.

¹⁴ See *Simpson v Klein NO and Others* 1987 (1) SA 405 (W).

[39] The situation had been elucidated much earlier in *Pols v R Pols-Bouers en Ingenieurs (Edms) Bpk*¹⁵ as follows:

“If the money is still under attachment, the creditor is not entitled to it, but is entitled only to a preference for his costs of execution. But if the money had passed to the creditor before winding up commenced, the liquidator has no claim to it”

E. CONCLUSION

[40] On the weight of the authority referred to above, I am persuaded that the R375 000.00 forms part of the assets of the company (in liquidation). The liquidators are by force of section 391 of the 1973 Companies Act required to recover same to be part of the insolvent estate of the company.

[41] Mr Viljoen has no legal entitlement to the funds held in trust by Van der Merwe Incorporated. His rights to lodge a claim as a creditor of the insolvent estate remain intact.

[42] Wherefore the following order is made:

(i) The applicant is ordered and directed to pay to the First to Third Claimants the sum of R375 000,00 with interest on the aforementioned sum *a tempore morae* on the prevailing rate of interest as prescribed, from date of this order.

(ii) The applicant is ordered to pay the First to Third respondents' costs of suit on a party and party scale at level B.

(iii) I make no order as to costs against the Fourth Claimant.

¹⁵ 1953 (3) SA 107 (T).

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 11 August 2024

Date of Judgment: 02 October 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 02 October 2024.