

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 004697/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
7/11/24	
DATE	SIGNATURE

In the matter between:

WYNAND DORFLING N. O

First Applicant

JAYNE DORFLING N. O

Second Applicant

and

JOHAN FRANCOIS ENGELBRECHT N. O

First Respondent

AMANDA LINDOKUHLE VILAKAZI N. O

Second Respondent

NEDBANK LIMITED

Third Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

Fourth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 07 November 2024.

Summary: Application for leave to institute an action on behalf of a Close Corporation in liquidation. Are the applicants entitled to obtain such leave in terms of section 388 read with section 387(4) of the Companies Act 61 of 1973? The rule in *Foss v Harbottle* is that in any action in which the wrong is alleged to have been done to a company, the proper claimant is the company itself.

Where a company has voluntarily been placed in liquidation by its members, it is the members that allege that the company is unable to pay its debts. The power to bring an action on behalf of the company under liquidation rests with the liquidator in terms of section 386(4)(a) of the Companies Act. In *Fargro Ltd v Godfroy* [1986] 3 All ER 279 (Ch) it was held that a *derivative action* is not available in a liquidation situation. An aggrieved shareholder may approach a Court and (a) ask the liquidator to bring the action in the name of the company, or (b) if the liquidator is unwilling, seek a relief (i) ordering the liquidator to bring the action on behalf of the company, or (ii) that the right be given to bring the action in the name of the company.

A Court acting under section 387(4) is like a Court of review, which must only interfere with the decision if the decision was taken *mala fide* and is one that a *reasonable liquidator* would not take. Some degree of judicial deference is required given the fact that a liquidator derives his or her powers from the statute. Held: (1) The application is refused. Held: (2) The applicants must pay the costs of this application on party and party scale taxable at scale B.

JUDGMENT

MOSHOANA, J

Introduction

[1] It is of significance to state upfront that this is not an application where the liquidators are alleged to have acted negligently in performing their duties in the winding up process. In an application of the present nature, what detains the attention

of a Court is the decision of the liquidators to refuse a request to institute an action against the alleged wrongdoers in the name of the company. In other words, a Court is called upon to consider the *bona fides* and reasonability of the decision of a liquidator to refuse to institute an action in the name of the company. Differently put, this Court is called upon to question the liquidator's failure to exercise his or her powers approbated in section 386(4)(a) of the Companies Act.¹

[2] Procedurally, the present application (application for leave) is launched within the parameters of section 388(1) of the Companies Act. That mentioned, this is an application brought by the trustees of Kaynazoe Trust ("the Trust"); namely: Mr Wynand Dorfling and Ms Shelly Jayne Dorfling (hereafter "the Trustees"). The Trustees seek an order to be granted leave to institute an action on behalf of Cinlo Thirty-Eight CC (in liquidation) ("Cinlo") against Nedbank Limited ("Nedbank") for damages. The application for leave is opposed by the liquidators and Nedbank.

Pertinent background facts to the present application

[3] Nedbank is a creditor of Cinlo, pursuant to Nedbank having advanced a loan and overdraft facilities to Cinlo. As at 13 June 2022, Cinlo was indebted to Nedbank in the tune of R 45 054 244.86, being in respect of the outstanding loan, overdraft facility and interest thereon. The Trust, as the sole member of Cinlo, through the Trustees, stood surety for the debts of Cinlo to the tune of R 36 809 000.

[4] During April 2022, having defaulted on its obligations towards Nedbank, Cinlo was unable to pay its debts. On 22 April 2022, by special resolution, Cinlo filed for voluntary liquidation with the Master of the High Court. Cinlo is the owner of two farms, namely: Kleinfontein and its Portion 1 and Doornfontein ("the Farms"). During July 2019, Kleinfontein was valued by Nedbank's valuator to be at the market value of R 37 000 000. In September 2019, Doornfontein was valued at R 12 700 000. Thus, as at 2019, the alleged "true" market value of the Farms combined was R 49 700 000. This allegation is strenuously disputed by the liquidators and Nedbank. I pause to

¹ Act 61 of 1973.

mention that this alleged “true” market value is based on nothing but the valuations of 2019.

[5] In terms of the Agricultural Valuation Report, internally kept by Nedbank, the two farms were valued at R 33 200 000 and R 12 900 000 respectively, with a total value of R 46 100 000 as at July 2022. Given the fact that Cinlo was in a liquidation process, the appointed liquidators sold the farms on 2 August 2022 for an amount of R 25 000 000. Nedbank, as the only preferred creditor, consented to the sale of the Farms. On 14 June 2023, the attorneys of the Trustees, in a rather lengthy missive, bemoaning the negligence on the part of Nedbank, requested the liquidators to institute, on behalf of Cinlo, an action against Nedbank for payment of damages allegedly suffered by Cinlo as a result of the sale of the Farms for an amount far below their “true” market value. I pause to mention that the farms were not sold by Nedbank. All it did, in its capacity as a preferred creditor, was to give consent to the sale of the farms.

[6] On 19 June 2023, in response to the missive, the liquidators, represented by Mr Johan Engelbrecht, stated the following:

“My failure to respond to the full content of your correspondence, should not be construed as my agreement thereto nor any admission of anything contained in your correspondence. Should it be necessary in future, I reserve my right to fully respond to the content of your letter.

I’ve duly considered your request and do not see merit in declaring myself *willing to institute action against Nedbank for payment of damages* as alleged in your correspondence.”

[7] Displeased by the decision of the liquidators of not willing to institute legal action against Nedbank, in January 2024, the Trustees launched the present application.

Analysis

[8] As indicated at the dawn of this judgment, the Trustees chose to label the present application as “leave to institute an action”. For reasons that will become apparent in due course, such is, in my considered view, a misnomer. The Trustees are

not actually seeking a derivative action in its truest form on behalf of Cinlo. When a company is in liquidation, a derivative action does not lie.² The simple reason for this principle is that when a company is liquidated, there is no longer directors or shareholders' meetings, which, in a sense, controls the activities of a company. The rule in *Foss v Harbottle* is that if a wrong is done to the company, the company is to be the proper plaintiff and only the company may sue and an individual shareholder or a group of shareholders may not sue.

[9] Section 353(2) of the Companies Act provides that as from the commencement of a voluntary winding-up, all powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned by the liquidator or creditors. In *casu*, Cinlo was placed on voluntary liquidation by its members because, on their own version, Cinlo was unable to pay its debts. They voluntarily placed Cinlo in the hands of the Master of the High Court. As the law dictates, the liquidators were appointed to conduct the proceedings of winding up Cinlo. An appointed liquidator acquires a variety of powers once so appointed.

[10] One of the general powers of a liquidator in any winding up process is to, once authorised, bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature. Thus, statutorily, the power to institute any legal action, lies with the liquidator. This Court takes a view that where a liquidator fails to exercise this statutory power, a form of *mandamus* review as contemplated in section 6(2)(g) of the Promotion of Administrative Justice Act³ (PAJA), may be instituted, as opposed to seeking leave to institute the alleged acquired legal action. To my mind, this statutory power must only be exercised by the liquidator and not any other person. Accordingly, in my view, unlike in a derivative action situation, which can only obtain when a company is not under liquidation, the appropriate order, if the Court is satisfied that the failure of the liquidator is reviewable in law, is to compel the liquidator to exercise the statutory power.

[11] Again, in an instance where the liquidator, as it is the case herein, expressly takes a decision not to exercise the statutory power, such a decision is administrative

² *Fargro Ltd v Godfroy* [1986] 3 All ER 279 (Ch) (*Fargro*).

³ Act 3 of 2000.

in nature and fits the definitional requirements of an administrative action which is reviewable in terms of any of the grounds specified in section 6(2) of PAJA. In this situation too, in my considered view, an aggrieved party should not seek leave to institute the action itself but must bring a review in terms of PAJA or a legality review.

[12] The Companies Act, 1973, predates the Constitution of the Republic of South Africa, 1996. Thus, it is readily acceptable not to observe in it dapples of fundamental rights guaranteed in the Constitution. Nonetheless, a situation that could easily be resolved by application of section 1(c) or 33 of the Constitution read with PAJA, was to be resolved through section 387(4) of the Companies Act. The subsection provides that any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks fit.

[13] An aggrieving decision involved herein is one of refusing to institute legal action against Nedbank for having allegedly sold the farms below their alleged “true” value. In terms of the applicable law, the only person empowered, albeit with authorisation, in a liquidation situation to institute legal action in the name of the company is the liquidator. A decision refusing to institute legal action is in effect a refusal to exercise statutory power. This is not a situation where the liquidators were authorised by the members in a general meeting to exercise the power. The Trustees are not alleging any authorisation given to the liquidators as contemplated in subsection (3) of section 386.

[14] Meskin in *Henochsberg on the Companies Act*⁴ commented that in a liquidation process, the aggrieved shareholders have two courses open to them. First, they can ask the liquidator to bring the action in the name of the company (exercise powers under section 387(4)). Secondly, if the liquidator asks for unreasonable terms, or is unwilling to bring the action (the situation in *casu*), the shareholders can apply to Court (using section 388(1) provisions). According to Meskin, under section 388(1), a Court may, (a) order the liquidator to bring the action, or (b) give the shareholders the right to bring the action in the name of the company. According to Meskin, the latter is the more usual order. This Court however takes the view that, since an exercise of

⁴ Meskin *Henochsberg on the Companies Act 61 of 1973* (2011) volume 1.

statutory power is involved, such powers cannot be given to a person not nominated by the Act. To my mind, taking into account the separation of powers, the powers of a Court are limited to compelling a liquidator, if it is warranted, to perform his or her statutory powers. It seems to me that widening the powers of a Court under the rubric of “it thinks fit” offends the principle of separation of powers.

[15] According parties not contemplated in the Act a right to do what the law, as designed, accorded to nominated persons is as good as a Court rewriting, as it were, the empowering statute. If the Court were to do so, it must do so, in my view, under exceptional circumstances. If the institution of a legal action is warranted, the most suitable person to do so on behalf of a company under liquidation, in my considered view, is the liquidator. Even if this Court is wrong in this regard, no case has been made to justify an order compelling the liquidators to institute an action against Nedbank. It is indeed correct, as submitted by counsel for the Trustees, that at this stage, the merits and demerits of the proposed action do not feature.

[16] However, a Court should not be quick to throw parties into litigation, even where there is no probable cause to do so. Nedbank, as a preferential creditor, did not sell the farms. The liquidators did so on the consent of Nedbank. The power to give consent is one that is legislated. Plainly, there is no recognisable cause of action against Nedbank. Of course this Court must question the *bona fides* of the Trustees.⁵ Is it in the interests of Cinlo to pursue litigation which is *prima facie* frivolous and vexatious? Clearly not.

[17] Greater care must be exercised by a Court faced with applications of this nature not to authorise individual shareholders to pursue their own personal claims under the wings of a company. To restate the common law principle in *Foss v Harbottle*, a wrongdoer against the company can only be sued by the company. However, if the same wrongdoer also wronged an individual shareholder, the principle in *Foss v Harbottle* does not prevent a shareholder from instituting its own action.⁶ In any event, the Court in *Ragless v IPA Holdings Pty Ltd (in liq)*⁷ laid down that the applicant must

⁵ *Mouritzen v Greystones Enterprises (Pty) Ltd* 2012 (5) SA 74 (KZD) at para 59.

⁶ See *Tran v Bloorston Farms Ltd* 2020 ONCA 440 (CanLII) at para 68.

⁷ (2008) 65 ACSR 700 at para 40.

establish that there is a real question to be tried; that is to say, he or she must be able to specify the legal rights to be determined at the trial.

[18] An applicant must show that there is a serious question to be tried with reference to the infringement of some legal right or the commission of some legal wrong. The Trustees are obliged to at least provide the Court with sufficient evidence and material to enable it to determine whether there is a serious question to be tried.⁸ To my mind, the Trustees failed to provide this Court with sufficient and material evidence to support an allegation that the true value, which was obtainable at the time of the sale of the farms was what the 2019 and July 2022 valuations alleged the value to be. Probably, a legal opinion from an independent senior counsel may have been weighty.⁹

[19] When faced with an application by an aggrieved person, a Court, like the present, will not lightly interfere with a decision which is *bona fide* or reasonable, regard being had to the objects of winding up and the duties of a liquidator in general. A liquidator acts in the interest of the body of creditors during a winding-up process.¹⁰ Section 362 makes it plain that for the purposes of conducting the proceedings in a winding up, a liquidator shall be appointed. To my mind, in this type of an application, a Court must necessarily defer to the powers of the liquidator, even if a Court has a discretion to make such order as it deems fit.

[20] As recognised in *Bato Star*, a Court is not endowed with superior knowledge to a point of ignoring, as it were, the expertise of a liquidator. Section 386(4)(b) endows the liquidator with powers to agree to any reasonable offer of compromise made to the company by the debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt. It must be recognised that the powers in section 386(4) are subject to the authority by a meeting of members.¹¹ Therefore, in compelling a liquidator to exercise

⁸ *Charlton v Baber* (2003) NSWSC 745.

⁹ *Carpenter v Pioneer Park Pty Ltd (in liq)* (2004) NSWSC 1007.

¹⁰ *Standard Bank of South Africa Ltd v The Master of the High Court and others* 2010 (4) SA 405 (SCA) at para 1.

¹¹ See *Griffin and Others v The Master and Others* 2006 (1) SA 187 (SCA) (*Griffin*).

its statutory powers, a Court must bear in mind that such powers are circumscribed statutorily.

[21] In terms of section 386(2A), the liquidator is empowered to recommend to the Master of the High Court, if satisfied that any immovable property of the company ought to be sold. When regard is had to all those powers and duties, it is difficult for this Court to accept that in refusing to institute an action against Nedbank, the liquidators acted in a *mala fide* manner or in a manner that a reasonable liquidator would not act. These are motion proceedings, the principle in *Plascon Evans* must apply. An application contemplated in section 387(4) read with section 388(1) is not there for the mere taking. Powers to be exercised by this Court under these sections are not dissimilar to the ones in section 165 of the Companies Act, 2008.¹² *Bona fides* and the best interests of a company remain the beacons. In my view, a party must demonstrate that the liquidator acted with *mala fides* and in a manner that a reasonable liquidator would not act.

[22] Instituting legal action has attached to it the risk of attracting legal costs. It must be borne in mind that the liquidator would be litigating in the name of a company if so compelled and such opens up a limping company to further haemorrhage. Similarly, if this Court affords the Trustees a right to sue, they will proceed in the name of the company, and in turn will attract legal costs for a moribund company. Unwillingness to expose an ailing company to further haemorrhage cannot, in my view, be seen as a *mala fide* and unreasonable act. The liquidators averred and these averments remain unchallenged, that they did not (a) act in dereliction of any of their statutory duty; (b) they had received various offers to purchase; (c) they had taken control of the farms and protected them; and (d) they were instructed by the sole creditor of the liquidated estate, Nedbank, to accept the best offer at the time. When these averments, together with the admitted facts, are taken into account, an order granting the final relief sought by the Trustees is not justified. In my view, a contention that the farms should have been sold through a public auction does not suggest that a valid cause of action in law may magically emerge against Nedbank. All of this is speculative and unhelpful to support any best interests of the company.

¹² Act 71 of 2008.

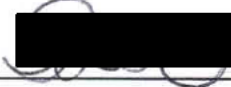
[23] One other aspect that merits mention in this regard is that incompetence or non-performance, as in failure to perform the duties required in the liquidation process, can lead to the removal of a liquidator. The section 379(2) procedure was available to the Trustees. In the circumstances, the application falls to be dismissed. What remains is the issue of costs.

[24] With regard to costs, this Court is possessed with a very wide discretion. There is no basis in law upon which the rule of costs following the results should not find application in this instance.

[25] For all the above reasons, I make the following order:

Order

1. The application is dismissed.
2. The applicant is to pay the costs of this application on a party and party scale taxable or to be settled at scale B.



GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:

Mr JJ Pretorius

Instructed by:

Muller Attorneys, Pretoria

For the Respondent:

Mr JM Killian

Instructed by:

Gerrit Coetzee Attorneys, Pretoria

Date of the hearing:

24 October 2024

Date of judgment:

07 November 2024