

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 13632 / 2023

In the matter between:

FANTOM OPERATIONS LTD

Applicant

JACO MAX AVENANT

First Respondent

W VAN DER LINDE

Second Respondent

CHARLES SCOTT STEWART

Third Respondent

In re:

JACO MAX AVENANT

First Respondent

W VAN DER LINDE

Second Respondent

In re:

Case number: 11479/2023

FANTOM OPERATIONS LTD

Applicant

REECO HOLDINGS (PTY) LTD.

Respondent

Coram: Wille, J

Heard: 6 November 2023

Delivered: 15 November 2023

REASONS

WILLE, J:

Introduction

[1] This was an urgent application by the applicant to set aside and reconsider an order that I granted in the urgent fast lane about two months ago at the instance of the first and second respondents.¹ The order I granted was without any notice to the liquidators of the liquidated company.² The order led to the establishment of a commission of enquiry into the affairs of the liquidated company.³

[2] Following extensive argument, I reconsidered and set aside my initial order, which led to the establishment of the commission of enquiry at the instance of the first and second respondents, together with a portion of the costs on the attorney and client scale. Following a winding-up order, the first and second respondents (the respondents) launched an urgent application without any notice to the liquidators of the liquidated company, which found me in the urgent fast lane. They averred that they were creditors of the liquidated company.

[3] I determined that the matter should be heard in court (in camera), as I was initially unpersuaded that these respondent creditors had the requisite standing to pursue the application to establish the enquiry. I was nevertheless persuaded and granted the order, which is now the subject of this reconsideration application. The liquidated company was a property holding and nature conservation company. It was provisionally liquidated about three months ago and finally liquidated about two months ago. Provisional and final liquidators were subsequently appointed. The applicant was the petitioning creditor in the liquidation application and advanced a substantial claim against the liquidated company.⁴

¹ The 'respondents' (the third respondent takes no part in these proceedings).

² Reeco Holdings (Pty) Ltd under Case Number 11479 / 2023 (in connection with the main 'liquidation' application).

³ Following sections 417 and 418 of the Companies Act 71 of 1973.

⁴ In the sum of R185 353 143,35.

Overview

[4] The first respondent was a former director of the liquidated company and resigned about six months ago. The second respondent provided farm management services to the liquidated company through a discrete company. The basis for the reconsideration and rescission application is the alleged misrepresentation, non-disclosure and abuse of process on the part of the respondents.

[5] They say this, among other things: (a) because the respondents failed to give the liquidators notice of their application; (b) because the respondents misrepresented to the court that they were creditors of the liquidated company; (c) because they failed to disclose numerous material issues which would have influenced the decision to grant the enquiry order, and (d) they alleged that the respondents' application was an abuse of process as it was launched with the ulterior motive to undermine both the liquidation and the enquiry process which the respondents knew the applicant would initiate following the winding-up order of the liquidated company.

Context

[6] Towards the end of last year, an order was granted in an application launched by the applicant to allow the applicant to enter the then-cited respondents' premises to obtain evidence essential to the applicant's claims against these then-cited respondents. The first respondent was one of these cited respondents. This order was executed against four respondents, including the first respondent, at his residence.

[7] In this latter application, it was alleged that the applicant advanced funds, resulting in two significant investments. One involved a local conservation project, and the other involved local property and other investments abroad.⁵ The applicant's case was that these investments would ultimately be controlled through a foundation as the holding entity.⁶ The applicant advanced that these investments were unlawfully 'hijacked' in a fraudulent scheme masterminded by a separate entity in this country.⁷

⁵ In the Netherlands.

⁶ This was through the vehicle of a foreign trust called the 'Stichting dApp' ("dApp").

⁷ By Jonathan Engelbrecht ('Engelbrecht'), Piet Nieman ('Nieman'), and by Edgepoint Consulting (Pty) Ltd ('Edgepoint')

[8] As a direct result of this alleged impropriety, one of the applicant's representatives requested to be appointed to the foundation's board to facilitate 'transparent' corporate governance. This request was denied, and the applicant instituted proceedings abroad for the removal of one of the directors allegedly intricately involved in this 'hijacking' and who also masterminded this alleged fraudulent scheme.⁸

[9] This named director stood down at the subsequent hearing, and the foreign court appointed an independent director.⁹ As a result of this, among other things, the subject foundation was later returned to the applicant's control. Investigations by the applicant's legal team revealed that contrary to the expressed intention that the foreign foundation would ultimately control all these investments, it appeared from the corporate holding structure that the liquidated company was controlled by one of the discrete third-party company directors.¹⁰

[10] Thus, in the application for the winding-up of the liquidated company, it was averred by the applicant that it advanced considerable funds to the liquidated company on loan account to fund its capital acquisitions and its ongoing expenditures. The loan agreement terms were that US\$30,000,000.00 would be advanced directly into the liquidated company's bank account. It was envisaged that the applicant would effectively control the liquidated company following a complicated agreed company reporting structure.¹¹ The loan would have no fixed repayment date and would not bear interest.

[11] The liquidated company used some of these funds to purchase several farms, livestock and game. The total claim advanced by the applicant under and in terms of the loan agreement amounted to R185,353,143.35. Also, in the application for liquidation, reference was made to questionable dealings and misappropriations by the then-directors of the liquidated company, and it was alleged that there were some reasons to believe that some of the former directors of the company may be liable for breaching their fiduciary responsibilities as directors.

⁸ Mr Nieman.

⁹ Mr Jasper Berkenbosch ('Berkenbosch') was appointed on 22 December 2022.

¹⁰ Mr Engelbrecht.

¹¹ Only US\$12 500 000 was ultimately advanced.

[12] The founding affidavit in support of the winding-up of the liquidated company highlighted some issues that needed to be investigated, among other things, the following: (a) certain alleged discrepancies in farm valuations pointing to possible overpayments; (b) certain alleged discrepancies in game valuations pointing to possible overpayments; (c) attempts to misappropriate company assets by issuing questionable preference shares and, (d) several questionable payments to former directors and several alleged irregular expenditures by former directors and managers.

The first application for the establishment of an enquiry

[13] The first respondent alleged the matter was urgent and sought the appointment of the third respondent as a commissioner for the insolvency enquiry, and this is where the matter found me in the urgent fast lane.¹² I directed that the matter be heard in court (in camera) and not in chambers as I was concerned about the legal standing of the first and second respondents to launch the application as ‘creditors’ of the liquidated company.

[14] This notwithstanding, I was persuaded on the papers as they were presented (without the benefit of the other side of the story) that the first and the second respondents were *bona fide* creditors and were vested with the requisite *locus* to launch the application. It seems evident now that I was mistaken and, regrettably, may have been misled.

The second application for the establishment of an enquiry

[15] A similar application was drawn and issued by the first applicant at about the same time but was presented to the court only a few days after the first application was presented before me. This application was correctly served on one of the provisional liquidators, who furnished copies to his co-liquidators. I must have been busy that week as the second application was also presented before me for determination only a few days after the first application. The applicant became aware of the order I granted regarding the first application shortly before the second application was determined before me. This information came to the knowledge of the liquidators by chance on the day before the second application was due to be heard.

¹² On Monday, 14 August 2023.

[16] Thus, when the second application came before me, the applicant wisely requested an order granting the applicant access to the court file in connection with the first application. I obliged as I did not have a good comfort level about these subsequent developments after reading the second application's content. I say this because, in one of the affidavits supporting the second application, it was disputed that the first and second respondents were genuine creditors of the liquidated company, which was the burning issue that I was uncomfortable about when I determined the first application.

[17] Regarding whether the first and second respondents were *bona fide* creditors, it was averred that requisition forms filed (in support of these claims as creditors) were filed on behalf of yet another discrete entity concerning certain rights that were on the face of it, neither valid nor liquid. Most importantly, it was also pointed out that no prior notice had been given to the provisional liquidators of the liquidated company before the first application was determined.

[18] This issue should have been brought to my attention by counsel for the first and second respondents. Taking into account the above circumstances, I granted an order in favour of the applicant to approach the court on the same papers (supplemented as may have been necessary) for an order to reconsider the order which I granted concerning the first application.

Consideration

[19] The applicant's case was that after they had obtained access to the court file regarding the first application, they believed that the first application was replete with serious non-disclosures and misrepresentations. They communicated with the respondents' attorneys to pursue this further. They requested an undertaking that the third respondent should take no further steps according to the order that I granted regarding the first application. This reasonable request fell on deaf ears.

[20] The enquiry authorized in terms of the second application has since commenced, and the first session of the commission of enquiry has already been convened, at which oral evidence was led from four witnesses. In addition, the respondents have received notifications to appear at these enquiry proceedings.

[21] The respondents' attorneys have also since applied to rescind or reconsider the order granted in connection with the establishment of the second enquiry and have further declined to confirm whether the respondents will attend upon the enquiry on the further dates on which the enquiry will be conducted.

[22] The first application emphasized maintaining secrecy. Significantly, it piloted the idea that the enquiry should be convened into the affairs of the liquidated company and try to disguise the loan by the applicant to the liquidated company. I say this because this loan is described as an 'investment', and it was suggested that the entire liquidation application needed to be more understood.

[23] The investment argument by the respondents linked to the principle of a share premium bears scrutiny. I say this because this company was barred from issuing shares having a par or nominal value.¹³ This is also because the liquidated company issued the shares before the applicant advanced any funds.

[24] This position regarding the loan is also corroborated to a certain extent by a former director who advanced that it had all the features of a loan because of the following: (a) the funding was provided directly to the liquidated company; (b) no shares were ever sold or issued with any condition of a share premium and, (c) the memorandum of incorporation expressly precluded the issue of these types of shares.

[25] The respondents initially stated that they were creditors of the liquidated company. After that, they conceded that this was inaccurate and that they were not creditors of the liquidated company in their own right. They say these allegations were in error, that no malice was intended, nor was this done to deceive or mislead.

[26] It was significant that these material non-disclosures, on their own, would permit a rescission of the order I granted. After all, the order was granted because the respondents averred that they were *bona fide* creditors of the liquidated company. By contrast, the respondents argued that nothing turned on this because the respondents would have (in any event) had the necessary *interest* to launch the application.

¹³ In terms of section 35 (2) of the 2008 Companies Act, 71 of 2008 (the exception is in terms of the Banks Act 124 of 1993)

[27] The respondents say this because they aver that they had shareholdings in one or other legal entity, which was a creditor. I do not see it this way. I say this because it would, as a matter of pure logic, be the discrete legal entity that would possess the relevant interest.¹⁴ The respondents do not engage with this at all.

[28] When the initial matter was presented before me, I expressed my reservations about the legal standing of the respondents. In response, it was submitted that the respondents had the requisite legal standing because they were genuine creditors. This was incorrect. The factual position was thus misrepresented. Also, I was at some disadvantage in considering the context of the application as the winding-up application was not placed before me for my perusal when I considered the initial establishment of the enquiry application.¹⁵

[29] I say this because, in hindsight, the founding affidavit in the liquidation application was set against several alleged allegations of fraud, misrepresentation and the hijacking of companies. None of this information (whether true or false) was featured in the initial enquiry application papers presented before me. The application also flagged several alleged mismanagement issues, which directly (and indirectly) touched on alleged issues of mismanagement by both of the respondents to this application.

[30] Turning now for a moment to the issue of the lack of service of the initial application on the provisional liquidators. To try and explain this, the respondents attempted to turn square corners. As a matter of pure logic (leaving aside our jurisprudence for a moment), the respondents were bound to notify the provisional liquidators to enable them to consider the matter and decide whether or not to take action.¹⁶ This is the case even where a liquidator was to be the subject of the enquiry.¹⁷ This must be so that the liquidators can fulfil their functions of maintaining oversight over insolvency proceedings. This is, among other things, why they are appointed. It is a matter of common cause that no such notice was given to the provisional liquidators before the hearing of the first application.

¹⁴ Only if the requirements in section 165 of the 1973 Companies Act were satisfied, would a 'derivative' proceeding accrue.

¹⁵ Also, the 'practice note' recommended that only pages 7 to 37 of the founding affidavit supporting the application be read.

¹⁶ *Ex Parte Brivik* 1950 (3) SA 791.

¹⁷ *Power NO v Bieber* 1955 (1) SA 490 at 504.

[31] On this point, history proves a more reliable guide to this issue than logic. This is because the founding affidavit in the initial application reasonably infers from the lack of notice to the liquidators that this approach was designed to keep the application secret from the liquidators. The service issue on liquidators was not canvassed before me when the initial application was presented. Where an order is sought without notice, good faith must be observed. All material facts must be disclosed, which might influence a court's decision, and the withholding or suppression of material facts entitles a court to set aside an order granted under these circumstances. Thus, the applicant must be scrupulously fair in presenting its case and deal fairly with any defences it is aware of or may reasonably anticipate. Points favouring the absent party must also be drawn to the judge's attention.

[32] The *Schlesinger* principle or doctrine should always be observed when applications are piloted without notice.¹⁸ Also, a litigant should not deflect the judge's attention from the force and substance of the absent respondent's known or likely stance on the matters at issue.

[33] Most importantly, it is so that the enquiry establishment provisions apply only for holding a confidential and private enquiry into the trade, dealings, affairs or property of a company that has been placed into liquidation due to its inability to pay its debts. The company's liquidators typically bring these types of applications seeking the holding of such enquiries. They can also be brought by a creditor or another party which establishes that it has an interest in the company.¹⁹ However, a creditor or person with some other interest must show that the enquiry is not required for its ends but rather that it would benefit the company in liquidation. The rationale for this is dictated by the difficult position in which liquidators find themselves, being strangers to the affairs of a company in financial difficulty.²⁰ Thus, this enquiry process is aimed at achieving the primary goal of liquidators, namely to determine what the assets and liabilities of the company were, to recover assets and to pay liabilities, and to do so in a way which will best serve the interests of the general body of creditors.²¹

¹⁸ *Schlesinger v Schlesinger* 1979 (4) SA 342 at 350B.

¹⁹ *Ex Parte Brivik* 1950 (3) SA 791.

²⁰ *Re Rolls Razor Ltd* [1969] 3 All ER 1386.

²¹ *Bernstein v Bester* 1996 (2) SA 751 (CC) at paragraph 16.

[34] As a general proposition, an order is erroneously granted if there existed, at the time of its issue, facts that the court was unaware of, which would have precluded the granting of the order and induced the court not to grant the order.²² If material facts are not disclosed or if the facts are deliberately misrepresented to the court, then the order has been erroneously granted.²³

[35] A court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in the affidavits filed by all the parties.²⁴ The outcome is that the reconsideration needs to be done based on a set of circumstances quite different from that under which the original order was obtained.²⁵

[36] The court has broad discretion to determine whether it is necessary to reconsider an order. The argument by the respondents that no notice was required to be given to the provisional liquidators before granting the initial order is as pale as death itself for the reasons set out herein. Further, it is common cause that the respondents were not and are not creditors of the liquidated company.

[37] In this case, the non-disclosures were far worse than simply ticking the wrong boxes on many forms. The respondents should have known better and did know better. The call in this matter is not even close, and the respondents' litigation compass badly needs repair. Thus, the facts and circumstances now differ significantly from when the order was granted, and the application must succeed.

Costs

[38] The applicant seeks a punitive costs order against the respondents. The award of costs on a punitive scale is made where the court considers it to be just that a successful litigant should not be out of pocket where there are exceptional circumstances arising either from the circumstances which give rise to the application or from the conduct of the losing party.²⁶ The award of costs is a discretionary one.

²² *Nyingwa v Moolman NO* 1993 (2) SA 508 at 510 D-G.

²³ *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) at 153 C-E.

²⁴ *Oosthuizen v Mijis* 2009 (6) SA 266 (W) at 267 - 269.

²⁵ *The Reclamation Group (Pty) Ltd v Smit and others* 2004 (1) SA 215 (SE) 218 D-E.

²⁶ *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597 at 607.

[39] The applicant motivated its request for punitive costs for the following reasons: (a) the respondents were fully aware of the nature of the disputes before the application was launched; (b) the respondents were not and are not creditors, and (c) the respondents did not give notice to the provisional liquidators before the application.

[40] The applicant contends for costs on a punitive scale for the entire application. I do not see it this way. However, some costs should be paid on an attorney and client scale. One of the fundamental cost principles is indemnifying a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.²⁷ The last thing already congested court rolls require is further congestion by an unwarranted proliferation of litigation.²⁸

[41] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.²⁹ The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as to costs as would be fair in the discretion of the court. No hard and fast rules have been set for compliance and conformity by the court unless there are exceptional circumstances.³⁰

[42] Costs follow the event in that the successful party should be awarded costs.³¹ This rule should be departed from only where reasonable grounds for doing so exist.³² In all the circumstances, a punitive costs order is warranted for some of the reasons accentuated by the applicant. Whilst I have some deep suspicions about the respondents' alleged conduct during this litigation, I cannot visit upon them the requested attorney and client cost order sought by the applicant since the inception of this litigation, absent further evidence.

²⁷ *Union Government v Gass* 1959 (4) SA 401 (A) 413.

²⁸ *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) para [16].

²⁹ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055 F-G.

³⁰ *Fripp v Gibbon & Co* 1913 AD 354 at 364.

³¹ *Union Government v Gass* 1959 (4) SA 401 (A) 413.

³² *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 (3) SA 692 (C).

[43] That said, it must have dawned on the respondents shortly after the application was filed that their opposition to it was doomed to failure. For this reason, a portion of the costs awarded in this matter was on the scale between attorney and client as set out in my order. These are my reasons for the order being granted and for setting aside the order with its costs.

E.D. WILLE
(Cape Town)