IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case No: 6914/2004

NOT REPORTABLE DATE: 13/4/2006

In the matter between:

PETRUS CORNELIUS MEYER Applicant

and

JOHAN PHILIP LOTZ First Respondent

DEON MARAIS BOTHA N.O Second Respondent

ADELE DOREEN MCQUARRIE N.O Third Respondent
(In their capacity as *co-liquidators* of *Transvaal Hotel* CC *Ck 1989/005950/23, duly appointed under The Certificate* of *appointment* No. *G1461/2004 dated* 9 *July 2004)*

In re:

In the matter of:

JOHAN PHILIP LOTZ Applicant

and

PETRUS CORNELIUS MEYER First Respondent

TRANSVAAL HOTEL CC Second Respondent

JUDGEMENT

MOLOPA AJ:

The Applicant, Petrus Cornelius Meyer hereinafter referred to as *("Applicant* "), launched this application against the First Respondent [the Second and Third Respondents having been cited only in their official capacity as Liquidators of the Transvaal Hotel CC, since the Hotel was, and at the time of the launching of this application under liquidation, which liquidation has now been rescinded as at 21 October 2004], for an order in the following terms:

1. That an order granted by the Honourable Mr. Justice Hartzenberg on 25 August 2004 be rescinded.

2. That the First Respondent, Johan Philip Lotz (hereinafter referred to as *("the First Respondent')* be ordered to pay the costs of this application.

3. Further and / or alternative relief.

The Applicant in this instance is the First Respondent in the main application whereas the First Respondent in this instance is the Applicant in the main application. The parties shall be referred to herein as Applicant (Meyer) and First Respondent (Lotz). The issues set out in the papers enunciated as the basis of this application are briefly that:

The order granted by the Hourable Mr. Justice Hartzenberg on 25 August 2004 was erroneously sought and / or granted in the absence of the Applicant, and while Hartzenberg J, nor the First Respondent and / or his legal representatives were aware of the liquidation of Transvaal Hotel CC under Case No. 8483/04. It is thus contended that the order of Hartzenberg J, in the light of the liquidation order was erroneously sought and / or granted, as envisaged in the Uniform Rules 42(1)(a).

Further, that since the Applicant was under the impression that it was not necessary for him to bring the liquidation order of the Close Corporations under the attention of the Court, and since the First Respondent was also not aware of the liquidation order aforesaid, that therefore since both parties for different reasons failed to bring the attention of the liquidation order to the attention of the Court, that there was therefore a common mistake between the parties as envisaged in Uniform Rule 42(1)(c), and that therefore for reasons set out above, the order granted by Hartzenberg J on 25 August 2004 should be set aside with costs.

The Applicant contends that since section 66(1) of the Close Corporations Act 69 of 1984 makes the provisions of section 359 of the Companies Act No. 61 of 1973 applicable to the liquidation of the Close Corporation, that therefore

the application brought before Hartzenberg J falls within the meaning of "civil *proceedings"* as envisaged in section 359(1)(a) of the Companies Act and that therefore the liquidation order of the Transvaal Hotel CC obtained under Case Number. 8483/04 suspended the main application, and that since the Court was not aware of such liquidation order, the order granted by Hartzenberg J was erroneously sought and / or granted.

Section 359 of the Companies Act provides as follows:

"(1) *When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-*

(a) *all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and*

(b) *any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.*

(2) (a) *Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up,*

shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) lf notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.

The question that arises is whether the application by the First Respondent in the main application against the Applicant herein can be said to be civil proceedings against the Close Corporation as envisaged in section 359(1)? In my view, and regard being had to all the circumstances around this case, the proceedings in the main application was specifically between the Applicant and the First Respondent. The Applicant has deposed to the answering affidavit in the main application in his personal capacity and not even on behalf of the Close Corporation. The order sought in the main application is specifically against the Applicant finally and not against the Close Corporation. It therefore cannot be said that the provisions of section 359 (1) of the Act is applicable in any way.

Further there is contention on behalf of the Applicant that the provisions of section 341 (1) of the Companies Act is also applicable. Section 341 (1) provides as follows:

"(1) *Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.*

(2) *Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders".*

If one has regard to the Judgement of Hartzenberg J one sees that the Applicant has been given an option to buy out the First Respondent, and this option still stands and has not been exercised. The matter being between the Applicant and the First Respondent specifically, the two (2) parties being the only members of the Close Corporation, I do not see how the Applicant seeks to rely on the provisions of section 341(1), I therefore find that the provisions of section 341(1) are not applicable in this instance.

Looking at the conduct of the Applicant in relation to the main application, the order of which the applicant seeks to rescind, one finds the conduct of the Applicant extremely calculated, untoward and deliberate in not coming to Court on the day in question. The Applicant did not even bother to bring to the attention of the Court the fact that the Close Corporation was under

provisional liquidation (although the liquidation in question has already been rescinded). It is not in dispute that as at 31 March 2004, when the liquidation application papers of the Close Corporation were served on one Ms Lettie Barnard at the Close Corporation, although the papers per se were not served personally on the Applicant, the Applicant was at the time still effectively managing the Close Corporation.

Nowhere in the papers does the Applicant state whether the service of the liquidation application papers were brought to his attention prior to the 20th of April 2004 when he signed his answering affidavit in the main application, but his conduct clearly shows that he knew that such liquidation application papers had been served, hence his offhand reckless conduct in attending to the main application. It is very clear that his absence before Court was solely and deliberately caused by his own conduct and he cannot and / or should not expect the Court to come to his assistance. The Applicant's remissness in taking any further interest in his own case cannot constitute sufficient cause for this Court to exercise it discretion in his favour

It is trite that the Applicant should make out his case in his founding affidavit as the affidavit constitutes evidence.

See : *Shepherd v Mitchell Sea Freight (SA) Pty Ltd,* 1984 (3) *SA 202 T at 205 E*

: *T. Beeck v United Resources* CC *and Another* 1997 (3) *SA* 315 *(C) at* 328 *B*

: *National Director of Public Prosecutions v Philips and Others 2002* (4) *SA 60 at 106* C

In his founding affidavit the main basis for his application for rescission of judgement is mainly that Hartzenberg J took into consideration incorrect financial statements in coming to his findings, and that since he (that is the Applicant) was not represented, Hartzenberg J therefore came to a wrong conclusion based on the incorrect financial statements. It is clear from the judgement of Hartzenberg J that he duly considered all facts before him including the correct financial statements attached to the affidavits before him since this is an aspect which was canvassed by both the Applicant and the First Respondent's legal representatives and correct financial statements were then filed.

It is clear that the judgement of Hartzenberg J was a well considered judgment, which aspect was conceded by Applicant's Counsel in Court, and

one cannot in any event find any fault with such judgment. Only in the replying affidavit, when the Applicant realises that his argument on the so-called *"incorrect financial statements"* is flawed, does the Applicant, realising that the liquidation order which he sought to rely on has been rescinded, does the Applicant attempt to bring in the reliance on the provisions of section 359(1) and 341 (1) of the Companies Act. I have already dealt with those provisions above and find that they are in any event not even applicable herein, and therefore do not come to the assistance of the Applicant.

As already stated hereabove, it is clear from the judgment of Hartzenberg J that he thoroughly applied his mind to all the facts before him, including the financial statements which were attached by the Applicant's answering affidavit in the main application. The fact that the Applicant was not present, although all his opposing papers had been filed and considered, which absence was in my view in any event deliberate, it cannot in my view be said and / or mean that the judgment was erroneously sought and / or granted.

Even if it can be said that there was a liquidation order, the circumstances under which the liquidation order in question under Case No. 8483/04 were obtained are highly suspect in any event. Clearly the liquidation application in question was not brought to the attention of the First Respondent, the Applicant purported to buy the Close Corporation as a going concern through

his other Close Corporation, Shomene 3 CC, Applicant was the only creditor who lodged a claim against the Close Corporation as reflected in Annexure *"PCM13"* to his founding affidavit, the liquidation application was brought by his own girlfriend Ms Mitchel. Throughout the liquidation process Applicant is the only active party *(to* the exclusion of the First Respondent who was also a member of the Close Corporation).

Hartzenberg J 's judgement cannot in any event be said to have been erroneously granted nor can it be said that there was a mistake common to the parties. There was no mistake at all, more so, in so far as the Applicant is concerned. As already stated above the Applicant was purely remiss in taking any further interest in his own case because in my view, regard being had to circumstances around the liquidation order alluded hereabove he thought that he was covered by the purported liquidation of the Close Corporation.

The Applicant does not specifically states when he got to know about the liquidation application, he vaguely states that he only got *"wind of it".* He does not play open cards and state vaguely when he got *"wind of it",* he simply leaves a vacuum in the Court application not stating when he got *"wind of it"* .

As already stated above, looking at all facts before the Court, the application was served on Ms Lettie Barnard, at the Close Corporation on 31 March 2004. The Applicant was still managing the Hotel at the time. In all probabilities, the Applicant must have been informed of the process, i.e, the service of the liquidation application even before he signed his answering affidavit on 20 April 2004, yet he did not bother to disclose this, and in any event as already stated above looking at all the facts before Court including the liquidation application itself it is highly suspect that the Applicant knew exactly what was happening in relation to the liquidation application under Case No. 8483/04. Anyway, nowhere in his application or opposition of the main application does he even attempt to deal with this aspect of the liquidation application, it only came out on my questioning to his Counsel that at the time of service of the liquidation application Applicant was still actively involved in managing the Transvaal Hotel Close Corporation.

I find, on a balance of probabilities that Applicant knew of the liquidation application even before the time he signed his answering affidavit on 20th April 2004. He did not bother to bring it to the attention of Hartzenberg J and this in fact explains his erratic conduct in not even appearing at Court on the day Hartzenberg J gave judgement, knowing very well that his Attorneys of record had withdrawn.

In any event as already stated above, Hartzenberg J thoroughly applied his mind to his judgement. His judgement cannot be said to have been erroneously sought and / or granted, nor can it be said that it was a mistake.

Looking at the events surrounding the main application, it is clear that the Applicant deliberately did not even bother to bring the liquidation application to the attention of the Court nor to the attention of the First Respondent, if one looks at the circumstances around the withdrawal of the Applicant's Attorneys of record, clearly, they withdrew more than two (2) months before the application was heard, after the notice of set down had been properly served on them, I cannot comprehend that the withdrawal by the Attorneys of record was because there were no instructions regarding security, which, as it was correctly pointed out by First Respondent's Counsel was only due at least ten (10) days before the hearing of the application, so, why can it be said that the Attorneys withdrew at least two (2) months prior to the hearing of the application because of Applicant's failure to give instructions on security? Applicant contends that they (his Attorneys) withdrew because already there was a liquidation order under Case No 8483/04, therefore: he did not give them further instructions.

In any event, whatever the reason was, the Applicant had an opportunity to engage other Attorneys if he so wished prior to the hearing of the main application. He himself (ie, the Applicant) knew of the hearing, he boldly said in his application for rescission that he did not see it necessary to attend Court and / or to instruct any other Attorney to attend to the hearing well knowing that the matter was going to heard, nor did he bother to get any further legal advise in this regard. He was purely remiss in taking any further interest in his own case. The First Respondent cannot be prejudiced by the conduct of the Applicant, nor can the Court be inconvenienced by the conduct of the Applicant. In any event, the liquidation order under Case No. 8483/04 has been rescinded, so what happens to this matter if Hartzenberg J's judgement were to be rescinded? It will simply be re-enrolled and re-argued and in my view the same conclusion will still be reached as the conclusion reached by Hartzenberg J.

As already stated above, despite the fact that the Applicant was not physically present in Court, deliberately so, it is clear from the judgement of Hartzenberg J that he thoroughly applied his mind to all the facts before him. Applicant's opposing papers duly served before the Court and Hartzenberg J's judgement is based on all the facts before him including the opposing affidavits which had been filed by and / or on behalf of the Applicant.

For reasons stated above it is my considered view that the Applicant does not make out a case for the rescission of judgement, whether under Rule 42(1) (a) or Rule 42(1)(c). In the result the application for rescission is dismissed with costs on an Attorney and client scale.

It is very clear that the conduct of the Applicant is such that the First Respondent cannot be expected to be out of pocket due to the conduct of the Applicant throughout the main application including the rescission application, hence an order that Applicant pays the costs on an Attorney and client scale.

In the result the order of Hartzenberg J stands and the rescission application is dismissed with costs on an Attorney and client scale.

LM MOLOPA AJ