IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 26194/06

DATE: 22/8/2007

NOT REPORTABLE

IN THE MATTER BETWEEN

SIMON MPHIKWA MAPHANGA	APPLICANT
AND	
FULLOUTPUT 1058 CC (Reg No CK2000/013460/23)	FIRST RESPONDENT
BUTLER'S BANANAS CC (Reg No CK2000/075620/23)	SECOND RESPONDENT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came to court by way of a notice of motion.

In the notice of motion the applicant is praying for an order in the following terms:

1. that the *rule nisi* which was granted on 31 August 2006 be revived and that the first and second respondents be placed under provisional liquidation in the hands of the Master of the High Court, with a return date to be determined on the date of hearing of this application;

2. that costs of this application be costs in the liquidation application, save in the event of opposition.

2. FOUNDING AFFIDAVIT

It was attested to by Mr Werner Nolte, the applicant's attorney of record. He alleges that this application is an application in terms of rule 27(4) of the rules of court.

The applicant brought an application for the liquidation of the first and second respondents. The application was properly served, and on 31 August 2006 this court granted a provisional winding-up order.

In terms of the said order all parties concerned were called upon to show cause, if any, on 5 0ctober 2006 why the provisional order should not be confirmed.

0n 14 September 2006 the second respondent served its notice to oppose. The first respondent served its notice of intention to oppose on 29 September 2006.

0n 5 0ctober 2006 the counsel, they briefed, requested the court to postpone the matter to 28 November 2006 to the opposed roll. The latter date was arranged with the registrar.

The presiding judge acceded to the request of their counsel, but by error, the presiding judge and her clerk entered the date to which the matter is postponed as 26 0ctober 2006 instead of 28 November 2006.

Prior to 28 November 2006, the clerk who was supposed to index and paginate the court file could not locate the file. The clerk made certain enquiries and discovered that the matter was enrolled on 26 0ctober 2006, and on the said date SHONGWE, DJP discharged the *rule nisi* with costs, due to the fact that there was no appearance on behalf of the applicant and the respondents.

The parties were not informed that the matter was enrolled on 26 0ctober 2006. All the parties were under the impression that the application will be heard on the opposed roll of 28 November 2006.

If the applicant was aware that the matter was set down on the roll of 26 0ctober 2006, necessary steps would have been taken to ensure that the matter is properly attended to.

He further alleges that the *rule nisi* was discharged as a result of a *bona fide* error and this court can, in terms of rule 27(4) of the Uniform Rules of Court, order that the said *rule nisi* is revived.

Confirmatory affidavit of the candidate attorney who was requested to index and paginate the court file was attached.

3. FIRST AND SECOND RESPONDENT'S ANSWERING AFFIDAVIT

It was attested to by Mr Pierre Johan Coetsee, who attested the answering affidavit in the main application.

He alleges that the orders which the applicant seeks to reinstate were obtained by default, which was as a result of the respondents' auditor's failure to inform the Registrar of Companies about their new physical address. The papers were served at their auditor's old address and same never came to the attention of the respondents. If the respondents were aware of the application, prior to the granting of the *rule nisi*, the applicant would not have obtained the said order as there were no merits in the applications for the liquidation of the two respondents.

The applicant is seeking an order for the revival of an order which should not have been granted.

He refers to the heads of argument which were prepared for the anticipated hearing of 28 November 2006 and confirms the contents and correctness thereof.

In the said heads of argument it is stated that the grounds upon which liquidation of the first respondent is sought are the following:

(a) a decision was allegedly made at a meeting of members called for the purpose of considering the winding-up of the first respondent during which meeting members having more than one half of the total number of votes, voted to wind up the first respondent;

(b) that it would be just and equitable to wind up the first respondent;

(c) that the first respondent is commercially insolvent and unable to pay its debts.

He disputes that a proper meeting was constituted and that proper notice was given. He being the only other member of the first respondent was not advised about the alleged meeting.

He was not in the country at the alleged time of the meeting, same applies to the reconvened meeting.

No facts nor averments are advanced for the averment that the first respondent is commercially insolvent.

The averment that it is just and equitable to liquidate the first respondent is based

on false facts.

The heads of argument further submits that the grounds for liquidation of the second respondent are non-existent. The alleged grounds are the following:

(i) that it would be just and equitable to wind up the second respondent;

(ii) that the second respondent is commercially insolvent in that it is unable to pay its debts.

The applicant stated that he has no knowledge of the creditors of the second respondent, and he does not state what are the assets of the second respondent and consequently he has failed to demonstrate that the second respondent is commercially insolvent.

No facts are advanced by the applicant to demonstrate that it will be just and equitable to wind up the second respondent. He further alleges that from the date that the applicant became aware that the *rule nisi* was discharged, which date is more or less 21 November 2006, the applicant did nothing but launched his current application only on 8 March 2007. The applicant launched the current application three and a half months after he became aware that the *rule nisi* was discharged.

No explanation is tendered for the unreasonable delay in launching the present application.

He further alleges that-

"Furthermore, the applicant has failed to indicate why it is necessary that the discharged orders be reinstated. There are obviously other remedies one of which is a request to this honourable court to proceed on the existing papers with an application to obtain a new liquidation order. After all, all the papers have been exchanged and now that the advantage of obtaining an order by default has been lost, there is simply no reason why the matter cannot proceed as a new application based on the existing papers where all the issues have been fully ventilated."

He proceeded and stated that the position of the respondents might have changed from the time that the *rule nisi* was granted and that fact might influence the question

whether the liquidation orders should be granted or not. The respondents have been conducting business to date.

4. REPLYING AFFIDAVIT

It was attested to by the applicant. He alleges that the orders which he seeks to reinstate were obtained by default but submit that the application was properly served on the respondents' registered addresses as they appear on the records of the Registrar of Companies and Close Corporations.

There is merit in the applications for the liquidation of the two respondents.

A proper case for at least the liquidation of the first respondent was made out, purely on the basis of his decision as the majority member of the first respondent in terms of section 68(9) of the Close Corporations Act 69 of 1984. Proper notices of the meetings were served on Mr Pierre Coetsee.

He only became aware of the fact that the rules were discharged on 23 November 2006.

As a result of Mr Pierre Coetsee's actions as set out in the founding affidavit, the business of the first respondent was high-jacked and as a result he did not have an income since approximately March 2006. He did not have money to instruct his attorneys to proceed with the current application until January 2007.

0n 15 January 2007 he instructed his attorneys to proceed with the current application, papers were drafted after consultation with counsel and the application was issued and served on 8 March 2007.

The first respondent has been dormant since approximately March 2006 and could therefore not have conducted any business from March 2006 to date.

It is necessary to reinstate the discharged order in respect of the first respondent as he has already complied with all the requirements in terms of the Insolvency Act by, *inter alia*, giving security and placing all the necessary advertisements.

He further states that if the court is not inclined to reinstate the discharged orders, leave will be prayed for to continue with the application on the papers as they are, subject to the necessary supplementation, if necessary.

The position of the first respondent could not have changed since the granting or discharge of the orders and that no reason exists not to reinstate the order in respect of the first respondent.

6. FINDINGS

During argument the applicant's counsel submitted that he is unable to advance reasons why the provisional order relating to the second respondent should be revived.

I think the above concession was correctly made.

As far as the first respondent is concerned applicant's counsel submitted that, as there are sufficient grounds for the liquidation of the first respondent, the provisional order granted against the first respondent should be revived.

0n the other hand, counsel for the respondents submitted that the holder of the majority of the members' interest failed to give the only other member, Mr Pierre Johan Coetsee, proper notice of the alleged meeting where a decision was taken to liquidate the first respondent.

There is a dispute between the parties about the question of giving of the notice of the meeting.

The applicant alleges that the two notices of the meetings were sent to the address of Mr Coetsee and the latter alleges that he was out of the country at the relevant time and he could not have been given proper notice.

Because of the seriousness of the business that the applicant intended to discuss at the said meeting, my view is that the applicant should have made certain that the notice of the said meetings come to the attention of Mr Coetsee timeously. The fact that Mr Coetsee was out of the country at the relevant time negates the allegation that Mr Coetsee was given notice of the meetings in question. *Prima facie*, no proper notice of the meetings was given to Mr Coetsee.

I am not going to deal with the other grounds on the basis of which the applicant seeks the liquidation of the first respondent because of the *prima facie* view I arrived at as far as the question of notices of the meetings are concerned.

In order to allow all the issues to be properly ventilated prior to the granting of the provisional orders against both respondents, my view is that the orders should not be revived. The applicant should be allowed to proceed on the same papers, appropriately amended, if so advised, so that the speedy resolution of this matter can be achieved with as little inconvenience to all the parties as possible. As stated earlier, Mr Coetsee, who signed the answering affidavit, as stated earlier suggested that the applicant can request the court to proceed on the existing papers with an application to obtain a new liquidation order, but the applicant choose to proceed with his application in terms of rule 27(4).

The applicant, in my view, has not succeeded with his application in terms of rule 27(4) and consequently the applicant must pay the costs of the respondents.

The court therefore makes the following order:

1. The applicant's application in terms of rule 27(4) of the Uniform Rules of Court is dismissed.

2. The applicant is granted leave to proceed against the respondents to seek provisional or final orders, on the same papers, appropriately supplemented, if so advised.

3. Applicant to pay the costs of the respondents of this application on a party and party scale.

W L SERITI
JUDGE OF THE HIGH COURT

26194-2006

HEARD ON: 10 AUGUST 2007
FOR THE APPLICANT: ADV F BOTES
INSTRUCTED BY: DU TOIT, SMUTS AND MATHEWS PHOSA
FOR THE RESPONDENTS: ADV T A L L POTGIETER
INSTRUCTED BY: BARNARD LOURENS