

CMM-Panamo Judgment

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : YES/NO

(2) OF INTEREST TO OTHER JUDGES : YES/NO

(3) REVISED ✓

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

SIGNATURE

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 63748/11

In the matter between:-

31/10/2012

CORPORATE MONEY MANAGERS (PTY) LTD
(Under curatorship)

1st Applicant

CMM FINPRO (PTY) LTD
(Under curatorship)

2nd Applicant

MIRO CAPITAL (PTY) LTD
(Under curatorship)

3rd Applicant

FOUR RIVERS TRADING 307 (PTY) LTD
(Under curatorship)

4th Applicant

REGENT GROUP CAPITAL (PTY) LTD
(Under curatorship)

5th Applicant

ESCAPAPE INVESTMENTS (PTY) LTD
(t/a SAKHA IBLOKHO)
(Under curatorship)

6th Applicant

CMM TREASURY SERVICES (PTY) LTD
(Under curatorship)

7th Applicant

CMM CASH MANAGEMENT FUND
(Under curatorship)

8th Applicant

PIETER HENDRIK STRYDOM N.O.

9th Applicant

JOHN RODERICK GRAEME POLSON N.O.

10th Applicant

LOUIS STRYDOM N.O.

11th Applicant

and

PANAMO PROPERTIES 49 (PTY) LTD

Respondent

JUDGMENT

[1] On 29 October 2012 this case came before me as the extended return date of a provisional liquidation order granted by Murphy J on 20 July 2012. The order granted on that date reads as follows:

- "1. *THAT Panamo Properties 49 (Pty) Ltd (hereinafter referred to as 'the respondent') and all other interested parties be and they are hereby called upon to show cause, if any, to this Honourable Court on 28 August 2012 at 10:00 or as soon thereafter as the matter may be heard why the respondent should not be wound-up.*
2. *THAT this order shall operate as an order provisionally winding-up the respondent compulsory.*
3. *THAT the respondent and all other interested parties be and are hereby called upon to show cause if any to this Honourable Court on 28 August 2012 at 10:00 or as soon thereafter as the matter may be heard, as to why any voluntary winding-up, implemented in respect of the respondent, should not be set aside.*

4. *THAT this order shall be served forthwith upon the respondent at its registered office and a copy of this order shall be published in the Government Gazette and once in the Citizen newspaper.**

[2] It is common cause that:

- 2.1 the respondent owes an amount of R9,578,945.00 plus interest thereon calculated from 1 October 2009 to the first to eighth applicants, all of which are under curatorship (and of which the ninth to eleventh applicants are the duly appointed curators), jointly and severally;
- 2.2 the respondent is commercially insolvent;
- 2.3 the provisional order was duly served on the respondent and advertised in the *Government Gazette* and the *Citizen*.

[3] It is also common cause that the provisions of s 346(4A)(a)(ii), (iv) and (b) of the Companies Act 61 of 1973 have been complied with.

- [4] During argument I raised the aspect of compliance with s 346(4A)(a)(iii) of the Companies Act 61 of 1973 with counsel. That section provides as follows:

"When an application is presented to court in terms of this section, the applicant must furnish a copy of the application –

(i) ...

(ii) ...

(iii) to the South African Revenue Service."

- [5] After the case stood down in order for Mr Badenhorst SC, who appeared on behalf of the applicants, to obtain instructions, I was presented with a copy of the application (i e founding papers) purported to have been stamped by the South African Revenue Service on 29 October 2012. The wording on the stamp reads as follows:

"SARS

P.O. BOX 436

2012-10-29

PRETORIA 0001

SOUTH AFRICAN REVENUE SERVICE.*

- [6] There are no particulars of, for example:
- 6.1 the address of SARS in Pretoria where the copy of the application was stamped;
 - 6.2 the person who stamped the said copy.
- [7] No affidavit as contemplated in s 346(4A)(b) was filed by the person (unknown to the court) who purportedly furnished a copy of the application to SARS.
- [8] Mr Pienaar, who appeared on behalf of the respondent, contended that compliance with the provisions of s 346(4A)(iii) and (b) was compulsory. He contended that:
- 8.1 the phrase "*[w]hen an application is presented to court*" in s 346(4A) refers to the time when the application is lodged with the registrar of the court, and not when it is heard. In this regard he referred to s 348 of the Companies Act 61 of 1973 where an almost similar

phrase has been attributed that meaning (see, *inter alia*, *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (in Liquidation)* 1984 (3) SA 815 (O) at 816D-E and *Venter NO v Farley* 1991 (1) SA 316 (W) at 320C);

8.2 SARS might, for example, decide to intervene in an application for liquidation on being furnished with a copy thereof.

[9] Support for Mr Pienaar's argument is to be found in Meskin *Henochsberg on the Companies Act* Vol 1 740(1)-740(2) [Issue 28]. See also *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 155H-156D and *Hendricks NO v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC) at 281I-282C.

[10] To conclude, the furnishing of a copy of an application for the winding-up of a company to SARS at the time when the application is lodged with the registrar of the court is peremptory. Proof of such furnishing by means of an affidavit is also peremptory.

[11] Mr Badenhorst SC did not contend that the provisions of s 346(4A)(a)(iii) and (b) were anything other than peremptory.


[12] It follows that the voluntary winding-up of the respondent cannot be set aside and that the provisional order made by Murphy J cannot be made final.

[13] The general rule remains that the successful party is entitled to its costs. I have not been addressed by the parties to consider departure from this established rule.

[14] In the premises, I make the following order:

14.1 The application is dismissed and the rule *nisi* that was granted on 20 July 2012 is discharged;

14.2 The applicants are to pay the costs of the application jointly and severally, the one paying the others to be absolved.


VAN LOGGERENBERG, AJ
31 October 2012

Counsel appearing on behalf of the applicants: M A Badenhorst SC

Applicants' attorneys: Roestoff & Kruse Attorneys

Counsel appearing on behalf of the respondent: W F Pienaar

Respondent's attorneys: E W Serfontein & Associates Inc