

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
(4)	DATE DELIVERED: 23/2/2014

Case no: 10370/14

23/4/2014

In the matter between:

THIBEDI DINEO MESO

Applicant

and

MATABELE DINARE BUILDING CONSORTIUM CC

First Respondent

PETRUS JACOBUS CORNE VAN STADEN NO

Second Respondent

MBATHI SHIRLEY MOTIMELE NO

Third Respondent

NEDBANK LIMITED

Fourth Respondent

MASTER OF THE HIGH COURT

Fifth Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Sixth Respondent

JUDGMENT

BAM J

1. The applicant, who described himself as the "*majority interest holder*" of the first respondent, on an urgent basis, applied for an order rescinding the final liquidation order obtained by the fourth respondent against the first respondent, by default, on 24 July 2013. On 2 November 2013 the second and third respondents were appointed liquidators of the second respondent. The first respondent was involved in the construction industry, doing business with *inter alia* the sixth respondent.

2. The application was served on the respondents on 4 April 2014. It is opposed by only the fourth respondent. It was enrolled to be heard in the Urgent Court for the week of 14 April 2014.
3. The fourth respondent issued summons, under case no. 62076/11, against the first respondent claiming delivery of a vehicle. On 26 April 2012 default judgement was granted against the first respondent for the return of the vehicle. The damages claim was postponed.
4. On 6 July 2013 fourth respondent served an application for the liquidation of the first respondent. The application was granted, also by default, on 24 July 2013. The grounds for the application were the aforementioned summary judgement for the return of the vehicle and a judgement obtained by the fourth respondent in the amount of R1 383 677.72. (According to the applicant an excavating machine belonging to the first respondent was attached by the Sheriff in order to satisfy the said debt. This fact was allegedly not disclosed to the court granting the liquidation order.)
5. The liquidators, second, third and fourth respondents, were appointed four months later, on 25 November 2013. The liquidators, themselves, were informed of their appointment on 17 December 2013, and due to the festive season when their offices were closed, started to take charge of the affairs of the first respondent on 6 January 2013.
6. The fourth responded, in opposing this rescission application, contended that the application was fatally defective in that the applicant did not disclose the "*whereabouts*" of any of the numerous creditors of the first respondent. In this regard it was submitted on behalf of the applicant that the liquidators are at this stage in control and possession of the first respondent's estate, including all issues pertaining to possible creditors, and it was therefore not required from the applicant to refer to any creditor. It was pointed out by the applicant that the liquidators were cited as respondents.
In this regard I am in agreement with the applicant's contention. I will return to the issue of the liquidators.
7. The applicant was in control of and conducted the business of the first respondent. In substantiating his application for the rescission of the liquidation order the

applicant advanced reasons of which, pertaining to the question of the late filing of this application, the following seem to be relevant:

- (i) At all relevant times the first respondent was represented by Mr Mokoena of M B Mokoena Attorneys;
- (ii) Upon receiving the liquidation application, the applicant handed it to Mr Mokoena, in the believe that Mr Mokoena would deal with same;
- (iii) Subsequently, however, a dispute about fees arose between the applicant and the said firm of attorneys;
- (iv) On 3 December 2013 Mr Meso was advised by somebody from the sixth respondent's offices that the first applicant's attorneys have informed the sixth applicant that the first respondent had been liquidated on 24 July 2013 and that any fees due to the first respondent should be paid to the liquidators;
- (v) This was the first time Mr Meso heard about the liquidation order. He was not informed by his attorneys of record about the situation pertaining to the liquidation application at all;
- (vi) In the meantime the first respondent carried on with its business with the sixth respondent and was even awarded new contracts it tendered for.
- (vii) Mr Meso was then advised by a new set of attorneys that he should approach the liquidators in respect of an application for the rescission of the liquidation order.
- (viii) On 8 January 2014 Mr Meso held a meeting with the liquidators, second and third respondents, advising the liquidators that they should proceed with a rescission application;
- (ix) On 24 January 2014 Mr Meso's attorneys informed the liquidators that because of the fact that no rescission application had been lodged by the them, they intended to proceed with the rescission application;
- (x) On 30 January 2014 Mr Meso was informed by the sixth respondent that the first respondent's contracts were in the process to be reviewed. The sixth respondent was however amenable to grant Mr Meso a further month in order to lodge a rescission application.

8. Although no confirmatory affidavit of the attorney, Mr Mokoena, was attached to the founding papers, which I do not find peculiar, and the fact that the applicant did not make any further enquiries about the results of the liquidation application, I am persuaded, in view of the circumstances alluded to above, that the applicant has advanced a sufficient explanation for his failure to personally attend to the liquidation application and his default when the order was granted.

9. In respect of the question whether the first respondent was indeed insolvent, the following issues come into play:

- (i) The first respondent were awarded several lucrative construction contracts since 2009 which were still in progress at the time the liquidation application was filed;
- (ii) As a result of a dispute in respect of a contract of more than R28M with the Mole Mole Local Municipality, a court order was granted on 25 March 2013 in favour of the first respondent against the said municipality. The dispute with the said municipality caused financial constraints to the first respondent, but, according to the applicant, an amount of R4,7M is at present due and payable.
- (iii) On 1 October 2012 a contract to the value of more than R115M was awarded to the first respondent by the sixth respondent, for a period of 3 years;
- (iv) The first respondent was awarded certain further allocations in terms of the provisions of the R115M to the value of R6,788M and R6363M. In terms of the said allocations an amount of R2,7M is now due and payable to the first respondent.
- (v) The sixth respondent, after the liquidation order was granted continued its business with the first respondent directly;
- (vi) On the applicant's version, that was accepted, it appears that the business between the first respondent and the sixth respondent continued as usual for several months after the liquidation order was granted. It is not explained why the fourth respondent, who was the applicant in the liquidation application, apparently made no efforts to enquire about the appointment of the liquidators, even several months after the liquidation order was granted.

10. The Court that granted the liquidation order was not aware of the aforementioned situation of the first respondent.

11. The fourth respondent, in opposing the applicant's application for the rescission of the liquidation order, stated in its opposing affidavit, that it actually, "*broadly speaking*", has two claims against the first respondent. The second claim involves a judgment in the amount of R1,383,77,72 granted on 16 May 2012 in favour of Imperial Bank. The fourth respondent alleged that it "*procured*" the rights previously held by Imperial Bank. It is not explained by the fourth respondent when the rights were so "*procured*".

12. The second and third respondents, the appointed liquidators, filed an affidavit deposed to by Ms Reinet Steynsburg, an insolvency practitioner, who were requested by the two respondents to assist in the “day to day” administration of the winding up of the first respondent. In the said affidavit it was confirmed that a meeting with representatives of the first respondent was held on 17 January 2014, and that the liquidators agreed to hold the matter in abeyance pending a rescission application. The application was served on 11 February 2014. The second and fourth respondents expressed their concern about claims by SARS and Standard Bank against the first respondent, which seem to be justified in the circumstances. Reference is also made to four further other creditors of the first applicant, and a total amount of about R280 000,00 in outstanding debts.
13. From the said affidavit it is not clear exactly what the liquidators did before they conceded to hold the matter in abeyance pending the rescission application. It seems clear, however, that any further activities of the liquidators, after the rescission application was served, were in fact suspended.
14. Apart from filing the said affidavit, nobody represented the liquidators when the matter was argued. It is therefore assumed that they did not oppose the application and abided the decision of this court.
15. The question whether the first respondent would have been liquidated by the court without all the issues pertaining to the first respondent’s situation having been ventilated, can obviously not be decided by this Court. This is in any event something this Court is not called upon to adjudicate. All this Court is requested to find is that the first respondent has a *bona fide* defence against the liquidation.
16. In view of the circumstances, I am of the view, despite the liquidator’s concerns, that the applicant has made out a proper case to succeed with the application.
17. Accordingly the applicant is in my view entitled to the relief sought. The consequences of the rescission liquidation order are governed by the Rules of Court. It also includes that the liquidators appointment and activities will be suspended pending the final court order. Accordingly the fourth respondent, being the applicant in the liquidation application, will be entitled to proceed with the application for

liquidation in terms of the Rules and the provisions of the Insolvency and Company Acts.

ORDER: (Made on 17 April 2014.)

1. The final liquidation order of the first respondent granted on 24 July 2013 is rescinded;
2. Costs reserved.

A handwritten signature in black ink, appearing to read 'A J Bam', written in a cursive style.

A J BAM JUDGE OF THE HIGH COURT

22 April 2014