

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 35867 / 2020

REPORTABLE: YES/~~NO~~
OF INTEREST TO OTHER JUDGES: YES/~~NO~~
REVISED: YES/NO
DATE: 24 April 2023

In the matter between :

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Applicant

and

SELECTIVE EMPOWERMENT INVESTMENTS 1 LTD Respondent

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 24 April 2023

JUDGMENT

M Snyman, AJ

Introduction

[1] This is an application for the liquidation of respondent.

[2] The applicant is the Companies and Intellectual property Commission ("CIPRO") and the respondent is Selective Empowerment Investments 1 Ltd ("SEI 1").

[3] As indicated by the names of the parties, it is not the normal type of liquidation application. The application is based on section 81(1)(f) of the 2008 Companies Act. (“Act”)

[4] The parties, in a joint practice note summarised the issues to be determined, as follows:

“8.1 Whether the respondent’s supplementary affidavit stands to (be) struck;

8.2 Whether the four points in limine, raised by the respondent holds merit:

8.2.1 the legal position;

8.2.2 lis pendens;

8.2.3 locus standi; and

8.2.4 hearsay.

8.3 Whether the applicant has complied with the provisions of Section 81(1)(f)(i) & (ii) of the Companies Act, 71 of 2008 and is entitled to a winding-up order in terms of the provisions of the aforesaid order;

alternatively,

8.4 Whether the applicant as the regulator in terms of section 344(h) of Act 61 of 1973 as read together with Act 71 of 2008, is entitled, and has the requisite locus standi, to an order that is just and equitable for the respondent to wound-up;”

[5] I agree with this summary. It is however important to deal with the issues that may be determinative of the application first, and if those points are not upheld, then deal with the merits of the application.

[6] I will therefore deal with the issue of *lis pendens* first as it may be dismissive of the application.

[7] The issue of locus standi raised is based on the argument that applicant cannot rely thereon that may be just and equitable to wind up SEI 1, must do so squarely within the parameters only of section 81 of the Act. As a result, the issue is intertwined with the merits and will be dealt with later.

Lis Pendens

[8] The three requirements for a successful reliance on the plea of *lis pendens* can be summarised as follows:

1. Litigation is between the same parties;
2. Based on the same cause of action; and
3. The same or similar relief being claimed in both proceedings.

[9] A plea of *lis pendens* shares similar features with the defence of *res judicata* because the underlying consideration is to ensure finality in litigation. Once a suit has been instituted, it should be finalised before that court. Depending upon the result another proceeding may then be instituted by the same parties relating to the same cause of action, but not before.¹

[10] In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*,² *lis pendens* was described as follows

"[2] As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and

¹ Nestle (South Africa) (Pty) Limited vs Mars Inc 2001 (4)

² 2013 (6) SA 499 (SCA)

therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.

[3] The plea bears an affinity to the plea of res judicata, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:

'Exception of lis pendens also requires same persons, thing and cause. - The exception that a suit is already pending is quite akin to the exception of res judicata, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of res judicata in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'

[11] In paragraphs [19] and [21] the court continued as follows in respect of res judicata and issue estoppel. It turns on the same principle to be decided. The court stated the following:

"[19] A strict application of the three requirements for that plea would generate a negative response. If the party raising res judicata had been the plaintiff in the earlier litigation, that would necessarily mean that the cause of action and the relief sought in the later proceedings, where the plea was being raised, differed from the cause of action and the relief in the earlier proceedings. This is illustrated by the facts in Cook. In the Supreme Court Muller was claiming damages for breach of the underlying agreement. His cause of action was based on the agreement and its breach. In the magistrates' court, Cook and his

co- plaintiffs were seeking to recover the face value of the dishonoured promissory notes on the basis that they had been dishonoured on presentation. Those were different causes of action and the relief claimed in each was also different.”

....

*[21] On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case. Boshoff was followed in a number of cases in provincial courts, but was regarded as controversial because it was thought to import into South African law the English principles of issue estoppel. It is unnecessary to explore that controversy because this Court laid it to rest in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk*. There, Botha JA held that Boshoff was based on the principles of our law. He said that its ratio is that the strict requirements for a plea of *res judicata* of the same cause of action and that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for their adaptation and extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea.”*

[12] It however does not follow that the plea of *lis pendens* will serve as a bar to hearing the matter simply because the above requirements have been satisfied. The court has the discretion whether or not to stay the proceedings or to hear the matter depending on what is just and equitable to do in the circumstances, including consideration of the balance of convenience.³

[13] For the determination of this issue, the requirements of *lis pendens* need not be further elaborated upon as respondent’s reliance thereon falters at the requirement that it be the same proceedings.

³ *Ferreira v Minister of Safety and Security and Another* [2015] ZANHC 14 at [8]

[14] Respondent's reliance on *lis pendens* is based, not on another liquidation application instituted by applicant t against it, but on the fact that an application had been instituted to have the directors declared delinquent, inter alia based on some or all of the alleged failures to comply with the provisions of the Act.

[15] The mere fact that the same facts relate to two different applications or actions, does not fall within the ambit of *lis pendens*. At best, and without making any finding on the merits of such a claim as it not before me, it could be claimed for instance, that the matters be heard together for convenience sake.

[16] The claim of *lis pendens* cannot be upheld.

[17] The second issue that needs to be determined is that of the striking out and admissibility of the supplementary affidavit filed by respondent.

Application to admit further or supplementary affidavits and striking out

[18] It is trite that in application proceedings, evidence must be led before court, by way of affidavit. The affidavits are limited to three sets. The Defendants point out that the Rule was succinctly explained in the Supreme Court of Appeal judgment in the case of *Hano Trading CC v J R 209 Investments (Pty) Ltd and Another*⁴ where the court stated the following:

"it follows thus, that great care must be taken to fully set out the case of the party on whose behalf an affidavit is filed. It is therefore not surprising that the Rule 6 (5) (e) provides that further affidavits may only be allowed at the discretion of the court."

[19] In The case of *Standard Bank of SA Ltd v Sewpersadh and Another*,⁵ it was held:

⁴ 2013 (1) All SA 142 (SCA)

⁵ 2005 (4) SA 148 (C)

“[13] clearly, a litigant who wished to file a further affidavit must make a formal application for leave to do so. It cannot simply sign the affidavit into the court file (as appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto.”

[20] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as *arbiter*, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.

[21] The point is simply that the respondent must make out a proper case for the further affidavits to be admitted. As such, the party seeking to have the further affidavit admitted must, *inter alia*, give reasons why the evidence was not placed before court, for instance that it was not aware thereof. No explanation is given by the respondent except that its deponent had a consultation with two counsel and that it was realised that not all aspects had been covered in enough particularity. Such explanation, without more is not adequate.

[22] Furthermore, on a brief reading of the further affidavit to be filed, it is clear that the deponent seeks to rely on the affidavits filed in the delinquency application to which I referred to above. Those affidavits cannot assist the respondent at all.

[23] I am, having considered the content of those affidavits and the application for having same admitted, not convinced that a proper case has been made out that the further affidavits be admitted which include the supplementary affidavit and affidavit filed in support thereof as well as all annexures thereto.

[24] The application is therefore dismissed. I will deal with the issue of costs below.

Striking out / Hearsay

[25] In terms of Rule 6(15) a court may not grant an application for striking out of evidence unless it is satisfied that the applicant therefore will be prejudiced if the application is not granted.

[26] In motion proceedings the affidavits serve not only to place evidence before the Court, but also to refine the issues between the parties.⁶

[27] If a party fails to admit or deny, or confess and avoid, allegations in the other party's affidavit, the court should, for the purpose of the application, accept that the applicant's allegations are correct.⁷

[28] The applicable legal principles to striking out are set out in Rule 6(15), which in relevant part, provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it be not granted.”

[29] Two requirements must be satisfied before a striking out application can succeed, viz:⁸

- a) The matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; and
- b) The court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced.

⁶ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F – 324C; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E cited with approval in *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at 550G-551C

⁷ *Moosa v Knox* 1949 (3) SA 327 (N) at 331; *United Methodist Church of South Africa v Sokufundumala* 1989 (4) SA 1055 (O) at 1059A; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 et seq; *Ebrahim v Georgoulas* 1992 (2) SA 151 (B) at 153D

⁸ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733B

[30] The meaning of the terms used in the rule was stated as follows:⁹

“Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter”.

[31] *“Irrelevant”*, for the purposes of the Rule, means irrelevant to an issue or issues in the action:¹⁰

“(T)he correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but, until it is excepted to and set aside, it embodies an issue by reference to which the relevancy of the matter which it contains must be judged.”

[32] In *Golding v Torch Printing and Publishing Co (Pty) Ltd and Others* ¹¹ Ogilvie Thompson AJ, as he then was, said:

“A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.”

⁹ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C-E; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516 e-f

¹⁰ *Stephens v De Wet* 1920 AD 279 at 282

¹¹ 1948 (3) SA 1067 (C) at 1090

[33] Historical background, even if strictly not relevant, should not be struck out¹²:

“For the sake of clarity the history of a case is often permissible as an introduction to allegations founding the cause of action.”

[34] Hearsay matter and opinion evidence not properly before court are regarded as irrelevant matter as it is inadmissible as evidence.

[35] Applicant in its application to strike out also seeks the striking out of parts of the supplementary affidavit filed. In argument it was specifically stated that it is premised on the court finding that the supplementary affidavit be admitted. As I have already found that no proper case is made out for the supplementary affidavits to be admitted, the will be regarded as *pro non scripto*.

[36] Although not pressed in argument, and in my view correctly so, the respondent's point in limine that the reports of the Financial Services Board as it was then known, as well as the reports of Ngubane & Co, the auditors, as well as the Independent Regulatory Board of Auditors (“IRBA”) constitutes hearsay and is as a result inadmissible, is without any merit. The reports and its content are not disputed at all.

[37] Having regard to what has been set out above in respect to the nature of litigation in respect of admissions, denials and the adjudication of the evidence, the respondents attempt to stop the applicant from relying on those reports on the basis of it being inadmissible hearsay cannot succeed.

[38] Applicant's application to have parts of the answering affidavit struck must still be considered.

[39] It seeks the following words to be struck out form the answering affidavit:

“disingenuous” in paragraph 22;

¹² *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 173 to 174

“*verily believe*” in paragraphs 62, 77, 108.2, 110.3, 112.3, 112.4, 120.4, and 121.3;

[40] The word “disingenuous” entails an element of fraud, dishonesty of moral corruption. As good as the word may sound in a sentence, it being used without any factual support for an inference of dishonesty or fraud therefore is *prima facie* vexatious and not to be allowed in affidavits. I found no factual support in the affidavits filed for the conclusion that the deponent or any official of CIPRO for that matter, committed fraud, was dishonest or is morally corrupt. The word is struck out.

[41] In the same vein it was suggested in argument and in the supplementary affidavits, though not admitted, that the application was motivated by racism or an attempt to discriminate against SEI 1, because it is wholly black owned. The mere thought thereof, let alone suggestion or reliance on such allegation without any proof, is not only unbecoming of any legal practitioner but in my view reckless and a clear violation of the oath such practitioner took. Practitioners and litigants should therefore not without proper proof make such allegations. There is in the current matter absolutely no basis for any allegation that the application was motivated by racism, racially motivated or even made for an ulterior purpose. The legal representative should not simply regurgitate what his/her client’s view or contention is. It is reckless and in my view constitutes misconduct if a legal representative makes such allegation without any merit. That however, does not say the allegations may never be made. I am merely saying that it is the duty of a legal practitioner to court, his/her profession and the public not to make allegations which cannot be supported by fact, especially allegations that are as emotive as being accused of racism, bias or that an official is using his/her powers for an ulterior purpose. The practitioner is not merely an extension of or mouth piece for the litigant. He/she has a duty represent the facts objectively and dispassionately. These allegations if made without any merit or factual support generally does more harm than advance the case for the client.

[42] Dealing with the word “*verily believe*”, its meaning needs to be ascertained as it is not the type of word used in general conversation.

[43] The word “*verily*” is a Middle English word dating from about 1250. It means “truly” or “in truth.” Therefore to “*verily believe*” something simply means to “truly believe” something.

[44] The words therefore seem at least imply that the facts do not fall within the knowledge of the deponent. I cannot find that the statements in the paragraphs referred to does not fall within the deponent’s knowledge. It is nothing more than legalese that should be if a person wants to convey it statement, intention and meaning clearly. It was not argued by Mr Van Rensburg for the applicant that the statements contained in the paragraphs referred to is hearsay and inadmissible. The application to strike out the word “*verily believe*” in the paragraphs listed above cannot succeed as a result.

[45] With the costs of the application to strike out parts of or words in the affidavits, I will deal with below.

Liquidation by CIPRO as applicant

[46] In the 1973 Companies Act the power of the Minister (Registrar) to liquidate companies were to be found in section 262. The test in such an application was “*if the court thinks it is just and equitable*”. It did not matter if the company was solvent or insolvent.

[47] The provisions of section 81 of the new Act applies only to “solvent” companies and the requirements are set out in section 81(1)(f) when CIPRO may apply to liquidate a solvent company.

[48] Subsections (2) and (3) of section 79 of the Act however states that:

“(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.

(3) If, at any time after a company has adopted a resolution contemplated in section 80, or after an application has been made to a court as contemplated in section 81, it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 5.”

[Emphasis added]

[49] The word “interested person” is not defined in the Act.

[50] Section 186 provides for the objectives of CIPRO as follows:

186. (1) The objectives of the Commission are—

.....

*(d) the **promotion of compliance with this Act, and any other applicable legislation**; and*

*(e) the **efficient, effective and widest possible enforcement of this Act, and any other legislation listed in Schedule 4...**”*

[Emphasis added]

[51] It further establishes an inspectorate and the Companies tribunal.

[52] It is therefore not difficult to conclude that CIPRO is such an interested person. This finding has an impact on the issue of Locus Standi raised by respondent.

Locus standi

[53] As stated the respondent claims that the applicant does not have locus standi to apply for a liquidation order based thereon that it is just and equitable to do so as contemplated in section 344 of the 1973 Companies Act.

[54] This argument stems from the applicant's reliance on section 344(h) of the 1973 Companies Act ("1973 Act"). The argument on behalf of the respondent is that CIPRO is not listed as a party who may so apply in terms of section 346. Admittedly not CIPRO, the Panel, the Minister or the Registrar of Companies are mentioned in that section, but in my view that is not the end of the enquiry.

[55] As already indicated above, CIPRO is an interested party and as such has the required locus standi to launch an application for liquidation of a company.

[56] Reliance on section 344(h), in my view is also not limited to creditors of a company only nor does the company need to be insolvent.

[57] In the matter *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*¹³ the court sets out 5 categories upon which the Court may grant an order that a company is declared insolvent included in the concept of "just and equitable under section 344(h) of the 1973 Act. It will be adequate to summarize it as follows:

- (1) The disappearance of the *substratum* of the company. It simply means that the purpose for which it was created fell away after having been formed for a particular purpose.
- (2) Illegality of the objects of the company and fraud committed in connection therewith.
- (3) A deadlock in the management of the company's affairs.
- (4) Grounds analogous to those for the dissolution of a partnership.
- (5) Where there has been oppression such as in the event of those in control of the company oppress the minorities in the companies.

¹³ *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (WLD) at 350C – 351B

[58] It is abundantly clear that it is not a requirement that the company sought to be liquidated must be insolvent. It is however a factor that may influence the order the be granted by the court in such application.

[59] CIPRO is not an entity listed in section 346 that would on the face of it entitle it to launch these proceedings. But having found that it is an interested person as set out above, it is clear that section 79 as read with item 9 of schedule 5 bestows such authority on CIPRO. It therefor has Locus Standi.

[60] Furthermore, the court further found that these 5 categories are not a *numerus clausus*¹⁴ and that it is open to court to develop further categories in future.

[61] Respondent also claims that the applicant does not have locus standi or right to launch these proceedings, because it must first have exhausted some other remedies or have sought compliance with the Act before it could have brought a liquidation application. Again, in my view this is a question whether the facts on which the applicant rely for the application would entitle it to an order or not and has nothing to do with the standing to bring the application.

[62] The remaining question is therefore, has applicant made out a case having regard to the legislative requirements.

Section 81 of the Companies Act 71 of 2008

[63] The relevant section empowering CIPC to liquidate a company is contained in section 81(1)(f). It reads as follows:

“81. (1) A court may order a solvent company to be wound up if—

.....

(f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that—

¹⁴ Rand Air, above p 350I – 350J

(i) ***the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and***

(ii) ***within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act No. 69 of 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.***

[Emphasis added]

[64] The Constitution requires a purposive approach to statutory interpretation.¹⁵ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,¹⁶ Ngcobo J stated:

“The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’”

[65] This approach is one that has been applied to varying degrees by our courts under the common law.¹⁷ The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.¹⁸

¹⁵ *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA) at para 21

¹⁶ 2004 (4) SA 490 (CC)

¹⁷ *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (AD); *Jaga v Dönges NO and Another*; *Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3

¹⁸ Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville

[66] The often-quoted dissenting judgment of Schreiner JA in *Jaga v Dönges, NO and Another*,¹⁹ also cited approvingly by Ngcobo J in *Bato Star*,²⁰ eloquently articulates the importance of context in statutory interpretation:

*“Certainly no less important than the oft repeated statement that the **words and expressions used in a statute must be interpreted according to their ordinary meaning** is the statement that **they must be interpreted in the light of their context**. But it may be useful to stress two points in relation to the application of this principle. **The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.**”²¹*

[Emphasis added]

[67] This being said, it is clear that the intent must be found in the wording of the enactment.²²

[68] This part is on the face of it applicable to solvent companies only. I will return to this below.

[69] The question is whether the provisions of sub-section (i) and (ii) must be read conjunctively or disjunctively, i.e. whether “and” should be read “or”, or whether it means “in addition to”.

[70] The wording of sub-section (ii) seems to give the answer to this when it refers to “*for substantially the same conduct*”. This clearly refers back to the provisions of

¹⁹ Above, n 15

²⁰ Above, n 14

²¹ *Jaga v Dönges* above at 662G-H

²² *Bertie Van Zyl* above at para [22]

sub-section (i). it is therefore to be read that the requirements of both the sub-sections must be present before such order can be granted.

[71] The requirements are in my view therefore clear.

- (1) The company must be solvent;
- (2) CIPC or the panel can apply only after having issued a compliance notice in respect of the conduct used as grounds for the application and the company has failed to comply with the notice;
- (3) The grounds for such application must be,
 - (2.1) fraud, or;
 - (2.2) illegal actions by;
 - (2.3) the company, its prescribed officers, or those in control of the company; and
- (3) if compliance procedures have been taken against its prescribed officers, or those in control of the company for substantially the same conduct within the previous 5 years and which have resulted in an administrative fine of conviction.

[72] There requirements are in my view “technical” and not “substantial”. By that I find that it seems that the court, apart from the overall discretion to grant or refuse an application for liquidation, which for the purpose hereof will assume is still applicable without making any finding thereon, can only consider whether there has been compliance with the provisions of section 81(1)(f) or not and not enquire into the merits of the compliance notices or findings referred to therein.

[73] The court is first of all only required to check whether the requirements are met. Those are:

- (1) The applicant must be CIPC or the Panel;
- (2) There must have been a first compliance notice delivered to the company which have not been complied with; and
- (3) There must have been a finding of guilty or a fine imposed on the company, its prescribed officers, or those in control of the company within the past 5 years after the compliance procedure has been followed; and
- (4) There must be a second compliance notice in respect of substantially the same conduct; and
- (5) The complaints/compliance notice must relate to the company, its prescribed officers, or those in control of the company who acted in a manner that is fraudulent or otherwise illegal.

[74] The applicant is CIPRO and the first requirement is therefore met.

[75] The Financial Services Board, as it was then known, in December 2011 issued an inspection report and respondent reported a 34% loss. It became clear that the respondent was conducting business in insolvent circumstances.

[76] In early March 2016 the Prospectus Vetting Committee investigated the respondent's prospectuses. Later in March the deponent to the founding affidavit for applicant was appointed to investigate the affairs of the respondent, SEI 1.

[77] On 26 October 2016 the applicant, issued the first compliance notice essentially notifying the respondent that it is trading recklessly and in insolvent circumstances. This notice was based on a report prepared by the deponent for CIPRO.

[78] The respondent replied to the notice on 5 December 2016. Importantly the noncompliance with the relevant legislation and the fact that it was conducting business in insolvent circumstances.

[79] On 16 January 2017 a second compliance notice is issued by applicant which is replied to on 31 March 2017.

[80] The respondent thereafter reacts to the compliance notices and report by the FSB by making representations on 4 July 2017.

[81] On 13 July 2017 the Auditors of the respondent issued a report reporting a “reportable irregularity” to the members of SEI 1 and inform them thereof on 14 July 2017. The auditors are required to report certain irregularities to (Independent regulatory Board for Auditors) IRBA.

[82] On 11 August 2017 a second such report is issued by the auditors of respondent and reported to IRBA.

[83] On 6 September the deponent to applicant’s affidavit is appointed after a complaint by IRBA was received.

[84] On 19 September 2017 a second report by the deponent for applicant is followed by a third compliance notice.

[85] A third report on the respondent’s affairs are issued on 7 December 2017 followed on the same day by a fourth compliance notice.

[86] On 16 January 2018 the respondent replies to the latest notice.

[87] On 14 February 2018 a fourth report and fifth compliance notice are issued to respondent.

[88] On 28 August 2018 the applicant launches proceedings to have the directors of respondent declared delinquent. Those proceedings, so I was informed has not yet been finalised. As a result, it was argued on behalf of Respondent that the matter is *Lis Pendens* with which I have dealt with above.

[89] The liquidation application was issued on 5 August 2020.

[90] There was adequate notices and instances where compliance notices had been issued. The issuing and content of the notice are not disputed. As a matter of fact, the non-compliance with inter alia section 30, 24 and numerous other sections of the Act as well as the Provisions of other legislation and directives issued by inter alia the FSB, as it was then known, is admitted and no explanation given whatsoever. In some of the instances the respondents were trying to comply with instructions to submit audited financial statements for 2015 when they again did not comply with submitting those for 2017. For at least 3 years no annual general meeting of its shareholders were held and the shares register never or at least not adequately “cleaned” up as instructed by CIPRO. Simply put the respondent and its directors simply flouted the legal prescripts.

[91] Dealing with the business of the respondent will explain the seriousness of the offences. Respondent is a public company soliciting investment by the selling of its shares granting the public the opportunity to invest as such in a diversified shares portfolio of inter alia shares trade on different exchanges.

[92] As I understand the position, the respondent uses public funds, targeting especially first time or inexperienced investors, to buy shares. These shares are not held by the investors but by the respondent. It failed for a number of years to obtain any subscriptions to new shares issued after publishing a prospectus. Respondent for a number of years received no investment and was trading in insolvent circumstances after having lost more than R30 Million due to an entity in which it held shares was liquidated.

[93] The question now turns to the further questions. Has there been any finding of guilty or the payment of a fine imposed as a result and further whether the conduct complained of is fraudulent or otherwise illegal.

[94] What constitutes fraudulent or otherwise illegal conduct is not described or defined in the Act, but I only need to deal with that requirement if there had been a finding of guilty or a fine had been imposed in the previous 5 years.

[95] Illegal conduct is clearly conduct which is prohibited by the common law or legislation. The conduct of respondent by not complying with the provisions of sections 30 and 24 is illegal as is the fact that it did not answer to each and every notice.

[96] The requirement of “previous 5 years” I find to refer to 5 years before the issuing of the second compliance notice and cannot mean 5 years before the launch of the liquidation proceedings. That is clear from the wording of section 81(1)(f) quoted above.

[97] It is common cause that there had not been such a fine or finding of guilty.

[98] As such the “technical” requirements of section 81(1)(f) has not been complied with and the respondent cannot be liquidated based on that section.

[99] In terms of section 262 of the 1973 Companies Act the Commissioner could apply to court to liquidate the company and the court could grant such an order if it was just and equitable.

[100] Had it not been for these requirements of section 81(1)(f) that an earlier fine or finding of guilty should have been made or imposed the respondent under the 1973 Act would have been liquidated.

[101] It is however also clear that the respondent is insolvent. Despite claiming in the supplementary affidavit that all audited statements had been filed and uploaded on caselines no such documents are before court.

[102] The only audited financial statements before court are those for the 2018 financial year. In those statements it is clear that the respondent made an operating loss of more than R11 million. Respondent used the capital raised through the sale of its shares to purchase shares. It deals with public money and making a loss of this nature clearly must of necessity mean that its liabilities exceeds it assets. Its assets are the shares in other companies. Apart from the day to day expenses such as rent and salaries, the liability to its own shareholders still remain.

[103] On the face of it, it seems clear that the respondent is insolvent, but having found that section 344(h) does not only apply to insolvent companies, I need not rely on this finding.

Section 344 of the Companies Act of 1973

[104] The applicant relies in the alternative on section 344(h) entitling the court to grant a liquidation of a company when it is just an equitable to do so.

[105] I have already dealt with the 5 categories when application may be made under section 344(h) of the 1973 Act. This matter qualifies as a 6th category.

[106] I am fortified in this approach inter alia by the provisions of section 158 of the Act in terms of which the court is obliged to develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act.

[107] CIPRO and the court also must promote the spirit, purpose and objects of this Act and if any provision of the Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.

[108] It being common cause that the respondent acted illegally and did not comply with the compliance notices issued to it or at least complied much later and long after having undertaken to do so.

[109] The respondent's directors further, while realising respondent is insolvent and the value of the shares are ever diminishing, still insist that it will not voluntarily liquidate and not even place such possibility or motion to vote on before an annual general meeting of shareholders clearly indicate that it will not only be in the interest of the shareholders should the company be liquidated, but it will be just and equitable to do so.

Order

[110] As a result of the matter having been argued fully, I seen no need to grant a provisional order.

[111] Respondent it therefore placed under final winding up.

[112] The costs of the application shall be costs in the liquidation.

BY ORDER

M SNYMAN, AJ

Counsel for Applicant: Adv HC (Chrisoff) Janse van Rensburg

Applicant's Instructing Attorneys: State Attorney, Pretoria

Counsel for Respondent: Mr M Matlala

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