IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 1906/2014

In the ***ex parte*** application of:-

OTTLIE ANTON NOORDMAN N.O. First Applicant

CHAVONNES BADENHORST ST CLAIR COOPER N.O. Second Applicant

SIMON MALEBO RAMPOPORO N.O. Third Applicant

(for the extension of their powers as provisional liquidators of

KAMEELHOEK (PTY) LTD [IN LIQUIDATION]

and

SCHAAPPLAATS 978 (PTY) LTD [IN LIQUIDATION]

and

J D J KNIPE First Respondent

A B J KNIPE Second Respondent

HEARD ON: 31 JULY 2014

JUDGMENT BY: G.J.M. WRIGHT, AJ

DELIVERED ON: 14 AUGUST 2014

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[1] This application concerns the powers of provisional liquidators and the possibility of the extension thereof by leave of the court. Mr Zietsman for the Applicants argued in

Afrikaans whilst Mr Grobler for the Respondents argued in English. As the Notice of Motion and Founding Affidavit are in English, I will proceed with this judgment in that language.

[2] The two companies Kameelhoek (Pty) Ltd and Schaapplaats 978 (Pty) Ltd were placed under provisional liquidation on 30 August 2012. On 6 September 2012 the Master of the High Court appointed the Applicants as provisional liquidators. The provisional order was extended on several occasions. On 27 June 2013 the two companies were finally liquidated. Final liquidators could thus far not be appointed due to *inter alia* litigation regarding a general meeting of creditors and shareholders which were held on 16 April 2013 and 5 June 2013. Decisions taken at the meetings regarding a claim by a certain Loftus Viljoen were taken on review.

[3] The Applicants have applied to the Master for the necessary authorisation to sell the immovable properties of the two companies in liquidation by public auction. This was done in terms of section 386(2A) of the Companies Act, 61 of 1973 (the parties are in agreement that this is the Act applicable to the situation). The Master refused to give the requested authorisation. As a result the Applicants have to approach the court for an extension of their powers.

[4] This application was initially launched on an urgent basis. After arguments were heard in this regard by Mbhele AJ, the matter was struck from the roll and it was ordered that costs are to be costs in the liquidation. The matter was thereafter

enrolled again and argued before me on 31 July 2014. It is therefore not necessary to deal with prayer 1 of the Notice of Motion.

[5] Although the application was brought *ex parte*, it was served on all interested parties, being:

(i) the Master of the High Court,

(ii) the shareholders of the two companies,

(iii) Mr. LOFTUS VILJOEN (a creditor), and

(iv) Standard Bank of South Africa (a secured creditor).

Two of the shareholders oppose the application, namely Mr J.D.J. Knipe and Mr A.B.J. Knipe. I will refer to them as the Respondents.

[6] As provisional liquidators the Applicants do not have the powers as set out in section 386(4) of the Companies Act, unless they were so authorised by a meeting of creditors and members in terms of section 386(3). Such a meeting can only take place after final liquidators have been appointed and after a first meeting of creditors was held. A second meeting of creditors is then necessary for such authorisation to be dealt with. It is unknown how long it will be before final liquidators are eventually appointed.

[7] Section 386(4)(a) empowers a liquidator to bring or defend legal proceedings on behalf of the company. *In casu*, the Applicants submitted that they need to request this court for the necessary leave in terms of section 386(4)(a) of the Act. The Respondents indicated that they do not have an

objection against any relief granted in terms of section 386(4)(a) of the Act (see page 293 paragraph 12.2.2. of the Opposing Affidavit). It needs to be mentioned that a later paragraph in the Opposing Affidavit reflect that the Respondents deem it unnecessary for leave in terms of section 386(4)(a) to be granted (see page 305 paragraph 14.1.2).

[8] This application is not brought on behalf of the companies in liquidation and it seems unnecessary for the Applicants to request an order in terms of section 386(4)(a). This point was not argued by the Respondents during the hearing of the matter. In the light of the circumstances of this case and the animosity between the parties, I do however consider it prudent to grant relief in terms of section 386(4)(a) even if it is done *ex abudanti cautela*.

[9] The Applicants further wish to have their powers extended so as to be authorised to sell the immovable property of the companies for the specific reason of generating money to pay the administration costs. This involves the provisions of sections 386(4)(h) and 386(5) of the Companies Act. Section 386(5) provides the following:

> "In a winding up by the court, the court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the court may consider necessary for the winding up of the affairs of the company in distributing its assets."

[10] In terms of this section a court has a discretion to grant leave to a provisional liquidator to do anything which the court may consider necessary for the winding-up of the affairs of a company and distributing its assets. In exercising that discretion the court must be satisfied that the acts for which the court's sanction is sought, are indeed necessary for winding-up the affairs of the company.

[11] Section 386(4)(h) reads as follows:

> "to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof"

[12] It is common cause that the Applicants need to show exceptional circumstances to justify the extension of their powers in terms of section 386(4)(h).

See: **Henochsberg on the Companies Act,** p 819;

***Ex Parte* Klopper NO: *In Re* Sogervin SA (Pty) Ltd** 1971 (3) SA 791 (T) at 797;

***Ex Parte* Van Den Berg and Others NNO: *In Re* Riviera International (Pty) Ltd (In Liquidation)** 2003 (6) SA 727 (W) at 734 – 735.

[13] It is the Respondents' contention that no such exceptional circumstances exist in the present matter. The main thrust of their arguments in this regard can be found in their Supplementary Opposing Affidavit. The Respondents contend that the Applicants' real intention is to finally

administer the estate of the companies before final liquidators have even been appointed (p 535 paragraph 3.4). The Respondents are also of the opinion that the Applicants are "wasting" money on expenses that are unnecessary and should not form part of the administration costs. In this regard the Applicants are acting recklessly (or so the argument goes). See p 539 paragraph 3.17 of the Supplementary Opposing Affidavit.

[14] In the Founding Affidavit the Applicants explain why they find it necessary to sell the immovable properties of the two companies in liquidation. At the moment the Applicants are obliged to cover the administration costs from their own pockets. This fact is not in dispute. What is in dispute, however, is the amount of the administration costs and the reason why the amounts are expended each month.

[15] I will first deal with the amount. On behalf of the Applicants it is argued that at least R1.5 million have already been expended, the amount escalating by approximately R125 000,00 a month. The administration costs as calculated by the provisional liquidators are set out in annexure "OA7" to the Founding Affidavit (pp 259 to 263 of the Indexed Papers).

[16] In their Supplementary Opposing Affidavit, the Respondents attack the amount already expended. They use various calculations and aver for example that it is not necessary to make use of a security company to secure the property and

allege that two farm workers will be sufficient to do the job. (see p 552 paragraphs 8.7 and 8.8) They further aver that the premium for the security bond is excessive and should be much lower if regard is being had to the values of the properties. (see p 551 paragraphs 8.4 to 8.6). They calculate the administration costs to be in the region of R26 182,50 per month and tender to pay R26 500,00 per month from here on further. I pause here to mention that this "tender" by the two Respondents rings hollow in the light of their previous refusal to adhere to the repeated requests by the provisional liquidators in the past for assistance from the Respondents. The tender also do not take into account the expenses already incurred.

[17] Mr Grobler referred to the case of ***Ex Parte* Klopper: *In Re*: Sogervin SA (Pty) Ltd** 1971 (3) SA 791 (T) where the issue of excessive spending was dealt with. He submitted that the provisional liquidators in the present matter are indeed spending excessively and should therefore not be rescued by the granting of the relief claimed.

[18] The application papers before the court make it clear that the parties also do not agree on the reasons for the amounts expended as administration costs. A large portion of time was also spent on this issue during argument before this court, especially with relation to the amounts spent in securing the property of the two companies in liquidation. In the Founding Affidavit the Applicants list several expenses (see paragraph 8.11 on page 15).

[19] Special reference is made to costs for securing the "properties" of the two companies payable to Tobie Myburgh Auctioneers. Tobie Myburgh Auctioneers had compiled a cost statement detailing costs of R1 547 586,67. This has been annexed to the founding papers as annexure "OA7" (pages 259 to 262 of the Indexed Papers) and deals with expenses from September 2012 to 25 February 2014. The Respondents aver that these expenses were incurred without any consideration of suggestions by the Respondents. [See especially paragraphs 14.3.7 to 14.3.12 of the Opposing Affidavit on pages 309 to 312.]

[20] The amount of the security bond has been determined by the Master of the High Court. This is an expense that has to be paid, regardless of what the Respondents think about it. In this instance the Master determined that the security to be filed by the provisional liquidators must be at least the amount of R70 000 000,00. See pp 629 and 630 at paragraph 8.2 of the Supplementary Replying Affidavit. The relevant debit notes from the insurers and the determination as received from the Master are attached to the Supplementary Affidavit (pages 707, 709 and 711).

[21] The Respondents themselves attached a document to their Opposing Affidavit that is titled "Skikkingsooreenkoms" (Annexure "C" on page 346 of the Indexed Papers). This settlement was reached by the three Applicants and the Respondents (as well as a Miss Vigne) during November 2013. Clause 3.2.1 of the settlement refers to an amount of

R1,672 863,18, being an amount spent by the provisional liquidators as administration costs up to 31 October 2013. Clause 3.2.2 makes provision for monthly expenses to a maximum amount of R120 000,00. Calculations of the arrear administration costs as well as the monthly “budget” were attached to the settlement agreement by the Respondents.

[22] In the light of this document it is incomprehensible how the Respondents can now dispute the amounts spent by the Applicants. It is equally incomprehensible on what basis the Respondents can now argue that the expenses incurred in securing the game and cattle is unnecessary and based on a decision by the Applicants themselves (without the consent of the shareholders of the two companies). This seems to be only one of the instances where the Respondents attempted to create factual disputes.

[23] It is common cause between the parties that the only assets of the two companies are two farms. The cattle and game on the farm do not belong to the companies. [The parties are now *ad idem* about this fact, although various of the annexures forming part of the application papers tell a different story.] The companies are keeping the animals as security for any amounts due to them by the estate of the late Mr Knipe (the father of the Respondents). It is the Applicants’ case that it is necessary to expend money securing the farms and the animals on it in the light of the various disputes between the children of the late Mr Knipe (see page 457, paragraph 8.7). The Applicants indicate that,

should the properties be sold, they will ensure to come to an arrangement with the buyer(s) regarding possession of the animals pending the finalisation of the disputes.

[24] In their opposing affidavits the Respondents submitted that, as the animals are not the property of the two companies, there is no need to secure them. Expenses in this regard are therefore unnecessary. And should the expenses relating to securing the property fall away, it will not be necessary to sell the farms in order to provide for administration costs. The Respondents point out that most of the administration costs was incurred in order to specifically secure the cattle and game on the two farms (paragraph 14.2.2 of the Opposing Affidavit). But the Respondents themselves remarked that the liquidators have a responsibility to the upkeep of all assets and to prevent damages and financial loss. (See page 699 paragraph 25).

[25] Again the Respondents conveniently forgot that they signed a written agreement that detailed the property that is to be secured by the provisional liquidators. Paragraph 2 of the settlement agreement (page 348 of the Indexed Papers) expressly provides that the game and cattle on the farms should be protected and maintained (“alle wild en beeste op die eiendomme van die maatskappye”).

[26] Interestingly enough, Mr Grobler at the very beginning of his argument submitted that the personal right to the cattle and game that is relevant here are indeed an asset. He made this

submission in posing the question whether the companies indeed only have the two immovable assets. The Respondents themselves have calculated the right to be worth R6 117 757,00 (see paragraph 6.1 of the Opposing Affidavit, page 286 of the Indexed Papers).

[27] Despite the alleged factual disputes detailed above, I am satisfied that the matter can be dealt with and adjudicated on the papers before court. Neither party suggested otherwise. And the contents of the settlement agreement of November 2013 are accepted in as far as it is necessary to refer to amounts of, and the reasons for, expenses forming part of the administration costs. I do not find it necessary to further resolve the alleged factual disputes between the parties.

[28] During argument Mr Zietsman for the Applicants submitted that the following circumstances are exceptional, and sufficiently so, as to justify an extension of the powers of the provisional liquidators to allow for the selling of its immovable property:

(i) It has already been two years since the companies were placed in provisional liquidation and since the Applicants were appointed as provisional liquidators;

(ii) There is no indication when the final liquidators will be appointed;

(iii) The Applicants were obliged to take control of the assets of the two companies and secure it (necessary actions that costs money);

(iv) The liquidation application in itself was not a simple process; (the return date was extended several times to afford some of the shareholders the opportunity to oppose the provisional order for liquidation; on the return the matter was still opposed; after a final order of liquidation was handed down, the Respondents attempted to appeal that order)

(v) The companies were liquidated on the basis of it being just and equitable to do so and especially because of the growing animosity between the shareholders (the children of the late Mr Knipe) amongst themselves and with their mother. It is now clear that there is even a dispute as to the shareholding in the two companies.

[29] It was repeatedly pointed out by the Applicants that they are only acting in consequence of their fiduciary duty and their duty to realise the assets of the companies. The effect of section 391 of the Companies Act, read with section 342, is that liquidators are obliged to recover and realise all the assets of the company being wound up, and to apply the proceeds of such realisation, first in discharge of the costs of liquidation, and thereafter in payment of the claims of creditors. A liquidator must act with reasonable care in discharging his duties.

See: **Concorde Leasing Corporation (Rhodesia) Ltd v Pingle-Wood NO** 1975 (4) SA 231 (R) at 234 – 235.

[30] The two companies in liquidation hold some form of lien or retention right over the cattle and game. The exact nature

and extent of that right still need to be investigated and or adjudicated. The liquidators are under a duty to protect that right. *In casu* it seems to indicate protection of the animals themselves (as has been agreed to by the Respondents in the aforementioned settlement agreement). Mr Zietsman specifically referred to section 82 of the Insolvency Act to emphasize this point. He dealt with the different views established through the cases regarding the question whether the provisions of section 82 is peremptory or not. Older cases deemed the provisions to be peremptory. In **Jacobs v Hessels** 1984 (3) SA 601 (T) the provisions were interpreted not to be peremptory, depending on the circumstances.

[31] Mr Grobler reacted to this argument by submitting that section 82 deals with estates unable to pay its debts, unlike the present matter where the liquidation was found to be just and equitable. [It was indeed never argued that the estates of the two companies are unable to pay its debts.]

[32] The facts in the present matter differ from that in the **Jacobs** matter. In **Jacobs** the creditors had been paid in full after the realisation of some of the assets of the estate. The court then found that it was not necessary to realise the balance of the assets and that therefore the provisions of section 82 were not peremptory.

[33] *In casu* each company only has one asset, namely a farm property over which a bond in favour of Standard Bank is

registered. Standard Bank needs to be paid, as well as the claim of the one creditor who already proved his claim. And there still remains the administration costs which is already astronomical. It appears clear (at least *prima facie*) that the immovable properties of the companies will have to be sold in any event in order to finalise the process of winding-up the companies. To keep on spending a substantial amount of money for the upkeep of the properties indeed seem illogical.

[34] ***Ex Parte* Van Der Berg and Others NNO: *In Re* Riviera International (Pty) Ltd (In Liquidation)** 2003 (6) SA 727 (W) is another matter where the court decided against an order in terms of section 386(4)(h). Again the facts in that case differed from what we are dealing with here. There the business and activities of the company was continued; there were several assets in the company; and most importantly, the time that elapsed since the provisional liquidation was significantly shorter.

[35] I pause here to comment on the time that has elapsed since the provisional liquidation and appointment of the Applicants as provisional liquidators and the launching of this application. Much of the time that has elapsed may be attributed to the actions of the Respondents in causing the return date to be extended on several occasions and in appealing against the final order of liquidation. There after followed the review application regarding the meeting where Loftus Viljoen proved his claim as creditor. The time that has passed since the companies were placed in liquidation of

necessity caused the administration costs to increase exponentially.

[36] The Respondents also argued that there are other remedies available to the provisional liquidators. In paragraphs 7.13 and 7.14 of their Opposing Affidavit (pages 290 and 291 of the Indexed Papers) the Respondents set out one possible solution to the problem, namely that the outstanding rent owing to the companies should be collected and the farms then leased so as to secure an income for the companies. Mr Zietsman correctly pointed out that this is not a viable option. Renting out the farms will entail a continuing of the business activities of the two companies. That also need authorisation from the court in terms of section 386(4)(f) of the Companies Act. Furthermore, the cattle and game on the farms will have to be relocated in order to provide occupation of the properties to any lessee.

[37] Mr Grobler posed the question during argument as to why the Applicants have not yet investigated the claim to the cattle and game. According to him the Applicants fail to explain why they are protecting a right without knowing exactly what right they are protecting. Mr Grobler pointed out that it is not clear what the position is of the estate of the later Mr Knipe.

[38] Mr Zietsman argued that the claims of the companies against the owners of the cattle and game are in dispute and must be investigated before summons can be issued to collect any

outstanding indebtedness. This will of course cost money, money which the provisional liquidators will again have to front from their own pockets. This appears to be a sensible argument, one which had not successfully been refuted by the Respondents.

[39] It was furthermore suggested that the liquidators should arrange an interrogation. The provisional liquidators have not been in a position to arrange an interrogation because of the pending review application and also due to a lack of funds. It is clear that the process by which final liquidators (with the necessary powers) are appointed will not be completed in the foreseeable future. Mr Grobler argues that this in itself does not constitute exceptional circumstances as the Applicants can easily wait out the time till the final liquidators are appointed. This argument of Mr Grobler loses sight of the administration costs that is a reality and need to be paid till such time as an interrogation can properly be held.

[40] I pause here to mention that it was never argued that the three provisional liquidators are indeed in a position to indefinitely carry the costs of the administration process out of their own pockets.

[41] It is currently also not possible for the liquidators to hold further meetings with creditors and shareholders. It is the Respondents who requested the Master of the High Court to keep the convening of the first meeting of creditors in abeyance pending the finalisation of the review application.

See pp 617 and 657. And the Master is adhering to that request.

[42] Before this application was launched, the Applicants did attempt to raise money on the security of the assets of the companies. However, neither Standard Bank nor Absa was willing to assist. See pages 15, 264 and 272 of the Indexed Papers. The shareholders (including the two Respondents) were requested at various instances to provide the necessary funds to accommodate the administration costs. The Respondents did not react in a cooperative manner.

[43] I am satisfied that the Applicants request an extension of their powers for a specific and legitimate reason, namely to realise funds for payment of the administration costs. The administration costs are necessarily incurred by the provisional liquidators by properly taking care of their various duties in winding-up the affairs of the two companies.

[44] I am satisfied that the facts and circumstances relevant to this case, taken in its totality, are such so as to constitute exceptional circumstances justifying an order whereby the Applicants as provisional liquidators are authorised to sell the immovable properties of the two liquidated companies. The most compelling circumstances are:

(i) the extent of the expenses that the provisional liquidators have been obliged to incur; and

(ii) the fact that it is clear that the animosity and quarrelling between the shareholders will continue until such point

that the winding-up process have been completed (and this necessarily involve a realising of the assets). It is clearly not in the interests of the creditors of the two companies or of its shareholders that the administration costs should escalate on a monthly basis.

[45] The Applicants had no choice other than to approach this court for the relief claimed. There is no reason why the costs that they so incurred, should not form part of the costs in liquidation.

[46] In his Heads of Argument, Mr Zietsman indicated that the opposition to the application caused further and unnecessary commitments for the estates and that this justifies an order that the costs of the application should be borne by the Respondents. In the alternative, that costs should be costs in the two liquidated estates. Mr Grobler requested for costs to be costs in the course of the liquidation process.

[47] The contents of the affidavits filed by the Respondents are evidence of the manner in which these two gentlemen have been approaching the whole situation. It is apparent that they are not in any way satisfied with the liquidation of the two companies. They seem bent on creating as many obstacles as possible to prevent the process of winding up from running smoothly. Particularly worrisome is their insistence on attacking the amounts of the administration costs and the reasons why it is being incurred. They do this despite the fact

that they had agreed to the amounts and to the safeguarding of the properties as far back as November 2013. Mr Zietsman was correct in pointing out that the Respondents adapted their version as the filing of the various affidavits proceeded. Their attitude justifies at least an order whereby they are to be held responsible for the costs of opposition.

[48] In the result I make the following orders:

1. Leave is granted to the Applicants to approach this court in terms of section 386(5) of the Companies Act, 61 of 1973, for purposes of bringing this application;

2. The powers of the Applicants as provisional liquidators of Kameelhoek (Pty) Ltd [in liquidation] and Schaapplaats 978 (Pty) Ltd [in liquidation] are extended to include the powers as set out in sections 386(4)(a) and 386(4)(h) of Act 61 of 1973 respectively;

3. The costs incurred by the Applicants in bringing this application are to be costs in the liquidation of the aforementioned companies;

4. The Respondents are to pay the cost of opposition.

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G.J.M. WRIGHT, AJ

On behalf of applicant:	Adv P. Zietsman Instructed by: Matsepes Inc BLOEMFONTEIN
On behalf of respondent:	Adv S. Grobler Instructed by: Phatshoane Henney Attorneys BLOEMFONTEIN

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