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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 4528/2018

In the matter between:

ELIZABETH MARIA VENTER Applicant

and

TSIU VINCENT MATSEPE 1st Respondent
ANTON OTTILE NOORDMAN N.O. 2nd Respondent
PHILLIP FOURIE N.O. 3rd Respondent
MATSEPES INCORPORATED 4th Respondent
FREDERICK JACOBUS SENEKAL 5th Respondent
THE MASTER OF THE HIGH COURT, BLOEMFONTEIN 6th Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION 7th Respondent

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HEARD ON: 25 OCTOBER and 8 NOVEMBER 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 29 MARCH 2019

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[1] This is an application for a declaratory order declaring that the applicant is not in liquidation and that the seventh respondent correct his records to reflect that the applicant is in business. The applicant is requesting costs only if the application is opposed.

[2] The applicant, Elizabeth Maria Venter, is the only shareholder of Sebal Beleggings (Pty) Ltd with registration number 2006/012369/07.

[3] The first respondent, Tsiu Vincent Matsepe a practicing attorney of Odendaalsrus is the co-liquidator in the estate of Sebal. The second respondent, Anton Ottlie Noordman, a practicing attorney of Bloemfontein is also a co-liquidator in the estate of Sebal. Both are acting in their legal capacity stated above in opposition of the application as well as seeking a relief as per the conditional counterclaim filed of record. The fifth respondent, Frederick Jacobus Senekal is the attorney of record for the first and second respondent. The first and second respondent are the only parties who have filed opposing papers.

[4] This matter came before me on 25 October 2018. Mr. K.W. Luderitz SC assisted by Adv. F.G. Janse van Rensburg appeared for the applicant and the first, second, fourth and fifth respondent were

represented by Mr. A. Sanders. Ms J. Engelbrecht appeared for the sixth respondent holding a watching brief. After substantial delay I ruled that both counsel proceed with oral submissions. Counsel for the applicant completed his arguments. Mr. Sanders was barely on his feet when he requested to be given more time in order to prepare himself because certain submissions were made of which he was not aware of. Given his reluctance to argue the matter and unnecessary interjections, I formed the impression that he was delaying the inevitable. It is patently clear that he was kicking for touch to avoid the bullet. The argument he raised for the postponement was unsound because nothing new was introduced in the oral submissions which was not in the papers before me.

[5] I found it prudent that I should grant him the postponement to 8 November 2018. It would have been unfair that the applicant and/or the estate of Sebal is burdened with the wasted costs for the day due to no fault on their part. The only litigants, responsible for the wasted costs will naturally be the first, second and fifth respondent in their personal capacity. I made an order to that effect.

[6] On 8 November 2018 the same legal team as on the previous occasion appeared for the applicant. Mr A. Harcourt SC assisted by

Mr A. Sanders was now appearing for the respondents. Ms G Wright who appeared for the sixth respondent informed me that her client abide by the decision of the court on the preliminary point to be determined.

[7] The preliminary point to be determined is a challenge in terms of Rule 7(1) of the Uniform Rules of Court. The contention is that the fifth respondent is precluded to act unless and until he satisfies this court that he is duly authorised to act. This means that the fifth respondent does not have the necessary authority to represent the first and second respondent. The absence of authority means that neither can oppose the application or pursue the counter application. The first and second applicants did not have the necessary authority as stated above in the absence of participation of the third co-liquidator in their opposition to the application and/or conditional counterclaim. Further, that the participation of the respondents in the proceedings is unauthorized. Therefore the first and second respondent have no *locus standi* to pursue the relief sought.

[8] I now turn to deal with the preliminary points raised by the applicant and the arguments advanced by both counsel.

[9] At the commencement of his submissions Mr. Luderitz outlined the position of the third respondent who filed an affidavit stating that he does not oppose the relief sought in the main application. One of the features of his affidavit is that the third respondent accepts that the order granted by Van der Merwe J (as he then was) on 28 April 2016 discharged the company from liquidation and supports the relief sought by the applicant. Pertinently he accepts that his appointment as a co-liquidator on 20 June 2016 was irregular and defective. Lastly he stated categorically that the fifth respondent has no authority or mandate to represent him in these proceedings and the notice of opposition filed of record does not purport to be his. I shall return to these aspects.

[10] He argued that in response to the challenge raised relating to the authority, the applicants relied on the powers of attorney dated 22 October 2018. He submitted that the Rule 7 Notice was concerned with the two (2) powers of attorney. The significant feature of the power of attorney signed by the first respondent is that it does not only seek to grant authority but ratify what has been done in the past. The power of attorney signed by the second respondent does not contain a clause ratifying any past action by any/or all of the co-liquidators. The crux of his argument was that neither of the

respondents were authorized. In the event that they are not acting jointly then they are not properly authorized and that they should be ordered to pay costs in their personal capacities.

[11] Mr. Luderitz argued quite forcefully that nullity cannot be ratified. He pointed out that the two joint liquidators can sign as many powers of attorney as they possibly can but they can never ratify anything to the exclusion of the one other liquidator. He argued further that the actions of the first and second respondent were in contravention of section 382 and 386 of the Companies Act 61 of 1963. He relied primarily on **Powell and another v Leech and another.** [1] There the court held that joint liquidators must act jointly in carrying out their duties. Relying on **Gainsford and others NNO v Tanzor Transport (Pty) Ltd**[2] he argued further that in the event that the liquidators are unable to act jointly, section 386 provides that they can procure support of the creditors and if it fails seek permission from the Master. If the Master refuses then the court can be approached in terms of section 387 for the necessary relief.

[12] In conclusion he submitted that the action of the respondents was designed to burden the assets of Sebal with costs. He stated that

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[1] **1997 (4) All SA 106 (W)**
[2] **2013 (4) SA 394 (GS)**

although the respondents may have personal interest in the form of their fees that does not confer on them in the capacities as liquidators the right to oppose the relief or seek one without joint approval.

[13] In response Mr. Harcourt pointed out that there was no bona fide and genuine dispute. He conceded that he does not have any mandate from the third respondent. He referred to the Notice of Motion clearly stating that the fifth respondent is the attorney of record for the respondents. This in his view, is an admission that he has the necessary authority to act on behalf of the respondents. This aspect is even admitted by the applicant in paragraph 7.3 of the founding affidavit wherein it is stated that at all material times the fifth respondent was the attorney of record. In the absence of any suggestion that anything has changed, then the point raised by the applicant has no substance and lacks merit.

[14] The authority of the fifth respondent to act for the respondents is a non-issue because the respondents have produced signed powers of attorney attached to the papers on pages 187 and 188 respectively. He emphasized that a power of attorney is not an affidavit and it has no prescribed form. Therefore the two powers of attorney complies

with the requirements conferring the necessary authority on the fifth respondent to act on behalf of the first and second respondent.

[15] The challenge against the authority of the first and second respondent was also raised by Merss Willers Attorneys in a letter dated 10 February 2017 pertaining to case number 567/2017. In terms of the court order handed down by my sister Chesiwe J on the even date, the first and second respondent were ordered to furnish the written permission from the creditor and a written mandate from the liquidators that Matsepes may act as attorneys of record. In the alternative, a written authority from the Master conferring upon them the necessary powers to act. Although this order was granted almost two (2) years ago, the first respondent maintains that it was materially flawed and bad in law. It is interesting to note that it has not been appealed against which means that it remains an Order of court. In response, the respondents are relying on the powers of attorney attached to the opposing affidavit marked TVM “7” and “8” respectively.

[16] Rule 7 (1) provides that the authority of anyone acting on behalf of a party may be disputed and such person may no longer act unless the court is satisfied that he is authorised to act. As Mr. Harcourt correctly

pointed out, the subrule does not prescribe the formality of the power of attorney. Nothing much turn on this.

[17] The pertinent issue is the definition of the word “authority”. The synonyms thereof are right, authorisation, power, mandate and prerogative. It is common cause that the first and second respondent are joint liquidators with the powers as set out in section 352 (1) of Act 61 of 1973 read with Item 9 of Schedule 5 of Act 71 of 2008.

[18] The joint liquidators must always take a joint decision before acting on a matter. The argument that the powers of attorney by two (2) respondents is in order is unsound. They lack the appropriate authority if the other co-liquidator does not participate in the decision-making process culminating in a particular action being taken. I also do not find any substance in the submission that because the applicant in her affidavit mentioned that the fifth respondent was at all material times acting for the first and second respondent confer such authority to him. The authority to act is conferred in terms of the statute.

[19] In my view then this disposes of this matter. Even if I am wrong, the next leg which will result in the same conclusion is challenge raised by the applicant relating to the issue of *locus standi.*

[20] It is trite that it is the primary duty of the liquidator(s) to preserve the assets of the company. In the execution of their functions, liquidators must do so in accordance with section 382 of the Companies Act which provides as follows:-

> **"Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the question in issue or give directions as to the procedure to be followed for the determination thereof."**

[21] In Powell and another supra the court held that joint liquidators must act jointly and that the observance of the provisions of section 382 is peremptory. The court went further that section 382 contemplates a joint decision prior to action taking place. This means that it cannot be done respectively.

[22] The actions of the first and second respondent are in contravention of this section. It is common cause that the third respondent is not party

to the decision to oppose the relief sought or seek relief contemplated in the conditional counterclaim. It stands to reason that he is not a party to the appointment of the fifth respondent as the attorney of record. Equally so, to the appointment of the fourth respondent as the law firm of choice.

[23] The section provides that in the event of an impasse between joint liquidators, such may be referred to the Master for the determination of the question in issue or give direction as to the procedures to be followed for the determination thereof. It appears from the papers that the first and/or second respondent did not invoke the provisions of section 382 (2) of the Companies Act.

[24] A further window of opportunity is provided to the joint liquidator(s) in this predicament in the form of section 387 (2) of the Companies Act. There it is provided that in the event the Master refuse to give directions, the liquidators may approach the court for the necessary relief. I was not referred to any application pending or contemplated by the first and/or second respondent to approach the court for the relief in resolving this impasse. I conclude that there is none.

[25] Section 386 deals with the general powers conferred upon the liquidators. In particular subsection 3 provides that armed with the authority granted by meetings of creditors or members or contributories or on the direction of the Master, the liquidators shall have the power to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature. In Gainsford supra the court held that the liquidator(s) must have the authority from the meeting of the creditors which must precede the bringing of such proceedings. The court went on to say that it is clear that the citation of the liquidated company itself and the prior authority of the creditors are the jurisdictional requirements for civil proceedings to be validly and properly before the court in terms of section 386 (4)(a).

[26] It is common cause that the first and/or second respondent do not derive their power from any meeting of creditors. I venture to say that they are acting on their own. This strengthened the submission that they lack any authority to place any defence or even seek relief validly before this court. Acting as liquidators they could not have appointed the fifth respondent to act in the name of the company. Obviously if they act in their personal capacities, they do not have to obtain the authority as envisaged in terms of the Companies Act.

[27] The importance of this section was emphasized in the passage on paragraph 31 in the Gainsford matter in the following manner:-

> **"This court is thus persuaded by the remarks of Epstein AJ in Fay supra that section 386 (4)(a) of the Companies Act is couched in peremptory terms and that liquidators cannot exercise the discretion to sue in the name of the company itself or whether to sue in their own names with the letters "NO" appended. The liquidators do not have locus standi in terms of section 386 (4)(a) of the Companies Act to institute proceedings under their own names. Any action instituted by the liquidator must be brought in the name of the company in which the assets vest and cannot be brought in the name of the liquidator. The liquidation of the company does not destroy the identity of the company. The Companies Act does make provisions for a liquidator in certain circumstances to institute an action in his/her name, but only where a court so directs."**

I agree

[28] This leads me to the conclusion that the first and second respondent could not have given the fifth respondent any authority to represent the estate of the company. Equally, they lacked the necessary locus standi to sue and be sued in their capacity as co-liquidators.

[29] On the issue of costs, I find no reason to deviate from the principle that the costs follow the result. However in this matter, I conclude that the estate of the company should not be burdened with the costs when the first, second and fifth respondent did not act in accordance with the law. I hold that the aforementioned respondents must pay the costs in their personal capacity.

[30] In the premises I make the following order:-

30.1. The fifth respondent does not have the authority to represent the first and second respondent in their capacity as liquidators in this matter.

30.2. The first and second respondent lack the locus standi to sue or be sued in their capacity as liquidators in this matter.

30.3. The first, second and fifth respondent must pay in their personal capacity the wasted costs of the 25 October 2018 jointly and severally the one paying the other to be absolved.

30.4. The first, second and fifth respondent must pay the costs of the application.

MATHEBULA, J

On behalf of Plaintiff:	Adv. K. W. Luderitz (SC) assisted by Adv. F.G. Janse van Rensburg
Instructed by:	Willers Attorneys Bloemfontein
On behalf of Respondent 1,2, 4 & 5:	Adv. A. Harcourt (SC) assisted by Adv. A. Sanders
Instructed by:	F.J. Senekal Incorporated Bloemfontein
On behalf of Respondent 6:	Miss. J Engelbrecht
Instructed by:	Master of the High Court Bloemfontein

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