REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 10378/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

17 NOVEMBER 2017 **FHD VAN OOSTEN**

In the matter between

GOODNESS MPUMI NCHABELENG	**APPLICANT**
and	
YENA INVESTMENTS CC	**FIRST RESPONDENT**
JM OELOFSEN NO	**SECOND RESPONDENT**
MA CHRISTIAN NO	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT JOHANNESBURG	**FOURTH RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	**FIFTH RESPONDENT**
CITY OF EKURHULENI MUNICIPALITY	**SIXTH RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The applicant, in her capacity as the sole member of the first respondent (Yena), by way of urgency, seeks an order for the setting aside of 'all proceedings in relation to the winding-up' of Yena and that it be discharged from liquidation. The winding-up proceedings were brought by the sixth respondent (the City) on 3 July 2017. The application was duly served at Yena's registered address but the matter proceeded on an unopposed basis. On 5 September 2017 a provisional winding-up order was granted, which was made final on 18 October 2017. The third and fourth respondents were subsequently appointed as the joint liquidators of Yena. Only the City opposes the present application.

[2] The application is premised on Rule 42 as well as s 149(2) of the Insolvency Act 24 of 1936, read with s 339 of the Companies Act 61 of 1973 (as amended by Act 71 of 2008) and s 66 of the Close Corporations Act 69 of 1984 on the ground that the winding-up order was erroneously sought and granted, in the absence of Yena.

[3] Having heard argument, I granted the order appearing at the end of this judgment. These are my reasons.

Urgency

[4] Counsel for the City placed the urgency of the matter in dispute. The issue can promptly be disposed of. Yena is the registered owner of an immovable property situated in Kagiso Street, Tokoza, Ekurhuleni (the property). A commercial building comprising a shopping complex of four shops has been erected on the property. Shoprite Checkers (Pty) Ltd is a major tenant of one of the shops. Negotiations have commenced with developers to extend the shopping complex by acquiring neighbouring properties for parking and additional shops.

[5] In the commercial set-up of Yena, its liquidation, it hardly needs to be stated, is of vital importance to its business reputation and continued survival. In this regard, the merits of the application are of fundamental importance in deciding urgency. If indeed the winding-up order was erroneously granted, the urgency of remedial steps in setting aside the order and reinstating Yena into its former status, are apparent and need no further comment.

[6] For these reasons I conclude that sufficient grounds for urgency exist.

Grounds in support of the application

[7] The City's liquidation application was premised on an alleged indebtedness to it by Yena, in the sum of R334 288.69, in respect of municipal rates, levies and duties levied by the City on the property. In support of the alleged indebtedness, the City attached to the papers in the liquidation application a 'copy of an account' which on perusal thereof, is a copy of a page of an email, incorporating a 'Duplicate Statement' reflecting the name 'Yena Investments CC', the stand address '6 Kagiso Crescent', and account number '2105360438'. In regard to the amount, nothing more is indicated than 'Balance B/FWD' (brought forward) of R334 288.69.

[8] Not unsurprisingly Yena disputes the alleged indebtedness. A long and protracted history of disputes having been raised and dealt with by the City, including default judgments taken against Yena in 9 magistrate court cases, is set out in detail in the founding papers. I do not consider it necessary to refer in any detail thereto. Suffice to refer to the eventual outcome of the disputes referred to by the applicant, which was an unequivocal acknowledgement by the City in a letter dated 29 November 2005, that the City 'has no further claim against Yena Investments CC…' Some four years later, so the applicant states, the City in an about turn, once again claimed amounts allegedly owing by Yena.

[9] None of the apparent inconsistencies and discrepancies in the City's accounting to Yena, referred to in the founding papers, has been addressed in the City's opposing affidavit in the present application. After many years of disputes the City has still not produced a proper specified statement of account. The deponent to the City's opposing affidavit in seemingly vague terms and based on unsubstantiated grounds, seeks to criticise and make inferences from certain of the letters written to the City by the attorneys acting for Yena. The lame excuse proffered of insufficient time for a proper response to the disputes having been afforded, in view of the many years the disputes have raged, sounds hollow and is without substance.

[10] On the information before this court, I am satisfied that the applicant has shown a bona fide viable defence to the City's claim.

[11] This brings me to the service of the provisional winding-up order, which it will be remembered was granted on 5 September 2017. In terms of paragraph 3 of the order, 'a copy of this order as well as the application shall be served on the respondent at the address where the applicant rendered its municipal services to the respondent as reflected in the account attached to the applicant's founding affidavit…' (6 Kagiso Crescent).

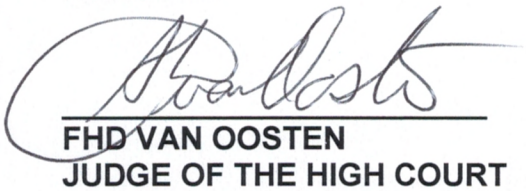
[12] In purported compliance with the order, the City's attorney of record, Mr Ficq, who practices as such in Roodepoort, deposed to a 'service affidavit' in which he confirmed that on 12 October 2017 he, personally, together with his messenger, attended 'at the premises of the respondent where the services were rendered by the applicant' but that no one was present. It is clear from the photographs attached to the service affidavit, that a copies of the application and order were left at the entrance gate of a residential property, which it must be presumed, was at no 6 Kagiso Street, at the corner of Kagiso and Mamelo Street. Significantly however, no reference to the particular township is to be found in either the affidavit or any of the annexures thereto. A copy of a condensed portion of what appears to be a Google map, has also been attached to the affidavit, indicating a ballooned address '6 Kagiso Crescent' once again, without any reference to a township.

[13] The City's attorney was undoubtedly not authorised by the court to effect service of the application and order. Nor was the attorney empowered by the rules of court to effect service. Service, in the absence of specific directions in regard thereto by the court, was to have been effected in terms of rule 4, by the sheriff. But, it goes further: the 'service' by the attorney was ostensibly, as has convincingly and conclusively been shown by the applicant, effected at the wrong address. It is undisputed that the premises where the City's services were rendered is *not* at a residential property as depicted on the photographs attached to the attorney's service affidavit, but at a commercial property, situated in Tokoza, Ekurhuleni, as is clear from the aerial photographs taken of the property which are attached to applicant's founding affidavit. The property is situated in Kagiso Street and *not* in Kagiso Crescent nor, for that matter, at the corner of Kagiso and Mamelo Street (which the applicant states is in Kagiso, on the West Rand), as is depicted on the photographs taken by the attorney.

[14] The applicant has pertinently raised the service issue in the founding affidavit. The City's attorney has not responded thereto. The ineluctable conclusion to be drawn is that improper and accordingly no service of the provisional winding-up order was effected which, had this been disclosed to the court at the hearing of the application for the granting of a final order, would have precluded the granting thereof. For this reason alone, the final winding-up order was erroneously granted and it accordingly falls to be rescinded. In order to allay the fears of counsel for the City as to the possible wide import of the order I propose to make, I merely need to state that the rescission portion of such order does not include the order granted by Nyobeni J, on 3 May 2017, in terms of which Yena was reinstated after its prior de-registration. Lastly, as for the service of the provisional winding-up order at Yena's registered address, I accept the version of the applicant that the registered address was changed but not formally registered as she was required to do, and that she accordingly was unaware of the granting of the provisional order.

Order

[15] In the result an order was granted in terms of the draft order, initialled and marked 'X'.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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APPLICANT'S ATTORNEYS	***DE KOOKER ATTORNEYS***
COUNSEL FOR 6TH RESPONDENT	***ADV T CARSTENS***
6TH RESPONDENT'S ATTORNEYS	***GD FICQ ATTORNEYS***
DATE OF HEARING	***14 NOVEMBER 2017***
DATE OF ORDER	***14 NOVEMBER 2017***
DATE OF REASONS	***17 NOVEMBER 2017***