✓✓ 20/11/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 53041/2016

In the matter between:

SIVAPRAGASAM NAYAGER First Applicant

RATHA KRISHNAN NAYAGER Second Applicant

(1) REPORTABLE: ~~YES / NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES / NO~~

20/11/17
DATE

SIGNATURE

and

JAN SMIT VENTER NO First Respondent

BEATRICE LINDA MILLS NO Second Respondent

JAN PAUL VORSTER NO Third Respondent

ELIZABETH WILANDA PRINSLOO NO Fourth Respondent

MOTSHWANA GRACE LUKHELE NO Fifth Respondent

MICHAEL MATHOMO MASILO NO Sixth Respondent

in re:

JAN PAUL VORSTER NO Applicant

and

ERF 603 BENONI CC Respondent

JUDGMENT

Tuchten J:

1 The second applicant was the holder of the member's interest (the member's interest) in Erf 603 Benoni CC (the close corporation). The second respondent's estate was placed under final sequestration order on 14 November 2012. The ownership of the member's interest passed upon the sequestration first to the Master and then, on their appointment, to the trustees in the second applicant's estate, who are the fourth and fifth respondents in the present case (the trustees).

2 I must mention that the second applicant obtained a rehabilitation order from this court on 9 October 2015. Pursuant to an application which I heard together with the present application, I shall hand down judgment on the same day as that on which I hand the present judgment down, setting aside the rehabilitation order and directing the revival of the sequestration process under the trustees.

3 On 5 November 2014, the trustees passed a resolution under s 129 of the Companies Act, 71 of 2008 (the new Companies Act) in which they resolved to place the close corporation under business rescue.

The business rescue practitioner concluded that the objects of business rescue could not be achieved and, on his own application, obtained a provisional order for the liquidation of the close corporation which was made final on 16 October 2015.

4 The applicants seek in the present application to rescind the final liquidation order which was made in their absences and permit them to oppose the liquidation of the close corporation.

5 The principal defence of the respondents to the rescission is that neither of the applicants has standing to apply for the rescission of the liquidation order and of the resolution to place the close corporation under business rescue.

6 The first applicant claims to have bought the member's interest from the second applicant on 1 January 2007. The applicants are brothers. Payment of the purchase price was not only expressed in the written contract of sale to be an obligation imposed on the first applicant. The fact of payment was in addition a suspensive condition. If payment was not made in accordance with the condition, the agreement lapsed.

7 In fact, payment was not paid as provided for in the agreement of sale. So the agreement of sale lapsed. After that, however, the first and second applicants purported to vary the agreement of sale and in fact the first applicant claims to have paid the purchase price in accordance with the variation. But the first applicant did not become the actual holder of the member's interest. This was allegedly quite simply became the two applicants failed to take the necessary steps to execute a form CK2 and lodge it with the Companies Commission.

8 An application to set aside a winding-up in relation to a company may only be brought under s 354 of the old Companies Act.[1] Section 354 is made applicable to the winding-up of close corporations by s 66 of the Close Corporations Act, 69 of 1984. To establish standing, the applicants must bring themselves within the provisions of s 354, read with the changes required by the context that the corporation invoiced is a close corporation rather than a company.

9 Section 354 provides that an application to set aside a winding-up may be brought by "any liquidator, creditor or member". The applicants seek to bring themselves within the definition of "member".

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1 Which remains in force by virtue of item 9 of Schedule 5 to The Companies Act, 71 of 2008 (the new Companies Act)

10 But the second applicant has ceased by operation of law to be a member of the close corporation. This is because by operation of the sequestration order his assets ultimately vested in the trustees. In his case, by virtue of the definition of "member" in s 1 read with the provisions of s 29(2)(e) of the Close Corporations Act, the trustees are vested with standing to act in relation to the member's interest and the second applicant no longer has the capacity to do so.

11 This position is fortified by the order which I made setting aside the second applicant's rehabilitation but would have been so even if the applicant's rehabilitation order had stood. The rehabilitation did not somehow re-transfer the member's interest to the second applicant. The trustees remained the owners of the member's interest and thus entitled to the benefits of s 29(2)(e) of the Close Corporation Act.

12 All that the first applicant has, on his version, is a right as against the second applicant to be reflected as a member of the close corporation and a right as against the close corporation in liquidation to be reflected as its member. He is therefore in the position of a beneficial shareholder who is not reflected as such in the share register of the company, who classically does not qualify to bring a winding-up application[2] or pursue a remedy for oppression under s 252 of the old

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2 See the note sv *member* in Henochsberg on the old Companies Act, loose lead ed.

Companies Act.[3] By parity of reasoning, a beneficial shareholder and accordingly a person in the position of the first applicant in relation to a member's interest has no standing to apply under s 354 to set aside a winding-up order.

13 it follows that the applicants have failed to establish standing and the application cannot succeed.

14 I shall briefly deal with the merits of the application. The applicants suggest that the trustees should not have passed a liquidation for the business rescue of the close corporation because it was not financially distressed. But it manifestly was. The close corporation was the owner of a property. It had expenses in the form at the very least of rates, utility expenses and the like. But it had no income. The second respondent was occupying the property and paying no rent. So the trustees would have had to raise funds to pay the liabilities of the close corporation as they fell due. They decided, as they were entitled to do, not to fund the close corporation.

15 The applicants say that they would have paid the expenses of the close corporation to the trustees. But they did not do so. There was no obligation on the trustees to pursue the applicants for this purpose.

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3 *Smyth v Investec Bank Ltd [2017] ZASCA 147*

16 The business rescue failed. No one, not even the applicants, came forward to fund the close corporation. The business rescue practitioner had no option but to seek the liquidation of the close corporation. Nothing that the applicants say they would have liked to put before the court considering the liquidation application would have made any difference.

17 And the position today, is that the trustees are in control of the close corporation. They still do not want to finance its operations. Even if the liquidation were to be reconsidered, the same result would follow.

18 The applicants says that they were not in wilful default of appearance at the liquidation application when it was heard. Both of them were aware of the business rescue and the subsequent liquidation application. They both employed attorneys to represent them in this regard. The second applicant seems to have left the resistance to the liquidation application to the first applicant. For some reason, the first applicant's attorney did not do anything of significance in this regard.

19 A provisional winding-up order was granted on 10 September 2015. The applicants say they learnt of this and were surprised. They then were content to accept the assurance of the first applicant's attorney that the matter would be "sorted out". So the applicants, while aware

that the attorney was not doing his job, simply remained supine. They took no steps to establish why their attorney was not doing what he had been asked to do or to employ an attorney who was more reliable.

20 The applicants knew that the return day of the provisional winding-up order was 12 October 2015 and that an affidavit by one or probably both of them would be needed to form a basis for an application by them to intervene in the liquidation. But by that date neither of them had signed such an affidavit.

21 And then, they say, the attorney finally sprang into action. He prepared an affidavit for the first applicant to sign and had the rule extended or the matter stood down to 16 October 2015. The first applicant says he deposed to the affidavit prepared by his attorney on 15 October 2015.

22 But then, the applicants say, the attorney simply neglected to have the affidavit filed in court and the final winding-up order was granted. The applicants say that the attorney actually told them that the final order had been granted but that he was "taking the matter on appeal."

23 This, the applicants say, entirely satisfied them and they left the entire matter in the hands of the attorney who then did nothing to prosecute the alleged appeal or the opposition to the grant of the winding-up

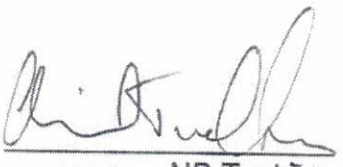
order. Only when an application for the eviction of the first applicant from the property came to his notice, did the applicants take action. They launched the present application by notice of motion dated 28 April 2016.

24 I hardly need say that the applicants were reckless in the conduct of their own affairs. The left the administration of their affairs in the hands of someone who repeatedly, on their version, showed himself to be thoroughly untrustworthy and did nothing themselves to correct the situation. They allowed themselves, on their version, to be reassured by vague promises that matters would be sorted out and did nothing themselves to ensure that they were.

25 There comes a time when a dilatory litigant can no longer shelter behind the alleged negligence, and worse, of his attorney. This case, in my judgment, is well on the wrong side of that line for the applicants. Through the attorney, the applicants elected not to oppose the liquidation application. They were therefore in wilful default. In my judgment no good cause for the rescission has been demonstrated.

26 I make the following order:

The application is dismissed with costs against the applicants, jointly and severally.



NB Tuchten
Judge of the High Court
20 November 2017

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