



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Reportable

CASE NO: D879/10

In the matter between:

**DIRECT CHANNEL KWAZULU-NATAL (PTY) LTD
(IN LIQUIDATION)**

Applicant

**[Herein represented by its joint liquidators, Leigh
William Roering N.O. and Simangele Martha Maseko
N.O]**

and

DENVER NAIDU AND 7 OTHERS

Respondents

Heard: 9 October 2014

Delivered: 28 May 2015

Summary: Liquidation of a company - effect thereof to legal proceedings already commenced in the Labour Court against such company, as an employer - The provisions of section 359 of Act Number 61 of 1973 are couched in peremptory terms in requiring the giving of the written notice to the appointed liquidators – proceedings considered to have been abandoned by the respondents – default judgment dismissed.

JUDGMENT

CELE J

Introduction

- [1] A default judgment sought by the respondents, who were dismissed in terms of section 189A of the Labour Relations Act¹, is being resisted by the applicant who seeks for the stay or dismissal thereof on the basis that such proceedings have been abandoned by the respondents. The respondents opposed the application and ask that a default judgment be granted in their favour.

Factual Background

- [2] The eight respondents were in the employment of the applicant in various positions. They were members of the Banking Insurance, Finance and Assurance Workers Union (BIFAWU), hereafter referred to as the union. On 20 January 2010 the applicant issued a notice in terms of section 189 (3) and 189A of the Act to its employees, simultaneously indicating that it would approach the Commission for Conciliation, Mediation and Arbitration (the CCMA) for the appointment of a facilitating commissioner. In February 2010 a consultation meeting facilitated by Commissioner Berlin Nayager of the CCMA commenced in earnest. The union attended the consultation meeting. Various other meetings were held and a number of challenges were experienced by the parties. On 31 May 2010 the applicant terminated the employment of the respondents. Some of the employees accepted a voluntary retrenchment.
- [3] Aggrieved by their dismissals, the respondents referred an unfair dismissal dispute to the CCMA for conciliation which failed to resolve the dispute. The applicants referred the dispute to this court by means of a statement of case on 12 October 2010. The applicant had 10 days to file a statement of response, in the event it wanted to oppose the application.²

¹ Act Number 66 of 1995.

² See rule 6 (3) (c) of the rules for the proper conduct of proceedings in the Labour Court.

[4] On 28 October 2010 the applicant launched an application for its winding-up and filed it with the Registrar of the South Gauteng High Court. It simultaneously served a notice thereof to the union which acknowledged the receipt thereof on 31 October 2010. On 24 November 2010 the respondents asked for their unopposed matter to be set down for trial. Nothing of note appears to have happened in the matter until on 5 March 2013 when the respondents filed an application for default judgment. Attorneys of the joint liquidators of the applicant wrote a letter dated 4 February 2014 to attorneys of the respondent, notifying them of various issues including that:

- The provisions of section 359 of the Company Act were applicable in this matter and the implications thereof;
- The winding up order was granted on 9 November 2010, placing the applicant under provisional liquidation until 11 March 2014.
- Liquidators were appointed on 31 October 2011.
- A special meeting of creditors was scheduled for 5 March 2014 at the Master's Office in Johannesburg.
- Messrs Shane Remiah and Zulfikaar Khan were made available by the liquidators to assist claimants with the completion of claim forms during the period 11 February 2013 to 13 February 2013 at an identified office in Commercial Road, Durban, to prove any further claims.

[5] Again nothing happened until 11 March 2014 when the Registrar set this matter down for hearing on 21 May 2014 as an unopposed application, on notice to both parties. Then on 26 March 2014 the applicant filed for the first time its 'answering statement of case'. It then filed its condonation application for the late filing of the statement of defense on 14 April 2014. On 20 May 2014 the applicant filed an affidavit seeking the dismissal of the default judgment. On 21 May 2014 an order was issued by this court per Gush J, adjourning the matter to the opposed roll. On 6 June 2014 the respondents filed their answering affidavit to oppose the dismissal of the default judgment.

Submissions

- [6] The applicant submitted that the union was aware of the application for liquidation and yet has never served a notice as required by law to the liquidators of the applicant. It was submitted that, in terms of section 359 (2) (b) of the Company Act, the proceedings in this matter ought to be considered to have been abandoned by the respondents and therefore that the default judgment should be dismissed. The respondents contended, in opposition, that the applicant's defense was way out of time, having been entered some three years late, making it an excessively long delay. A contention made was that it made no sense for the applicant not to oppose the respondents' claim merely because the applicant had brought up a winding-up application. According to the respondents, their attorneys advised the applicant's liquidators of the current proceedings on 9 July 2013 which was an indication that the respondents' claim was not abandoned. It was then averred that the respondents' claim was sound, logical and clearly showed that they were unfairly dismissed by the applicant thus entitling them to the default judgment.

Evaluation

- [7] The application to dismiss the default judgment is premised on section 359 of the Companies Act Number 61 of 1973. This Act has been repealed by the Companies Act Number 71 of 2008 which came into operation on 1 May 2011 in terms of government gazette number 34243 dated 20 April 2011. Schedule 5 of Act Number 71 of 2008 contains transitional arrangements. Item 10 of schedule 5 provides for the preservation and continuation of court proceedings by stating that:
- (1) "Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.

- (2) Any order of a court in terms of the previous Act, and in force immediately before the effective date, continue to have the same effect as if that Act had not been repealed, subject to any further order of the court.”

- [8] The reference in item 10 to the previous Act is a clear reference to Act Number 61 of 1973. The winding up order was granted on 9 November 2010, placing the applicant under provisional liquidation. The Act that was in operation and which continued to apply in this matter is then Act Number 61 of 1973.
- [9] Once a winding-up order is granted by a Court, all civil proceedings including judgments by or against the company in respect of which the order was sought, are suspended until the appointment of a liquidator³. Also, once a liquidator has been appointed, civil proceedings against that company may only continue or commence provided a litigant, intent on continuing or commencing such proceedings, within four weeks of the liquidator’s appointment, gives such liquidator at least three weeks’ notice in writing, before continuing or commencing with the proceedings.⁴
- [10] It remained common cause that the respondents did not give the liquidators in this matter any notice, within four weeks of the liquidators’ appointment, as envisaged by section 359. Yet it remained common cause that the respondents had the requisite knowledge of the appointment of the liquidators. A further opportunity presented to the respondents was their receipt of the letter issued by attorneys instructed by the liquidators, calling on them to file their claim. They did nothing to protect their positions.
- [11] The provisions of section 359 of Act Number 61 of 1973 are couched in peremptory terms in requiring the giving of the written notice to the appointed liquidators. Should such notice not be given to the liquidator within four weeks of such liquidator's appointment, proceedings are considered to be abandoned, unless the court directs otherwise. The resistance by the respondents to the

³ Section 359(1)(a) of the Companies Act; *Richard Keay Pollock N.O. v North Copper Wire (Pty) Ltd* [2002] 1 All SA 244 (T) 246

⁴ Section 359(2) of the Companies Act

order sought by the applicants is essentially that the applicant delayed excessively in filing its defense to the statement of case. The position taken by the applicant, in my view is akin to the lodging of a special plea or exception which could be done without the filing of the statement of defense. Put differently, on the basis of the common cause facts, the applicant would be entitled to walk into court, when a default judgment is considered, and argue a point of law based on the provisions of section 359 of Act 61 of 1973, without filing opposing papers.

[12] On 28 October 2010 when the applicant launched an application for its winding-up with the Registrar of the South Gauteng High Court, winding-up is deemed to have commenced.⁵ Then, when on 9 November 2010 the South Gauteng High Court granted the winding-up order, proceeding initiated by the respondents in this matter were suspended. They remained so suspended until a prescribed written notice would be served to the liquidators. No such service materialized. I take the view that the Labour Court proceedings are affected by the operation of the provisions of Act Number 61 of 1973 dealing with liquidation. The clearer indication of this appears in the repealing Act Number 71 of 2008. Section 144 thereof reads:

- (1) "During a company's business rescue proceedings any employees of the company who are-
 - (a) represented by a registered trade union may exercise any rights set out in this Chapter-
 - (i) collectively through their trade union; and
 - (ii) in accordance with applicable labour law; or
 - (b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.

⁵ See section 348 of Act 61 of 1973.

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

(3) During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to-

(a) notice, which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

[Para. (a) substituted by s. 94 of Act 3/2011]

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) form a committee of employees' representatives;

(d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)(c);

(e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)(c);

(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (2); and

[Para. (f) substituted by s. 94 of Act 3/2011]

(g) if the proposed business rescue plan is rejected, to-

- (i) propose the development of an alternative plan, in the manner contemplated in section 153; or
- (ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153.

(4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of-

- (a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and
- (b) in the case of a defined benefit pension scheme, the present value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.

(5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order."

[13] Accordingly, the proceedings initiated by the respondents in this matter are considered to have been abandoned by the respondents. In considering the costs order, it is to be observed that, had the respondents not pursued this matter after the end of 2010, that is, after the appointment of liquidators and the expiry of prescribed period of the giving of the written notice, that would have saved both parties further unnecessary costs.

[14] The following order stands to be issued:

1. The default judgment in this matter is dismissed.

2. The respondents are to pay the costs hereof.

Cele J

Judge of the Labour Court of SouthAfrica.

APPEARANCES:

For the Applicant: Mr. Z Luthuli instructed by A.P.Shangase and Associates

For the Respondent : Adv.C.Edy instructed by Cox Yeats

LABOUR COURT