THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 192/2015

In the matter between:

RIAAN ANTON SWART	**APPELLANT**
and	
CHARLENE HEINE	**FIRST RESPONDENT**
JUSTIN MARK HEINE	**SECOND RESPONDENT**
DEKSNY TRADING (PTY) LTD	**THIRD RESPONDENT**
CHARLES SCOTT STEWART	**FOURTH RESPONDENT**
ANTON STRYDOM NO	**FIFTH RESPONDENT**

Neutral citation: *Swart v Heine* (192/15) [2016] ZASCA 16 (14 March 2016)

Coram: Lewis, Pillay, Willis, Mathopo JJA and Plasket AJA

Heard: **25 February 2016**

Delivered: **14 March 2016**

Summary: Company law ─ application for rescission of an order enabling enquiry into the affairs of a company in voluntary liquidation in terms of s 417 of the Companies Act 61 of 1973 ─ ex parte application made to enable enquiry met the requirements of s 388 of the Act ─ appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Pretorius J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Mathopo JA (Lewis, Pillay, Willis JJA and Plasket AJA concurring):

[1] This appeal turns on whether an ex parte application that served before Ledwaba DJP in chambers in the Gauteng Division of the High Court met the requirements of s 388(1) and (2) of the Companies Act 61 of 1973 (the Act),[1] and whether a proper case had been made for the order sought in terms of the section. Ledwaba DJP, who heard the matter in camera, granted an order for leave to convene an enquiry in terms of s 417 and 418 of the Act in respect of a company under voluntary liquidation. The appellant, a former director of the company, when he discovered that the order had been made, applied for rescission of the judgment on the basis that the order was erroneously sought or granted because there was no reference to the provisions of s 388 of the Act in the notice of motion and founding affidavit. Pretorius J, who heard the application for rescission, held that although the section was not specifically mentioned in the notice of motion and founding affidavit, the relief sought before Ledwaba DJP was contemplated in terms of s 388. She accordingly dismissed the appellant's application for rescission. This appeal is against that judgment with the leave of that court.

[2] The order sought before Ledwaba DJP was that: (a) the matter be heard in camera; (b) leave be granted to the applicants to hold an enquiry into the affairs of the company BSA Group Holdings (Pty) Ltd (in liquidation) (the company); and (c) Mr

[1] I shall set out the section in full below.

Charles Stewart be appointed to conduct the enquiry under ss 417 and 418 of the Act of 1973 read with s 9 of Schedule 5 of the Companies Act 71 of 2008.

[3] A brief background to the matter is as follows. The company, previously registered as Biz Africa 111 (Pty) Ltd, was voluntarily wound-up by special resolution of its directors when it was unable to pay its debts. The appellant is a director of the company together, with Mr Mellet and Mr Stevenson.

[4] The first respondent (Charlene Heine), the second respondent (Justin Mark Heine) and the third respondent (Deksny Trading (Pty) Ltd) are creditors of the company. They were also applicants in the ex parte application which the appellant is challenging. Ms Heine is owed the amount of R45 785 in respect of outstanding salaries. Acting on behalf of the company, the appellant signed a settlement agreement acknowledging the company's indebtedness to Ms Heine. When the company failed to honour the undertaking, Ms Heine issued summons and obtained judgment against the company. Mr Heine, is owed the sum of R652 643 by the company in respect of which Mr Stevenson signed a settlement agreement on behalf of the company undertaking to pay him. That amount is still outstanding and summons was issued against the company. Deksny Trading is owed $190 042 in respect of a loan it advanced to the company.

[5] The respondents' locus standi as creditors of the company is not disputed. The gravamen of the appellant's complaint relates to whether or not the ex parte application that served before Ledwaba DJP met the requirements of s 388(1) and (2) of the Act. An answer to this question is dispositive of the appeal. It is thus not necessary to deal with all the points raised by the appellant's counsel in his heads of argument as during the hearing in this court, the issues on appeal were narrowed to: (a) whether the ex parte application was defective for lack of specific reference to s 388(1) and (2), in the notice of motion and founding affidavit; and (b) if not whether a proper case was made for the relief sought in the papers. Section 388 of the Act provides:

'**Court may determine questions in voluntary winding-up**

(1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in

the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.
(2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit.'

[6] In relation to the first issue, the appellant contends that since there was no specific reference to s 388 in the notice of motion and founding affidavit, the jurisdictional requirements in terms of that section were absent and thus that the order granted ex parte was erroneously sought and granted. Counsel for the appellant thus contended that in the absence of an express reference to the section Ledwaba DJP could not have appreciated or understood that this was an application in terms of s 388 of the Act. In support of his argument, he referred to the affidavit filed by the attorney for the respondents, which he submitted, also did not make any reference to s 388. This submission is misplaced. What has to be considered in my view is not merely the form but rather the substance of the entire application. The submission that Ledwaba DJP misconstrued the nature and purpose of the application is ill-conceived. Equally unsustainable is the reliance on *Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2013 (4) SA 394 (GSJ), where Saldulker J held that the absence of reference to a section was a 'serious mistake' affecting the case. That judgment was overturned by this court on appeal (*Gainsford & others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA)) although not on this point. However, the statement of Saldulker J was not in line with authority in this regard.

[7] In my view it is not necessary for a litigant who is relying on a statutory provision to specify it. It is sufficient if it is clear from the facts alleged by the litigant that the section is relevant and operative. This point was made clear in *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) 725H-726A, where this court stated the following:
'It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see *Ketteringham v City of Cape Town* 1934 AD 80 at 90) or, put differently, it is sufficient if

the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see *Price v Price* 1946 CPD 59, *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 634I).'

See also in this regard *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 27.

[8] In the present, case all averments necessary support the relief which they were granted were made by the respondents. A reading of the notice of motion, in particular paras 2 and 3, and the entire founding affidavit demonstrate clearly that what the respondents sought before Ledwaba DJP was leave to convene an enquiry in terms of ss 417 and 418 on the Act having stated the company had been wound-up voluntarily and that they were creditors of the company. It is of course difficult to imagine, in the circumstances of this case, that the application meant to achieve something other than an application contemplated in terms of s 388 of the Act.

[9] Once it became clear to the respondents that the financial status of the company required an investigation, they decided to launch an application under s 388 for leave to convene an enquiry in terms of ss 417 and 418 of the Act. This was especially so because the company had been voluntarily wound-up by the directors in circumstances where it was clear that such an enquiry was not only desirable but urgently warranted, because, as at the date of liquidation, the company had no movable or immovable assets. The directors of the company signed settlement agreements purporting to bind the company in circumstances where the company was already unable to pay its debts. In those circumstances the respondents were entitled to approach the court in terms of s 388. This point was made by Hefer AP in *Michelin Tyre Company (South Africa) Pty Ltd v Janse van Rensburg* 2002 (5) SA 239 para 4, where he said the following:

'There are at least two ways of procuring a s 418 enquiry even in a voluntarily winding-up. The first is to convert the winding-up into a winding-up by the court under s 346(1)*(e)* and the other is an application to court under s 388 for leave to convene an enquiry.'

[10] It is clear that Ledwaba DJP was informed, in the founding affidavit, that the company had been voluntarily liquidated on the basis it was unable to pay its debts. The respondents also made it clear that the relief they sought was just and

beneficial. He thus properly exercised his discretion and granted the order sought. On that basis alone I would dismiss the appeal.

[11] In view of this conclusion it is not strictly necessary to deal with the other submissions made on behalf of the appellant. However, a few observations may not be inappropriate. Counsel for the appellant contended that the respondents should have approached the court in terms of s 415 of the Act for leave to interrogate the appellant by the Master or the presiding officer at the second meeting of the creditors. This submission misconceives the purpose of the enquiry under the section. After the first meeting of creditors it became clear to the respondents, following the report of the provisional liquidators, that they would not succeed in uncovering the truth about the financial affairs of the company. In that report the liquidators stated inter alia that:

'At this stage it appears that a further enquiry is not desirable in regard to any matter relating to the promotion, formation or failure of the Company or the conduct of its business unless further justifiable information becomes available.'

The report further went on to say:

'As of yet we could not find any grounds to believe that directors or officers or previous directors or officers of the Company to be personally liable for damages or compensation to the Company or for any debts or liabilities of the Company, as provided in the Act. Should further investigations reveal any offences, a report will be submitted.'

[12] The respondents, as creditors of the company, were understandably unhappy with the liquidators' report and thus exercised their rights in terms of s 388 of the Act. From the wording of s 388, it is clear that the respondents could bring such an application and that the court could determine any such question arising in the winding-up or to exercise any of the powers which the court might exercise where a company is wound-up by the court. In my view nothing precluded them from approaching the court in terms of this section. In fact, the circumstances of this case clearly warranted an urgent intervention in terms of ss 417 and 418 of the Act. The appellant's submission that the purpose of the enquiry is to extort, frustrate or squeeze payments from him is ill-conceived.

[13] There is a further disconcerting aspect to this appeal. The issues in this appeal are simple and straightforward and do not involve complicated or complex issues of law. This is a case where leave to appeal should not have been granted at all. Why the court a quo thought this appeal deserves the attention of this court is not explained. This court has repeatedly bemoaned the fact that unworthy appeals are referred to it, with the result that more deserving and meritorious appeals are either delayed or lose their places in the roll. (See *Shoprite Checkers Pty Ltd v Bumper* 2003 (5) SA 534 (SCA); *S v Monyane & others* 2008 (1) SACR 543 (SCA).) Leave to appeal should not be granted where there is no reasonable prospect of success on appeal, or no compelling reason why an appeal should be heard ─ s 17(1)*(a)* of the Superior Courts Act 10 of 2013.

[14] Accordingly, the appeal is dismissed with costs including the costs of two counsel.

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R S Mathopo
Judge of Appeal

Appearances

For Appellant:	J Vorster (with him U Lottering) Instructed by: J I van Niekerk Inc, Pretoria Symington & De Kok, Bloemfontein
For First, Second and Third Respondent:	A J Louw SC (with him J Holland-Müter) Instructed by: Van Greunen & Associates Inc, Pretoria Azar & Havenga, Bloemfontein