THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case Number : 3 / 07

In the matter between

JOHN ALISTAIR LEGH **APPELLANT**

and

NUNGU TRADING 353 (PTY) LTD **FIRST RESPONDENT**

RIETFONTEIN GENERAL GALVANISERS (PTY) LTD (in liquidation) **SECOND RESPONDENT**

Coram : **HOWIE P, HEHER, PONNAN, MLAMBO JJA et MALAN AJA**

Date of hearing : **12 SEPTEMBER 2007**

Date of delivery : **27 SETEMBER 2007**

SUMMARY

Winding up - s 20(1)(*c*) of the Insolvency Act 24 of 1936 not rendered applicable to a Company in winding up by s 339 of the Companies Act 61 of 1973.

Neutral citation: This judgment may be referred to as :
Legh* v *Nungu Trading 353 **[2007] SCA 122 (RSA)**

PONNAN JA

[1] During 1998, the appellant, John Alistair Legh, and one Gregory Francis Porteous ('Porteous') purchased the shareholding and loan accounts in the second respondent, Rietfontein General Galvanisers ('the Company'), in consequence of which each acquired ownership of 50 per cent of the Company's shares. In addition the loan account of the Company was divided and each became a creditor of the Company to the tune of R219 964. According to the appellant, during 2003, Porteous disposed of his entire share capital and loan account in the Company to him. This is disputed by Porteous. That dispute is the subject of pending litigation between them.

[2] The Company is the registered owner of Portion 40 (Portion of Portion 24) of the farm Rietfontein 63 IR Township, Registration Division IR, the Province of Gauteng, measuring 6,0214 hectares and held under Deed of Transfer T13546/1958 ('the property'). It has no other assets and conducts no other business. Since 1998 no financial reports had been prepared in respect of the Company and it had not conducted any type of activity whatsoever in relation to the property. For the period 2004 to 2006 there appeared to be no transactions on the Company's bank account save for five deposits effected by the appellant to meet bank charges and in order to keep the bank account active and open.

[3] Over the years the property came to be neglected and had fallen into a state of disrepair, so much so that it had come, according to the Ekurhuleni Metropolitan Municipality ('the Municipality'), to constitute a serious health hazard. Numerous written demands by the Municipality to the Company to remedy the situation were ignored. Moreover, charges on the property had not been paid to the Municipality since 1998. That resulted in an action being instituted by the Municipality in 1999 for payment in the sum of R134 473.22. Although the action was initially defended by the Company it subsequently was barred from pleading and judgment by default was taken against it during November 2003 for the amount claimed.

[4] On 14 May 2004, the Municipality applied on notice to the Company for an order declaring the property executable. There was no opposition by the Company. On 24 May 2005, the Sheriff, having attached the property with a view to its sale in satisfaction of the judgment, served a notice on the Company at its registered office that the property would be sold in execution. The sale was duly advertised thereafter in the local press. The appellant was informed on 7 June 2005 of the sale in execution but took no steps to prevent the sale from proceeding. Nor for that matter did he even attend the sale in execution which occurred on 22 June 2005.

[5] At the sale in execution the property was sold on behalf of the Municipality by the Deputy-Sheriff to the first respondent, Nungu Trading 353 (Pty) Limited ('Nungu'), for the purchase price of R100. A condition of the sale was:

'The purchaser shall pay to the Local Authority or any other body or person entitled thereto, all such rates or taxes, and any other amounts, including arrear amounts, owing to the Local Authority, for any services rendered in respect of the property and shall pay to the plaintiff's attorneys, the aforesaid amounts together with the costs of transfer, transfer duty, interest and all other amounts necessary to obtain transfer of the property, upon demand.'

[6] In a letter dated 17 August 2006 to a director of Nungu, the Sheriff stated:

'On the date of sale in execution all parties present were made aware of the additional payment to the purchase price of approximately R3,5 million in outstanding rates and taxes due to Ekurhuleni Metropolitan Municipality. It was stressed that this amount was payable over and above the purchase price and that this amount would most probably not be securable by a bond.'

[7] On 23 March 2006, Nungu was informed by the Municipality that the amount owing to it was R3 424 346.18. By agreement with the Municipality, Nungu paid to it the sum of R320 203.51 in order to obtain a clearance certificate. Additional arrangements had, according to Nungu, been made with the Municipality in respect of payment of the outstanding balance. The clearance certificate was duly issued on 16 May 2006 and thereafter steps were taken to effect registration and transfer of the property into the name of Nungu.

[8] On 4 August 2006, Porteous and two others brought an urgent application for the winding up of the company. On 14 August 2006 a written agreement was concluded between Porteous and Nungu. Pursuant to that agreement the application

was withdrawn. By that stage the transfer documents had been lodged with the Registrar of Deeds and it was anticipated that registration and transfer was imminent. The next day the appellant launched an urgent application for the winding up of the Company and the Company was placed in provisional winding up by an order of the Johannesburg High Court.

[9] On 26 August 2006, Nungu applied to intervene in the winding up application. It sought the discharge of the provisional winding up order. In the alternative Nungu contended that it was entitled, in terms of s 20(1)(*c*) of the Insolvency Act 24 of 1936 ('the Act'), to registration and transfer of the property into its name notwithstanding the provisional winding up order being made final. Blieden J agreed with Nungu's alternative contention and on 13 October 2006, the learned Judge granted the following order:

'(a) the rule *nisi* provisionally winding up the Company is confirmed.

(b) It is declared that the intervening party, Nungu is entitled to take transfer of the property in terms of the agreement between it and the Sheriff of Germiston alternatively the Municipality.

(c) The applicant is to pay the costs of the intervening party, such costs are to include the costs of two counsel.'

With leave of the learned Judge the appellant appeals against part (b) of the order as also the resultant cost order, whilst Nungu conditionally cross appeals, seeking, in the event of the appeal succeeding, that the winding up order be discharged.

[10] Section 20(1)(*c*) reads:

'The effect of the sequestration of the estate of an insolvent shall be –

…

(c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs'.

Section 339 of the Companies Act 61 of 1973 provides that in the winding up of a company unable to pay its debts, the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by the Companies Act. The question that this appeal therefore raises is whether s 20(1)(*c*) is rendered applicable to a company in winding up by virtue of s 339 of the Companies Act.

[11] First though, a look at the other provisions of s 20 of the Act, for s 20(1)(*c*) cannot be viewed in isolation. A useful starting point, it would seem, is s 20(1)(*a*). Its effect is to divest the insolvent of his estate and to vest it in the Master and then, upon his appointment, in the trustee. Section 20(2)(*a*) provides, that for the purposes of s 20(1), the estate of the insolvent shall include 'all property of the insolvent at the date of the sequestration including property or the proceeds thereof which are in the hands of the sheriff or a messenger under a writ of attachment'. The estate of a company in liquidation, on the other hand, remains vested in the company. In terms of s 361(1) of the Companies Act all of the property of a company being wound up is deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. The property of the company of whatever kind, although it is in his or her custody and under his or her control, does not vest in its liquidator unless the court so orders in terms of s 361(3). Sections 20(1)(*a*) and 20(2)(*a*) of the Act insofar as they vest the insolvent's property in the trustee therefore plainly have no application to a company in winding up. Both sections are therefore not rendered applicable by s 339 of the Companies Act to a company in winding up. (See Michael Blackman 'Attachments put in force before the commencement of winding-up' (1980) 97 *SALJ* 379 at 381.)

[12] Section 20(1)(*b*), which, save for certain specified exceptions, causes all civil proceedings instituted by or against an insolvent to be stayed, until the appointment of a trustee, likewise finds no application to a company in winding up, for it has corresponding counterparts in ss 358 and 359 of the Companies Act. Nor for that matter is s 20(1)(*d*), which empowers the insolvent, if in prison for debt, to apply to a court for his release, applicable to a company in winding up, for it by its very nature is unique to an individual insolvent.

[13] If, as I have just shown, none of the other provisions of s 20 of the Act are of application to a company in winding up, the legislature could hardly have intended, it seems to me, that only the one provision, that contained in s 20(1)(*c*) would be rendered applicable. But there is a further reason. One, which on the authority of this court, is decisive of the issue.

[14] Section 361(1) of the Companies Act provides:

'In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.'

Of its predecessor, s 124(3)(*b*) of the Companies Act 46 of 1926, Botha JA stated in *Secretary for Customs and Excise v Millman, N.O.* 1975 (3) SA 544 (A) at 552 G:

'In view of this special provision in the Companies Act, the property of a company is not, upon its winding up, by reason of sec. 182 [now s 339] of the Companies Act, vested in the Master and the liquidator in terms of s 20 of the Insolvency Act 24 of 1936 as was supposed in the majority judgments in *Cornelissen, N.O. v Universal Caravan Sales* (Pty.) Ltd 1971 (3) SA 158 (AD) at pp177, 183.'

[15] In *Cornelissen,* the majority held:

'In terms of sec 20 of the Insolvency Act (which is, *mutatis mutandis*, applicable in the case of liquidation of a company), the goods therefore formed part of the company's estate and as such vested, upon liquidation, in the appellant in his capacity as liquidator of the company. I agree with Kotzé A.J.A., that, having regard to the terms of sec 20, read with later provisions in the Insolvency Act relating to the distribution of the proceeds of the assets, the whole estate, which would include the goods in question, would fall to be dealt with by the liquidator strictly in accordance with the scheme of distribution described in the Act.' (per Miller AJA at 177H – 178A); and

'By virtue of sub-sec. (1)(*a*) of sec. 20 of the Insolvency Act, 24 of 1936, as amended – applied *mutatis mutandis* to the winding-up of a company unable to pay its debts by sec. 182 of the Companies Act, 46 of 1926, as amended – a company becomes divested of its estate on winding-up.' (per Kotze AJA at 183 D)

[16] Moreover, s 342(1) of the Companies Act provides that 'in every winding up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding up and . . . the claims of creditors . . .' (see also s 391). That purpose and indeed the purpose of s 361(1) could hardly be achieved once the sole asset of the company has been transferred out of the company and into the name of a third party. Similarly, various powers conferred upon the liquidator by s 386 are rendered nugatory by the grant of the declaratory relief envisaged in paragraph (b) of Blieden J's order. It follows, on the facts here present, that the grant of orders on the one hand finally winding up the company, and on the other authorising its sole asset to be transferred into the name of a third party, are mutually contradictory and create what can only be described as a legal anomaly.

[17] It follows that s 20 (1) (*c*) finds no application to a company in winding up and in the result the appeal must succeed. I turn now to the cross appeal.

[18] In my view, the appellant established that he is a creditor of the company. Furthermore, it is undisputed that the Company was unable to pay its debts. Generally speaking an unpaid creditor has a right *ex debito justitiae* to a winding up order against a company unable to pay its debts. It is so that the court is vested with a discretion by the very terms of s 344 of the Companies Act. Blieden J was alive to that and exercised his discretion in favour of the grant of a final winding up order. In that, he cannot be faulted. In the result the cross appeal must fail.

[19] In the result:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The first respondent's conditional cross appeal is dismissed with costs, including the costs of two counsel.

(c) The order of the court *a quo* is set aside and there is substituted therefore the following order:

(i) The rule *nisi* provisionally winding up the respondent is confirmed and a final order of liquidation issues;

(ii) The intervening party's application is dismissed with costs, including the costs of two counsel.

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V M PONNAN
JUDGE OF APPEAL

CONCUR:

HOWIE P
MLAMBO JA
MALAN AJA

HEHER JA:

[20] I have read the judgment of Ponnan JA and agree with the orders he proposes. I prefer to leave open the question of whether s 20(1)(*c*) of the Insolvency Act falls to be treated on the same footing as the other subsections of s 20(1) in the application of s 339 of the Companies Act ('the Act'). The last-mentioned section only applies the provisions of the law relating to insolvency in respect of any matter not *specially*[1] provided for by the Act. The provisions in question in this case are those which bring about a stay of execution after an attachment of assets belonging to the insolvent estate. I do not think that the sections of the Act referred to by my colleague speak necessarily or by implication on that matter: cf *Mahomed v Kazi's Agencies (Pty) Ltd and Others* 1949 (1) SA 1162 (N) at 1166 *in fine*. Section 359(1)(a) of the Act may well do so, but for the reasons which follow, I do not think it is necessary to decide whether it does.

[21] Section 359(1)(*a*) suspends all civil proceedings (ie both those already commenced before a winding-up and those which would, but for the suspension, be commenced after the making of an order for winding up) until the appointment of a liquidator, whereafter they may be commenced or continued only after compliance with the provisions of s 359(2). In this case the claim against the company for transfer of the property sold in execution had arisen before the commencement of the winding-up. After the provisional order the property remained that of the company and fell into the concursus.

[22] To obtain an order for transfer of the immovable property into its name Nungu had perforce to bring a counter-application against the company, as it purported to do by serving that application at the registered office of the company. At the time a provisional winding-up order was in operation but Nungu did not attempt to comply with s 359(2) of the Act.

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[1] My emphasis.

[23] It does not matter in this regard whether one treats the claim for transfer as part of the proceedings of execution (as Jennett J did in *Ex parte Flynn*: *in re United Investment and Development Corporation Ltd* (*in liquidation*) 1953 (3) SA 443 (E) at 445G-H) or as an independent proceeding. In either case the counter-application purported to initiate civil proceedings for relief against the company (*cf Collett v Priest* 1931 AD 290 at 299; *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd* 1998 (4) SA 1240 (D) at 1248H) in the face of the statutory bar while the company was powerless to resist. The court *a quo* accordingly had no valid application before it which enabled it to make the order for transfer (whether under s 20(1)(*c*) or otherwise).

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J A HEHER
JUDGE OF APPEAL