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

CASE NO: 28945/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

26/04/18
DATE

SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicants

and

TEMP-U-AIR SERVICES (PTY) LIMITED Respondent

Summary: Costs implication of withdrawal of winding-up of a company. Principles governing withdrawal and costs restated. Withdrawal with no tender for costs. Service of section 345 of the 1973 Companies Act. Strict compliance with service requirements v/s substantive compliance.

JUDGMENT

Molahlehi J

Introduction

[1] The issue in this matter concerns costs which arose following the withdrawal of the opposed winding up of the respondent by the applicant. The application stemmed from the alleged failure by the respondent to settle five of its debt with the applicant.

[2] The withdrawal of the application occurred in the context where the respondent applied for condonation for the acceptance of its supplementary answering affidavit. The affidavit was filed on 23 January 2018 that is some fifteen months from 14 October 2016 when the answering affidavit was filed.

[3] The essence of the supplementary affidavit is a record of the common cause facts of what transpired regarding the payment of the debts owed to the applicant since the filing of the answering affidavit.

[4] It is also important to note that the respondent had already paid some substantial amounts when the applicant enrolled the matter for hearing on 1 November 2017.

[5] The supplementary answering affidavit was accepted, in light of the above discussion and in the interest of doing justice between the parties, in particular, ensuring full ventilation of the dispute.

[6] At the beginning of the hearing, the applicant sought to have the matter removed from the roll. The respondent opposed that approach and contended that it would remain vulnerable because removal means any other creditor could intervene to have the case resuscitated.

[7] After a lengthy debate in which the court expressed a *prima facie* view that the application to remove the matter was in the circumstances nothing but a withdrawal of the application. The applicant did not, however, tender costs.

[8] The general rule in our law is that costs follow the results, meaning that the unsuccessful party bears the burden of costs. Rule 41 (1) of the Rules of the High Court (the Rules) provides that proceedings may be withdrawn before the matter is set down for hearing. A withdrawal after the set down can either be by consent of the parties or leave of the court.

[9] A party that withdraws from the proceedings once the matter has been set down has to do so, on notice which may embody an undertaking to pay costs of the suit. In a case where the withdrawal is not accompanied by a tender for costs the other party is entitled to apply for the same.

[10] It is generally accepted that a litigant who withdraws proceedings is in the same position as an unsuccessful litigant and thus should be responsible for costs.[1]

[11] In the present matter the applicant contends that it is not liable to pay costs because the withdrawal was consequent the settlement of the debt after the institution of the proceedings. It should on these bases be regarded as a successful party.

[12] The respondent, on the other hand, contended that the application bears no merit and in particular that the claim was premature for failure to comply with the requirements of s 345 of the 1973 Companies Act (the Old Act).

[13] In terms of the transitional arrangement in the 2008 Companies Act the issue of an insolvent company continues to be governed by the Old Act. The application in this matter is made in terms s 344 (f) read with s 345 of the Old Act.

[14] Concerning s 344 (f) of the Old Act a company may be wound-up if it is unable to pay its debts. Section 345 provides that a company may be deemed to be unable to pay its debts if the creditor to whom the company is indebted to in the

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[1] Germihuys v Douglas 1973 (3) SA 299 (NC) and Sentraboer Korporasie Bpk v Maphaka 1981 (2) SA 814 (at 818.

sum not less R100,00 has served the statutory notice calling for the payment of the amount that is owing and due.

[15] The essential requirement to satisfy the deeming provision is that the creditor has to show that the notice demanding payment was served on the debtor company.

[16] In addition to the above, the creditor has to show that the company has after three weeks of service of the notice failed to meet the demand.

[17] In Koekemoer v Taylor and Stage,[2] Goldstone J held:

> "predicate situations where a company may well be able to pay debts but is conclusively deemed not to be able to do so, i.e. where the company has failed to respond positively to a statutory demand for payment. . ."

[18] The respondent contends that there has not been compliance with the requirement of service and therefore the provisions of s 344 of the Old Act did not find application. The applicant, on the other hand, contends that the requirement of service does not have to be applied in the strict sense, but rather substantial compliance is sufficient.

[19] Service of process on a company is governed by Rule 4 (1) (A) of the Rules, which in the relevant parts for the purposes of this judgment reads as follows:

> "4 Service
>
> (1) (A) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (a) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:
>
> (i)... (iv)...

[2] 1981 (1) SA 267 (W).

(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law."

[20] In considering whether there has been compliance with the requirement of service of the notice in this matter account should be taken that the purpose of the Rules is to assist in administering justice. In Arendsnes Sweefspoor CC v Botha,[3] the Supreme Court of Appeal per Shongwe JA held that:

"[19] With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing, 'rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process.' And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (see LAWSA, Third Edition Volume 4 – paragraph 8-10 page 10 et sec) (see also Kgobane & another v Minister of Justice & another [1969] 3 ALL SA 379 or 1969 (3) SA 365 (A) at 369 F-H). Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see Highfield Milling Co (Pty) Ltd v A E Wormald & Sons [1966] 3 ALL SA 27; 1966 (2) SA 463 (E) at 465 F-G)."

[21] In dealing with the issue of whether service was proper and legally recognized the learned Judge said:

[3] (471/12) [2013] ZASCA 86; [2013] 3 All SA 605 (SCA); 2013 (5) SA 399 (SCA) (31 May 2013).

"Service of a court process must substantially comply with the relevant rules. In my view, it does not matter whether one is dealing with a default judgment, a liquidation case or a case dealing with the interruption of prescription. It is trite that each case must be dealt with on its own particular facts and merit. There is no differentiation or exception. The court, if service is contested, must determine whether service was good and legally recognized or substantially compliant with the rules of service. The cause of action and the consequences resulting from the process served are irrelevant to the question whether proper service took place."

[22] In Brangus Ranching (Pty) Ltd v Plaaskem (Pty),Ltd 2011 (3) SA 477 (KZP) para [15][4]. the full bench of the KZP per Van Zyl J writing for the majority said:

"Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an employee of the company) willing to accept such service, has been recognised as a good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises', Van Zyl J also referred with approval to Chris Mulder Genote Ing v Louis Meintjies Konstruksie (Edms) Bpk 1988 (2) SA 433 (T). Brangus is the most recent high court judgment which, in my view, is authority for the proposition that effectiveness of the service of a court process or substantial compliance should trump the form. In other words, by reason of the fact that a copy of the summons was served at the registered office of the defendant there had been substantial compliance with the requirement of Rule 4(1)(a)(v). Even though the service did not strictly comply

[4] Ltd 2011 (3) SA 477 (KZP) para [15]

with the Rule. I was unable to unearth any decision of this court dealing specifically with Rule 4(1)(a)(v)."[5]

[23] The service of summons, in that case, were served on a person who was apparently responsible for the premises rather than an employee of the company. The court found this to have substantively complied with the provisions of Rule 4 (1) of the Rules.

[24] In addition to quoting the above with approval Shongwe JA in Arendsnes Sweefspoor CC (supra) held that that was the correct approach.

[25] In the present matter it is common cause that the service of the notice in terms of s 345 of the Old Act was effected by the courier, Ms Human. She states in her service affidavit that she left the notice with the security guard at the gate. She does not, however, provide his name nor his relationship with the respondent.

[26] In seeking to remedy the defect set out above the applicant filed a further service affidavit by Ms Human. In this respect she states in the affidavit that:

"4.1 I have attended the registered address of the Respondent on three occasions, . . .

4.2 The address upon which I sought to effect delivery was 7 Patton Street, Duncanville;

4.3 The area appeared to be secured by security personnel;

4.4 I confirm that there were no visual sign boards on the premises depicting the respondent's, name. As a consequence I left the section 345 notice with the security guard at the gate, who accepted receipt thereof on the Respondent's behalf."

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[5] The previous approach adopted in BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd, was that strict compliance with the mode of service was required in effecting the service of s 345 notice.

[27] The above approach in my view does not assist the case of the applicant in as far as service is concerned because it is not in line with the basic principle of motion proceedings that a party needs to make out its case either in the founding or the answering affidavit. However, even in the second affidavit Ms Human still does not identify the security guard. There is no averment that the security guard is an employee of the respondent or the premises he was guarding is the physical address of the respondent.

[28] In my view, based on the above, far from strict compliance with the requirements of proper service of the s 345 notice, the applicant has failed to comply with the provision of adequate service substantially. I am therefore in agreement with the respondent that the applicant's application was fatally defective and would ordinarily have been unsuccessful had it proceeded with the application.

[29] In the circumstance the proposition of the applicant that it was a successful party and thus entitled to costs is unsustainable.

[30] As concerning the issue of costs the respondent contended that appropriate costs in the circumstance would be punitive based on the scale as between attorney and client.

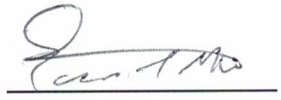
[31] In my view the facts and the circumstance in this matter point to the abuse of the insolvency procedure by the applicant. It was quite clear even from the submission of the applicant's Counsel that this is a matter that could appropriately have been dealt with through action proceedings. In fact, that is precisely what the applicant has done. It issued summons claiming payment of the debts it alleges is due and owing by the respondent. The application was instituted as a means to compel and recover the debt from the respondent who

had terminated its banking relationship with it. This fact weighs in even in relation to the general consideration of whether the applicant should held responsible for costs. This conduct of the applicant is unacceptable and accordingly the court has to express its displeasure about it and discourage its repeat.

Order

[32] In the premises, the following order is made:

1. The filing of the supplementary answering affidavit is condoned.
2. The winding-up application of the respondent is withdrawn.
3. The applicant is to pay the cost of the respondent on the scale as between attorney and client scale.



E Molahlehi

Judge of the High Court;

Johannesburg.

Representation:

For the Applicant: Adv J C Viljoen

Instructed by: Stupel and Berman Inc.

For the Respondent: J C Klopper

Instructed by: Innes Rupert Steenkamp Attorneys

Heard: 07 February 2018

Delivered: 26 April 2018