REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case No.: 40406/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

20-07-23
DATE

SIGNATURE

In the matter between:

DEON MARIUS BOTHA N.O.	FIRST APPLICANT
GERDA MARYKE VAN TONDER N.O.	SECOND APPLICANT
TLABO IGNATIUS MAENETJA N.O.	THIRD APPLICANT

and

THEODOR WIILHELM VAN DEN HEEVER N.O.	FIRST RESPONDENT
ROYNATH PARBHOO N.O.	SECOND RESPONDENT
THE MASTER OF THE NORTH GAUTENG HIGH COURT	THIRD RESPONDENT
THE MASTER OF THE SOUTH GAUTENG HIGH COURT	FOURTH RESPONDENT

JUDGMENT

HIEMSTRA AJ

[1] The South Gauteng Master of the High Court appointed the applicants as provisional liquidators of Ramdale (Pty) Ltd (in liquidation) (the company) on 10 April 2012 pursuant to a purported special resolution in terms of s 351 of the Companies Act, 61 of 1973 to voluntarily wind up the company and the purported registration of the resolution in terms of s 200 of the same Act. On the same date the North Gauteng Master appointed the first and second respondents as provisional liquidators pursuant to a provisional liquidation order granted against the company in the North Gauteng High Court. According to a report by the North Gauteng Master, the appointment of the first and second respondents preceded that of the applicants' appointment by a few hours. However, the applicants dispute this statement on the ground that, had that been the case, the North Gauteng Master would have made that allegation in earlier correspondence. The sequence of the appointments is not crucial, and I am not required to make a finding on this issue. However, it was argued that the sequence in which the different Masters assumed jurisdiction in respect of the estate is crucial. I shall deal with the submission in due course.

[2] Act 61 of 1973 (the old Act) has been repealed and replaced by Act 71 of 2008 (the new Act), but Chapter XIV of the old Act, providing for the winding-up of companies remains in force until a date determined by the minister after alternative legislation has come into force.[1]

[3] This is a dispute between the two sets of liquidators as to who have been validly appointed.

[4] Before dealing with the main issues between the parties it is necessary to dispose of a secondary issue. Mr Suttner SC, who appeared on behalf of only the first respondent, submitted that the applicants did not show that they act *nomine officio* and argued that they are acting in their own interests. He submitted that their designation in the citation as acting *nomine officio* is wrong. It is further submitted that there is no allegation that the Master or any of the creditors of the company had authorised them to act in that capacity and to mulct the estate in the costs of this application. In my view, however, the applicants are entitled to bring this application in their official

[1] Appendix 1 to Act 71 of 2008, item 9(4)(a)

capacity as part of the administration of the estate. The question as to which set of liquidators has been validly appointed has arisen and it must be resolved.

[5] Mr Suttner challenged the validity of the applicants' appointment on mainly two grounds:

1. That the resolution in terms of which the company is purported to have been wound up does not meet the requirements of a special resolution as required by s 349 of the old Act. S 349 provides thus:

   249. Circumstances under which a company may be wound up voluntarily. –A company, not being an external company, may be wound up voluntarily if the company has by special resolution resolved that I be so wound up."

2. That the resolution had not been registered in terms of s 200 of the old Act, as required by s 351(1) of the old Act and is therefore of no force and effect.

[6] I shall deal with the two submissions consecutively.

THE VALIDITY RESOLUTION

[7] Mr Van der Merwe SC, appearing on behalf of the applicants, argued that the first respondent had not raised in his answering affidavit that the resolution itself does not qualify as a special resolution envisaged by s 349. That is correct. However, if it appears *ex facie* the document that it does not pass muster as a special resolution, then it cannot be ignored merely because the issue had not been raised in the papers.

[8] S 1 of the old Act defines a special resolution as follows:

"'**special resolution'**, in relation to a company, means a resolution passed at a general meeting of that company in the manner provided by section 199."

The new Act defines a special resolution as follows:

"'special resolution' means—

(a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in section 65(10)—

   (i) at a shareholders meeting; or

(ii) by holders of the company's securities acting other than at a meeting, as contemplated in section 60; or.."

Both the old and the new Acts, state that a special resolution is one taken by the members.

[9] The resolution in this matter reads as follows:

"RESOLUTION
Voluntary liquidation

We, the undersigned Directors of the above-mentioned company, consent and agree that at the general meeting of the company held on 9 March 2012, a resolution be passed that the Company be wound up voluntarily by its creditors in terms of Section 351 of the Companies Act, Act 61 of 1973, as amended.

CONTENTS OF RESOLUTION

IT IS RESOLVED THAT:

1. The Directors of the company consent and agree at the meeting that the company be wound up voluntarily by its creditors in terms of Section 351 of the Companies Act, Act 61 of 1973, as amended.
2. Glynis Merle Ramsay is authorised to sign all documentation and processes to give effect to the voluntary wind up of the company.
3. Ramdale Stud (PTY) LTD is commercially insolvent and not in a position to pay its creditors.

We, the undersigned, hereby certify that we are Directors of the company.

This done and executed at Pretoria this the 9th day of March 2012."

It is signed by two directors, Glynis Merle Ramsay and Geoffrey Grant Ramsay.

[10] The following aspects of this resolution bear scrutiny:

1. Its appellation is "RESOLUTION" and not "SPECIAL RESOLUTION". If it were a special resolution, one would have expected it to have been so called.

2. It states explicitly that "[t]he Directors of the company consent and agree that the company be wound up voluntarily by its creditors ....." It does not state that the members had resolved that the company be wound up. Admittedly, the introductory paragraph above the resolution itself provides, with appalling confusion of tenses, that the directors "consent and agree that at the general

meeting of the company held on 9 March 2012 a resolution be passed that the Company be voluntarily wound up ...". It does not state that a resolution, even less a special resolution, had been passed by the members. It seems to anticipate the passing of a resolution at the general meeting on 9 March 2012, and they agree in advance to such resolution being passed. I accept that this is merely poor draftsmanship, and that it was intended to convey that such a resolution had in fact been passed. However, the omission of the essential element, namely that a special resolution had been passed, cannot be explained as poor phraseology.

[11] I find accordingly that the resolution pursuant to which the applicants were appointed as liquidators is not a special resolution as required by s 349 of the old Act,

REGISTRATION OF THE RESOLUTION

[12] S 351(1) of the old Act provides

"A voluntary winding-up of a company shall be a creditors' winding-up if the resolution contemplated in section 349 so states, **but such a resolution shall be of no force and effect unless it has been registered in terms of section 200.**" [My emphasis]

[13] S 200 provides

"**200. Registration of special resolutions.** –(1) Within one month from the passing of a special resolution a copy of such resolution together with either a copy of the notice convening the meeting concerned or a copy of the consent contemplated in section 199 (3A), as the case may be, shall be lodged with the Registrar, who shall, subject to the provisions of subsection (2), and upon payment of the prescribed fee, register such resolution.

(2) The Registrar may refuse to register any special resolution so lodged with him, except upon an order of the Court, if such resolution appears to him to be contrary to the provisions of this Act or the memorandum or articles issued after the registration of the resolution.

(3) A copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the registration of the resolution.

(4) A copy of every special resolution shall be transmitted by the company concerned to any member thereof at his request, and on payment of an amount of twenty-five cents or such lesser amount as the company may determine.

(5) Any company which fails to comply with any requirement of subsection (3) or (4) and every director or officer thereof who knowingly permits or is party to the failure, shall be guilty of an offence.

(6) If a company makes default in lodging with the Registrar a copy of any special resolution, and the notice of the consent, as required by subsection (1), the company, and every director or officer who knowingly permits or is party to the default, shall be guilty of an offence."

Not all the subclauses quoted are pertinent to this matter, but I quote them to demonstrate the importance that the legislature attaches to special resolutions. Acts which a company may do only if sanctioned by a special resolution are of particular concern not only to its members but also to its creditors and its potential members and creditors. It is also important that members of the public should have access to any adopted special resolution and to the information which should be contained in the notice convening the meeting at which it was passed.[2]

[14] S 200(1) requires that not only the resolution itself be lodged with the Registrar, but also a copy of the notice convening the meeting. The notice convening the meeting is pertinent because for a special resolution to be passed, it must be passed at a general meeting of which not less than twenty-one clear days' notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it.[3]

[15] The resolution pursuant to which the applicants were appointed has not been lodged and registered in terms of s 200 of the old Act. Instead form CoR 40.1 in terms of section 80 of the new Act and Regulation 40(f) of the Companies Regulations of 2011 was used. This form is entirely inapplicable. It is designed for the registration of a special resolution for the winding up of a solvent company in terms of s 80 of the new Act. The correct form is CM 26, contained in Appendix 11 to the old Act. This form provides, in addition to the contents of the resolution and the section or the paragraph of the memorandum or articles in terms of which the resolution has been passed, a copy of the notice convening the meeting. Such a notice, as I have said in the previous paragraph is of vital importance. Form CoR 40.1 does not require a copy of the notice.

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[2] Henochsberg on the Companies Act 61 of 1973, at 328 and the authorities referred to.
[3] S 199(1) of the old Act

[16] The first respondent explained that no CM 26 forms had been available at the offices of CIPS at the time the resolution was lodged. That is, however, not an excuse for using an inapplicable form, moreover one that does not provide for all the information required in terms of s 200 and the correct form.

[17] Mr van der Merwe argued that whatever form had been used, the resolution has been registered by CIPS and it is there for the world to see. Substance should prevail over form. However, the substance of s 200 has not been met. There is nothing to show that the meeting at which the resolution had purportedly been passed, had been constituted for the purpose of passing a special resolution, or that the requisite notice had been given. What is there for the world to see from the registration is that a solvent company had been liquidated.

[18] Mr van der Merwe further argued that in accordance with the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[4] the administrative act of registering the resolution remains in force until it has been set aside. Mr Suttner, on the other hand, argued that no reading of *Oudekraal* empowers the Court to render valid what the legislature expressly renders invalid. He referred to *Gainsford & Others NNO v Tiffski Property Investments (Pty) Ltd & Others*[5] where the Supreme Court of Appeal said

"It is trite that no legal consequences flow from a void jural act."

I agree that Oudekraal does not render the invalid resolution valid.

[19] Mr van der Merwe further referred the Court to s 4 (3) and (4) of the Administration of Estates Act[6] which provide as follows:

"(3) No act performed by a Master in the *bona fide* belief that he has jurisdiction shall be invalid merely on the ground that it should have been performed by another Master.

(4) If more than one Master has in such belief exercised jurisdiction in respect of the same estate or property, that estate or property shall, without prejudice to the validity of any act already performed by or under the authority of any other Master, as soon as it becomes known to the Masters concerned, be, be liquidated, distributed or administered as the case may be, under the supervision of the Master

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[4] 2004 (6) SA 222 (SCA)
[5] 2012 (3) SA 35 (SCA at 46 [38]
[6] 66 of 1965

who first exercised such jurisdiction, and any appointment made and any grant, signing and sealing or endorsement of letters of executorship, tutorship or curatorship, by any other Master in respect of that estate or property, shall thereupon be cancelled by such other Master."

It is common cause that the Johannesburg Master had opened a file and assumed jurisdiction in respect of the estate before the Pretoria Master.

[20] These provisions, in my view, do not the assist the applicants. The act performed by the Johannesburg Master in appointing the applicants is not invalid because it should have been performed by another Master. It is invalid because the resolution is not a special resolution and because it has not been validly registered. No legal consequences can flow from it.

[21] The only challenge to the appointment of the first and second respondents is that the appointment of the applicants by the South Gauteng Master should take priority because the South Gauteng Master had first exercised jurisdiction in respect of the estate. In view of the invalidity of the appointment of the applicants, the appointment of the first and second respondents is beyond question.

CONCLUSION

[22] I find therefore that the resolution itself does not pass muster as a special resolution. I find further that it had not been registered as required and is therefore of no force or effect.

[23] If follows that the appointment of the applicants pursuant to the resolution is invalid.

[24] The applicants find themselves in an unfortunate situation for which they are not entirely blameless. The applicants have not explained the reason for the alleged unavailability of CK 26 forms. It may be because CIPS had temporarily run out of forms, or that it, under the erroneous impression that they are no longer in force, does not keep such forms. Whatever the position, it is unsatisfactory that parties are not supplied with the correct forms. The unavailability of forms is, however, no excuse. It should not be too difficult to produce a form providing for the information re-

quired by CK 26, or to delete on Form CoR 40.1 what is inapplicable and to fill in the correct information.

[25] It is important for Masters of the High Court to properly scrutinise resolutions that require lodgement and registration, and in particular that they have been passed in accordance with the law.

In the result I make the following order:

1. The application is dismissed.

2. The costs of this application are costs in the administration of Ramdale Stud (Pty) Ltd (in liquidation).

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J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	19 July 2012
Date of judgment	23 July 2012
Counsel for the applicants	Adv. J.L. van der Merwe SC
	Adv. S.J.J van Rensburg
Attorney for the applicants:	Tintingers Incorporated
Counsel for the first respondent:	Adv. J. Suttner SC
	Adv. P. Cirone
Attorney for the first respondent:	Cliffe Dekker Hofmeyr Inc