IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

Case no: 22/2005
Date heard: 17.3.2005
Date delivered: 19.4.2006

In the matter between:

THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES	Applicant
vs	
MAY GARMENTS COMPANY (PTY) LTD (In voluntary liquidation)	First Respondent
RYNETTE PIETERS N.O.	Second Respondent
PUNITHAN QUENTIN NAIDOO M.O.	Third Respondent
MICHAEL TIMKOE N.O.	Fourth Respondent
HEINRICH NEL	Fifth Respondent
MASTER OF THE HIGH COURT (BHISHO)	Sixth Respondent

JUDGMENT

A.R. ERASMUS J:

[1] The first respondent is a company at present in a creditors' voluntary winding-up in terms of s 349 read with s 200 and s 351of the Companies Act 61 of 1973. (For the sake of convenience I refer to the first respondent as 'the company'). The applicant invokes the provisions of s 354 of the Act in seeking the setting aside of the winding-up proceedings.

[2] The basis upon which the applicant relies is inextricably tied up with the historic events giving rise to the winding-up proceedings. Those events are as follows. The company traded at factory premises located at Dimbaza within the area of the Master of the High Court (Bhisho). Its registered address, however, was 52 Lower Mount Road, King Williams Town, which – paradoxically – is within the area of the Master of the High Court (Grahamstown). On 1 December 2003, the applicant filed with the registrar two statements in terms of paras (a)(ii) and (iii) of ss (1) of s 114 of the Customs and Excise Act 91 of 1964. In terms of that act this amounted to obtaining judgment against the company in respect of the amounts therein stated, *viz* R35 572 420.29 million and R284 170 034.84 respectively. The applicant obtained writs in execution in those amounts. The immovable assets of the company were seized under the writs at the company's business premises. Sales in execution of the goods were advertised, but postponed for reasons not relevant to the issue before court. On 14 October 2004, the applicant obtained an order of court authorizing the sale of the seized goods by way of public tender. It was decided that a better return would be obtained

by way of public auction. Auctioneers were appointed and a sale in execution was scheduled for early December 2004.

[3] On 8 November 2004, the applicant's attorney, Mr. Wolmarans, who is also the deponent to the founding affidavit, received a telephone call from Mr. B. Duchen, an attorney acting on behalf of the company. The matter was discussed. Wolmarans advised Duchen that the sale was scheduled to take place on 1, 2 and 3 December 2004. It was thereafter decided that it would be appropriate to reschedule the sale. The sale was rescheduled for 25, 26 and 27 January 2005. Wolmarans advised Duchen accordingly. On 3 January 2005, Wolmarans received a telephonic call from a gentleman who advised him that the respondent had been placed in liquidation and that one Pieters had been appointed as one of the joint provisional liquidators. This was the first advice that Wolmarans or the applicant received of this development. At a meeting on 10 January 2005, the second, third, fourth and fifth respondents advised Wolmarans that they had been appointed by the master (Bhisho) as joint provisional liquidators of the company. The

applicant was not happy with these developments and on 12 January 2005 launched the present application.

[4] It appeared that in the meantime there had been developments behind the scenes. It became apparent that the master (Bhisho) did not have jurisdiction in the matter and that his appointment of the second, third, fourth and fifth respondents was therefore invalid. The master (Grahamstown) reports that the file was sent to him. He withdrew the appointment of the provisional liquidators by the master (Bhisho); but then on 14 January 2005, appointed the same persons as joint provisional liquidators. He states that in the event of the requested order being granted, there is no likelihood of the company being able to carry on business. Its liabilities will exceed its assets, and liquidation at a later stage is therefore inevitable.

[5] It appears that on 1 December 2004 (on the advice of Duchen) the company had filed a special resolution: 'That the company be wound up voluntarily by creditors as provided for in s 349(1) and 351 of the Companies

Act 1973 as amended'. The resolution was lodged with the Registrar of Companies in terms of s 200 of the Act on 22 December 2004.

[6] On 17 January 2005 the liquidators, through their attorney, approached the master (Grahamstown) for leave to oppose these proceedings. He responded as follows:

> 'Kindly note that I do not have the power to authorise the joint provisional liquidators to oppose any legal proceedings on behalf of the company (in liquidation).
> As the joint provisional liquidators have however been cited as respondents separately from the company I have no objection to the provisional liquidators approaching the court in their own names N.O. and not on behalf of the company for leave to oppose the application, provided that they indemnify the company from any costs should the court order costs against them or should the court find that such application should not have been defended or brought at all.'

[7] On 19 January 2005, the second, third, fourth and fifth respondents withdrew their opposition to the application. On 20 January 2005, the court issued the following order:

'1. That a rule nisi do issue calling upon the respondents and any interested parties to show cause on Thursday the 3rd of March 2005, at 10h00 why a final order should not be made in the following terms:

1.1 that the voluntary winding-up of the first respondent in terms of section 351 of the Companies Act is set aside;

1.2 that the costs of this application be paid by the first respondent.

2. That pending the return date the applicant is authorised to retake possession of the assets of first respondent and to sell the same by way of public auction on 25th, 26th and 27th January 2005 and thereafter to pay the proceeds to the credit of the applicant's attorney's trust account pending the finalisation of this application.

3. That a copy of this order be served upon the respondents and the master of the High Court (Eastern Cape Division) and published once in the Daily Dispatch newspaper.'

[8] The public auction went ahead and the proceeds thereof were paid into the trust account of the applicant's attorneys.

[9] On 28 February 2005, the acting assistant master (Grahamstown) appointed the second, third, fourth and fifth respondents as liquidators of the company. In an affidavit by one A. Frans, filed in reply in the matter, the deponent states that the appointment took place upon the strength of a

meeting of creditors convened before the magistrate, King Williams Town. The meeting was convened at the instance of the provisional liquidators by way of publication of a notice in the government gazette on 28 January 2005. Frans deputed a member of his staff to attend the meeting. He states that he has been advised that the meeting took place but that it was not attended by any creditor. He attaches to his affidavit a copy of the minutes of the meeting. It appears *ex facie* the document that no resolution was passed. These allegations are unanswered.

[10] On 3 March 2005, the opposing affidavit of the second respondent, together with confirmatory affidavits of the other respondents, was filed. The application was argued before me on the postponed return day of the rule nisi. Judgment was reserved and the rule extended. Thereafter, I addressed certain problems I had in a memorandum to the parties' legal representatives. Both counsel favoured me with further argument on the points raised by me. I am grateful to them for their useful assistance in the matter. The query related to a large extent to the status of the liquidators, in particular whether

they were appearing in their representative or personal capacities, and whether they had the necessary competency to act in either capacity in these proceedings. Upon reflection, it seems to me that the answer to these problems is as follows. The company and the individual liquidators were brought to court by the applicant. This was the correct procedure in that a company in liquidation has no legal capacity to represent itself other than through its liquidators. For purposes of applications such as the present, the company and the liquidators are in law a single unit. This is not a case where a party is seeking relief as against the company, but one where it challenges its status. The company and its liquidators are before court as the subject of the application. It must follow that the liquidators shall be heard in such proceedings, and do not need the consent of the master or the directions of the creditors to do so.

[11] The validity of the proceedings in terms of s 114 of the Customs and Excise Act are not challenged. It is accepted that the applicant has a statutory lien over the movable property of the company in the amount of R35

million and R284 million. Section 114 (1)(b)(i) provides that the claims of the state shall have priority over the claims of all other persons upon anything subject to the lien. This includes, I should think, the proceeds of the sale of the company's property at present held by the applicants.

[12] It is contended on behalf of the applicant that the continued liquidation of the company serves no purpose in that by virtue of the statutory lien the applicant's claim ranks above all other creditors. Incurring liquidation expenses will therefore not be to the benefit of the creditors, but in fact needlessly diminish the applicant's proceeds from the sale. The only persons to benefit from the continued liquidation, so the applicant submits, will be the liquidators.

[13] In his opposing affidavit, the fourth respondent submits that the rights of creditors are all to be governed by the winding-up process. There is no reason, he suggests, why the applicant should be singled out or be entitled to special treatment of its claim. The applicant, albeit a substantial preferent

creditor must be dealt with like any other creditor 'according to the preference and ranking of creditors as set out in the mechanism dealing with insolvent companies'. He states that there are many other creditors of the company, and attaches a schedule detailing those creditors. He submits in the event of the court setting aside the liquidation, an anomalous situation will arise and that these creditors be forced into a type of 'financial no-man's-land'. I have difficulty with these submissions, but need make no finding thereon.

[14] None of these other creditors has joined in the application. However, affidavits by two of them have been placed before the court by the respondents. One of these is the landlord of the company's business premises. He claims to have a secured claim for a legal hypothec in terms of s 85 of the Insolvency Act in respect of three months' arrear rental. Subsection (2) of that section provides that a landlord's legal hypothec shall confer a preference with regard 'to any hypothec'. In accordance with the common law, as I understand it, such hypothec does not extend to the

proceeds of the sale of such article or articles. (I need not however decide the question.)

[15] The fourth respondent states that the liquidators are opposing the application on the basis that they have to recover their costs of administration of the company in the winding-up. He states that a conservative estimate of their total costs of administering the winding-up of the company is to date approximately R100 000.00. There are additional expenses incurred by the liquidators in the amount of R11 225.00 and R23 256.00. These administration costs and expenses are not fully detailed and it is not clear whether any thereof relates to the abortive initial winding-up proceedings upon the invalid appointment effected by the master (Bhisho). This aspect can become controversial and could give rise to a conflict of interests on the part of the liquidators.

[16] The court has a wide discretion in terms of s 354 to achieve what is just and equitable in the circumstances. The court will have due regard to the

wishes of creditors – as it is enjoined to do in terms of ss (2) of s 354. The court shall have particular regard to the wishes of the applicant who is the major if not the only liquidation creditor. I shall accept that the interests of the creditors are relevant to the issue before court, even though a benefit to creditors out of the liquidation is not a circumstance in which a company may be wound-up by the court, as listed in s 344 of the Companies Act.

[17] In terms of s 349, the only requirement for the voluntary winding-up of a company is that it has by special resolution resolved that it be so wound-up. It is common cause that such resolution was passed and that thereafter the statutory requirements were complied with. The creditors had no say in that process.

[18] There were, it seems, good grounds for placing the company in voluntary liquidation. It is common cause that it had not traded since 2003, and that it had no assets and no realistic prospect of ever doing business. In the circumstances, it was in the public interest that it be liquidated. The

company was an empty shell and no purpose was served in it continuing to exist, which would have brought with it certain statutory obligations.

[19] The applicant no doubt has good cause for concern. There are however other means whereby its fears can to some extent be addressed. If the appointment of the liquidators was irregular, or their continued involvement unacceptable to the creditors, there are remedies open to the applicant. Similarly, the applicant is not without remedy should he wish to contest any claim for costs or expenses by the liquidators. The anticipated 10% administration fee on the assets of the company certainly appears to be excessive in the circumstances, but there too the applicant has a remedy.

[20] As to costs, it seems to me that the applicant acted in what it perceived to be the public interest and the application was not without merit. In any event, as the applicant is in effect the residual beneficiary in the winding-up, there seems to be little purpose in ordering it to pay costs.

[21] In the result, the following orders issues:

1. The application is refused and the rule nisi discharged.

2. The costs occasioned by this application shall be costs in the liquidation.

A.R. ERASMUS
JUDGE OF THE HIGH COURT

DATE: 12/04/06