Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case Nr: 1522/2010
Case Heard: 23/09/2011
Date delivered: /09/2011

In the matter between:

MEC, Roads and Public Works, NC **PLAINTIFF**

and

Vista Park Development (Pty) Ltd	**1st Respondent**
Joh-arch Investments (Pty) Ltd	**2nd Respondent**
Chavonnes Badenhorst St Clair Cooper NO	**3rd Respondent**
Luke Bernard Saffy NO	**4th Respondent**
Donovan Theodore Majiedt NO	**5th Respondent**

JUDGMENT

Olivier J:

1]. In what I will for the sake of convenience referred to as the main application, and which was lodged in August 2010, the applicant, the Member of the Executive Council responsible for the Department of Roads and Public Works in the Northern Cape Province claims orders confirming the cancellation of a contract between the applicant and a joined venture

consisting of the first respondent, Vista Park Development (Pty) Ltd, and the second respondent, Joh-arch Investments (Pty) Ltd, for the construction of a hospital for mentally ill persons, and an order that the respondents vacate the premises (where the hospital was eventually partially constructed).

2]. Although notice of opposition was given on behalf of both respondents, during September 2010, neither of the respondents initially filed any opposing papers.

3]. On 6 October 2010, and therefore after the main application had already been lodge, the first respondent was placed under provisional liquidation, and it was finally liquidated on 3 March 2011.

4]. In terms of section 359 (1) (a) of the 1973 Companies Act[1] the provisional liquidation of the first respondent resulted in the suspension of the main application, as far as it was concerned, until the appointment of a liquidator[2].

5]. When the first respondent was placed under provisional liquidation mr Donovan Theodore Majiedt, Mr Chavonnes

1 61 of 1973

2 In terms of the provisions of item 9 Schedule 5 to the 2008 Company's Act (71 of 2008) which came into operation on 1 May 2011, the provisions of chapter 14 of the 1973 Company's Act (which will include section 359 of that Act) "*continues to apply with respect to the winding-up and liquidation of company's*".

Bardenhorst St Clair Cooper and mr Luke Bernard Saffy, to whom I will hereinafter for the sake of convenience refer as "*the liquidators*", where appointed as provisional liquidators. Same persons were appointed as final liquidators on 3 March 2011.

6]. The provisions of section 359 (2) of the 1973 Companies Act read as follows:

> *"(2)(a) Every person who, having instituted legal proceedings against the company which were suspended by a winding-up, intends to continue same, … shall within four weeks after the appointment of the liquidator give the liquidator not less than 3 weeks' notice in writing before continuing … the proceedings.*
>
> *(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs."*

7]. On 21 April 2011 the applicant notified the liquidators of the intention to proceed with the main application. That notice was clearly not within four weeks after the appointment of the liquidators in their capacities as final liquidators[3].

8]. These provisions are intended for the exclusive benefit of a liquidator, and can therefore be waived[4]. On 2 June 2011 the

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3 **Strydom NO v M G Construction (Pty) Ltd and Another: In re Haljen (Pty) Ltd (In Liquidation)** 1983 (1) SA 799 (D) at 806B-807H; **Ronbel v Sublime Investments** 2010 (2) SA 517 (SCA) at 519A-B

4 **Barlows Tractor Co (Pty) Ltd v Townsend** 1996 (2) SA 869 (A) at 884F-G; **Gilbert Hamer & Co Ltd v Icedrome Promotions (Pty) Ltd** 1962 (3) SA 372 (D) & (CLD)

liquidators' attorneys addressed a letter to the applicant, without any indication of having considered the possibility of such a waiver, and adopted the attitude that the applicant's proceedings were deemed to have been abandoned because of the applicant's failure to furnish the liquidators with notice within the prescribed period of four weeks.

9]. Early in July 2011 the applicant's attorneys filed a notice in terms of Rule 15 to join the liquidators as respondents in the main application, as well as a supplementary affidavit on behalf of the applicant and a notice of set down in which the liquidators were then for the first time reflected as the third to fifth respondents in the main application.

10]. In the supplementary affidavit it was indicated that, if necessary, the applicant intended applying for an order in terms of section 359 (2) of the Companies Act, and the grounds on which the applicant would rely in this regard were set out. The notice of set down already referred to also contained, in addition to a repetition of the relief sought in the notice of motion, a prayer for relief in terms of section 359 (2) (b) of the Companies Act.

11]. The liquidator's response to this was to file an application, in terms of rule 30 (1) for the notice of set down to be set aside

as an irregular step. They contended that an abandoned application could not be set down and that the applicant should have lodged a substantive application for the purposes of relief in terms of section 359 (2) (b).

12]. On the initial date of hearing, 19 August 2011, it was ordered, by agreement between the parties, that the matter be postponed to 23 September 2011. It was further agreed, and ordered, that in the event of the matter not being resolved by then and the liquidators not waiving their protection in terms of section 359 (2), the first respondent would deliver opposing papers, to which the applicant would then reply. Dates for the filing of these papers and of supplementary heads of argument, were also agreed upon, and incorporated into the order that was made by agreement.

13]. It appears that the matter has not been resolved. This is most unfortunate. It causes a further delay in the completion of the construction of the hospital. The prejudice suffered by mentally ill persons and the public in general in this province has been described in detail in the founding affidavit, the allegations in this regard have not been challenged.

14]. Be that as it may, the first respondent has in the meantime filed an opposing affidavit in the main application, as well as

a counter application for the delivery of certain items, which are presently on the premises, to the liquidators. The counterclaim is conditional and dependant on findings by this Court that the applicant has in fact lodged a substantive application for the purposes of section 359 (2) of the Companies Act and that this Court does have the jurisdiction to entertain the main application.

15]. The first respondent also applies for the condonation of its failure to file its opposing affidavit within the period agreed upon and ordered on 19 August 2011.

16]. The applicant has filed an affidavit to reply to the first respondent's opposing affidavit, and to oppose the counter application and the application for condonation.

17]. The condition, in the notice of the counter claim, which refers to the jurisdiction to entertain the main application, is clearly a mistake en should have referred to the jurisdiction to entertain the application in terms of section 359 (2). The jurisdiction of this Court to entertain the main application has never, and still is not, challenged.

18]. Although the liquidators are not persisting with their application in terms of Rule 30, they still maintain that the

applicant has not in effect brought a substantive application for relief in terms of section 359 (2) (b) of the Companies Act. They also now challenged this Court's jurisdiction to entertain the application in terms of section 359 (2) (b). In my view it would be prudent to consider the issue of jurisdiction firstly. Should it be found that this Court does not have the required jurisdiction, it would be unnecessary to decide whether the applicant has in effect filed a substantive enough application for these purposes.

19]. The words "*the Court*" in section 359 (2) (b) should be read with, in the first place, the definition of the word "*Court*" in section 1 of the Companies Act. The part of the definition relevant for purposes hereof provides that the word "*in relation to any Company …, means the Court which has jurisdiction under this Act in respect of that Company …*".

20]. To determine which Court would have jurisdiction in respect of a particular Company regard has to be had to the provisions of section 12 (1) of the Act, which provides that:

"The Court which has jurisdiction under this Act in respect of any company …, shall be any provincial or local division of the High Court of South Africa within the area of jurisdiction whereof the registered office of the company … or the main place of business of the company … is situate."

21]. In **Henochsberg on the Companies Act**[5] the following is remarked as regards the jurisdiction to entertain applications in terms of section 359 (2) (b) and other proceedings in the course of the winding-up of a company:

At 761:

> *"It is submitted that the only Court which has jurisdiction to make the direction* (in terms of section 359 (2) (b)), *where the company is in voluntarily liquidation, is the Court which has jurisdiction in terms of section 12 (1) and, where the company is in compulsory liquidation the Court which ordered the company to be wound-up; another Court, in which the proceedings have been, or are proposed to be, instituted, has no jurisdiction to make the direction (**cf Van der Harst v Wells NO** 1964 (4) SA 362 (W) at 364)"*.

At 692-693:

> *"Chapter XIV contains numerous sections according powers to the Court in various contexts. Whether the winding-up is compulsory or voluntary, the Court which has jurisdiction to exercise the power under s 340 (1) read with the related provisions of the Insolvency Act … is exclusively the Court having jurisdiction at common law in respect of the particular defendant … Whether the same situation obtains in relation to the exercise of any power which is*

5 Meskin, November 2010 edited by Kunst *et al*

aimed at obtaining a substantive order against a particular defendant depends on the provisions creating such power: it is submitted that such situation does obtain in the case of proceedings, eg under ss 362 (1), 362 (2), 423 or 424, but not in the case of those under, eg s 417. Subjected to the above, it is respectfully submitted that the only Court which has jurisdiction to exercise such power is, in the case of a compulsory winding-up, the Court which granted the winding-up order, and, in the case of a voluntary winding-up, the Court which has jurisdiction in respect of the company in terms of s 12 (1) read with s 1 (1) ***sv*** *'Court': It is this Court which has the power at first instance ultimately to supervise all aspects of the winding-up … and accordingly an order affecting the company made at first instance by any other Court during the course of the winding-up may hamper the effective exercise of such power.* ***Cf*** *the position in judicial management (Ex Parte Pan-African Tanneries Ltd 1950 (4) SA 321 (O) at 322-323)"*

22]. In the **Van der Harst** case referred to where pending in the Cape Provincial Division, but the application in terms of section 118 (2)[6] was lodged in the Witwatersrand Local Division, the division in which the particular company had its

6 of the Company's Act 46 of 1926, and the predecessor of section 359 (2) of the 1973 Company's Act

registered address or place of business and in which, indeed, the winding-up order in respect of that company had also been granted. It was contended for the respondent in that matter that the Court in which the proceedings were pending had ? jurisdiction to entertain such an application. Vieyra J made reference to section 229 and section 215 of the 1926 Companies Act. There provisions were to a large extent similar to those in their respective successors, section 1 and section 12 of the 1973 Act. More specifically the definition of the word "*the Court*" in section 229 of the 1946 Companies Act also contained the introductory qualification "*In this Act unless inconsistent with the context*". Vieryra J, in rejecting the contention advanced on behalf of the respondent, held that there was nothing in section 118 (2) that was *"inconsistent*" with the definition of "*the Court*" in section 229 and that, accordingly, "*the Court*" envisaged in section 118 (2) would be a Court as defined in section 229. In terms of section 229 that Court would be the Court "*which has jurisdiction under this Act in respect of that Company*". To determine which Court would have jurisdiction in respect of the particular company in terms of that Act one had to have regard to provisions of section 215 (1) of that Act which provided that "*The court which has jurisdiction under this Act in respect of any company … shall be any provincial division or local*

division of the Supreme Court of South Africa within the area of jurisdiction whereof the registered office of the company … or any place of business of the company … is situate". The Witwatersrand Local Division was the division in which the registered office or a place of business of that company was situated and it would therefore generally have had the jurisdiction required in respect of that company. As regards the jurisdiction in respect of an application in terms of section 118 (2) the Viera J found that the Witwatersrand Local Division would also in that respect have jurisdiction:

"*The merits of any particular action or proposed action are not an issue. The sole issue is whether there is reasonable excuse for the default and it is eminently reasonable that the Court which in matters generally under the Companies Act has jurisdiction should likewise deal with this particular question. It is not a question of one Court being involved in the procedural aspect of a case being conducted in another Court.*[7]

23]. In the **Pan-Africa Tanneries** case referred to in the second quotation above, the Court in the Free State Provincial Division was concerned with an application for an order summoning a meeting to consider and offer of composition. The company had been placed under judicial management in

7 At 364D-E of the report

the Transvaal Provincial Division and at the time the registered office of the company had been in that division. The Court rejected a submission that, because the registered office had since then been moved to Bloemfontein, that Court had the jurisdiction to entertain the application:

"*It was submitted that in terms of sec. 215 of the Companies Act this Court did have jurisdiction to grant the order by virtue of the fact that the company's registered office is now in this Province. When, however, the company was placed under judicial management its registered office was in the Transvaal, and the Transvaal Provincial Division had jurisdiction to place the company under judicial management. The effect of that order was to place the company under the management of the appointed judicial managers, '****subject to the supervision****' of that Court. The judicial managers are responsible to that Court for the management of the affairs of the company and are in respect of certain duties subjected to the direction of the Master of the Supreme Court of the Transvaal. It seems to me that any matter effecting the management of the company or its affairs is one to be dealt with exclusively by the Court under whose supervision the company is being judicially managed.*"[8]

(My emphasis)

8 at 322A-D

24]. In my view the same argument would apply in the case of a company in liquidation. The winding-up process will be subject to the supervision of the Master of the Division in which the winding-up order was granted[9], and of the Court which granted that order.

25]. In **Graham NO v The Master of the Supreme Court**[10] it was held that, in "*proceedings arising from and during the windingup of the company*" the Court that had made the winding-up order was "*the proper court to consider the application*"[11].

26]. Although the Court in **Goode Durrant & Murray (SA) Ltd and Another v Lawrence**[12] was concerned with an application for sequestration, in which it was argued that the application should be transfer from the Witwatersrand Local Division to the Durban and Coast Local Division on the ground that it would be more equitable and convenient for that division to hear the matter, the following dictum at 331A of the report is significant for present purposes:

"*It follows, the moment that an order for sequestration is granted, that the Court granting the order is vested with*

9 see the definition of "*Master*" in section 1 (1) (b) of the 1973 Company's Act
10 1996 (CLR) 797 (D)
11 at 800
12 1961 (4) SA 329 (WLD)

jurisdiction in regard to everything that follows upon the order; all applications to Court and the Master's control of that estate is absolute and even rehabilitation must be in that ***forum***."

27]. This approached is supported, as far as the liquidation of companies is concerned, by the editors of **Insolvency Law**[13] at 15-20:

"*The Court which liquidates a company (being,* ***Ex hypothesi****, a Court within the area of jurisdiction of which the company's registered office or main place of business is situated) also has jurisdiction under the Companies Act to exercise any power accorded thereby in relation to the administration of the winding-up. It is respectfully submitted that, save in relation to a review of a decision, ruling or order of the Registrar of Companies, it is, indeed, the only Court which has such jurisdiction, notwithstanding that another Court has concurrent territorial jurisdiction with it, since it alone has the power at first instance* ***ultimately*** *to supervise all aspects of the winding-up, including the setting aside of the proceedings therein.*"

28]. In **Pollak on Jurisdiction**[14], it is also stated that "*As in the case of the sequestration of the estate of a person it is only the*

13 Meskin, November 2010 edited by the Hon Mr Justice P M Magid *et al*
14 2nd edition, Pistorius, p130

Court which issued the order in consequence of which the company is wound-up that has jurisdiction to deal with any matter pertaining to the winding-up". Reference is also made to **Ex Parte Bobat: In Re Kathorian Trading Co Ltd**[15], in which mention was also made of the importance of the supervision of a particular division as a factor when considering the question of jurisdiction[16].

29]. In **The Law of South Africa**[17] it is also stated, with reference to the provisions of section 12 of the Companies Act and the **Van der Harst** case that the proper forum for an application in terms of section 359 (2) (b) would be the division "*within whose area of jurisdiction the registered office or main place of the company is situate*", which would obviously also be the Court which granted the winding-up order, "*notwithstanding that the Court in which the action is to be continued is in another division*"[18].

30]. It is so that the wording of section 359 (2) of the 1973 Companies Act differs from that of section 118 (2) of the 1946 Companies Act. Section 118 (2) required a finding "*that there was a reasonable excuse for the default*", and in the **Van der**

15 1965 (2) SA 291 (D & CLD)
16 at 293E
17 vol 4, part 3, 1st re-issue
18 page 279

Harst case this was viewed as the "*sole issue*" in an application in terms of section 118 (2)[19].

31]. This requirement was omitted in section 359 (2) of the 1973 Companies Act, leaving the Court with "*an unfettered discretion*"[20]. This does not, however, in my view mean that the existence of such reasonable explanation will not still be a factor to be considered, and it will therefore still remain "*eminently reasonable*" that the Court which would generally have jurisdiction in terms of the Companies Act, should consider this factor[21]. The question would be whether the failure to file a notice timeously could possibly negatively affect the winding-up process, a process ultimately supervised by that Court.

32]. In addition the Court considering such an application should "*have regard to the interest of all interested parties, being the creditors, liquidator and members*"[22]. In my view the Court which "*ultimately*" supervises the winding-up process, and whose jurisdiction the Master in control of that process is situate, is the Court best positioned to consider these interests.

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19 **Van der Harst and Another v Wells NO, supra**, at 364D-E
20 **Ronbell v Sublime Investments, supra**, at 521D
21 **Van der Harst and Another v Wells NO, supra**, at 364E
22 **Ronbell v Sublime Investments, supra**, at 521D

33]. I may add, in passing, that I have requested that the Master in Bloemfontein furnish a report in this matter. A report has in the meantime provided to me. The Master, however, seems to have misunderstood the purpose of the report. His report is of no assistance at all, because it does not address the interest of creditors, liquidators and the members of the company in liquidation.

34]. In my view this underscores the importance of the supervision of the winding-up process as a factor in determining the issue of jurisdiction. The Court which granted the winding-up order would be the Court to which the Master in its area of jurisdiction would in the normal course of events report, and which would ultimately and in effect balance and protect the interests of all parties involved in, or potentially effected by, the winding-up; all the more so where the liquidators are involved as parties and are opposing the pending proceedings.

35]. It would be an anomaly if a Court which does not supervise a particular winding-up process, and has not control over it, could make an order which may eventually negatively affect the interest of creditors and members in that winding-up process.

36]. The Court where the proceedings are pending, or are to be instituted, would also in my view not necessarily be in a better position to consider whether the applicant has a *prima facie* case.

37]. I have therefore come to the conclusion that this Court does not have the jurisdiction to entertain this application in terms of section 359 (2).

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	**Adv Bhana, SC**
Instructed by:	**KIMBERLEY**
For the Respondent:	**Adv Zietsman, SC**
Instructed by:	**KIMBERLEY**