

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
JOHANNESBURG

CASE NO: 12419/13

(1)	REPORTABLE: <del>YES</del> NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> NO
(3)	REVISED.
2013-04-19	
DATE	SIGNATURE

In the matter between:

**AST AFRICA TRADING 501 CC**

Applicant

and

**ECOTECH BOOK BINDERS (PTY) LTD**

Respondent

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**J U D G M E N T**

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**KGOMO, J:**

**INTRODUCTION**

[1] On 10 April 2013 the applicant herein caused to be issued this application against the respondent for the following orders:

- 1.1 Condoning the applicant's non-compliance and deviation from the Uniform Rules of Court and dispensing with the forms and service provided for in the Rules; and disposing of this application as one of urgency in terms of Rule 6(12) in accordance with the procedures set out in the Rules;
- 1.2 Placing the respondent under final liquidation in the hands of the Master of the High Court;
- 1.3 That the costs of this application be costs in the winding up, save in the event of opposition, in which event the respondent should be ordered to pay same; and
- 1.4 For further and/or alternative relief.

[2] The application is opposed by the respondent.

[3] It is common cause that all procedural prerequisites like service on the Master of the High Court, the employees and South African Revenue Service ("SARS") have been complied with. The respondent challenged the issue of proper and/or requisite service on the 9 employees of the respondent.

[4] What is not in dispute is that the Sheriff of Johannesburg South attended at the respondent's place of business at 28 Inglestone Road, Village Deep, Johannesburg on 11 April 2013 and served the application on three of

the employees, namely, one Terrence Moonsamy – an estimator there -; Chantele Louw – a receptionist -; and Farad Ismail – a production manager.

[5] There is evidence herein that these individuals are the top-ranked employees at the respondent. I am satisfied that they should have brought the contents of the papers served on them to the attention of the other 6 (six) employees working with and/or under them.

[6] I thus find no substance in the respondent's complaint that service on employees was not proper or as required.

#### THE PARTIES

[7] The applicant, AST AFRICA TRADING 501 CC, is a close corporation duly registered and incorporated in accordance with the Close Corporations Act, 1984 (Act 69 of 1984); with its registered place of business situate at 5 Ormonde Close, Upavon Road, Ormonde, Johannesburg.

[8] The respondent, Ecotech Bookbinders (Pty) Ltd, is a limited liability company duly registered and incorporated in terms of the company laws of the RSA, with its registered place of business situated at No. 28 Inglestone Street, Village Deep, Johannesburg.

[9] The applicant is controlled by one Farhad Mahommed.

[10] The respondent, according to the Companies and Intellectual Property Commission ("*CIPC*"), has only one director, namely, Cynthia Govender of No. 2, Greenwich Street, Davina, Johannesburg. According to a Windeed company report dated or issued on 9 April 2013, this company has 100 issued shares of R1,00 each. It (company or respondent) was registered on 28 September 2012.

#### REASONS FOR THE APPLICATION

[11] The applicant seeks the final liquidation of the respondent on the ground that it is just and equitable that the respondent be liquidated finally, primarily because:

11.1 the respondent is unable to pay its debts and is *de facto* insolvent;

11.2 the respondent is *de facto* rudderless as its sole director, Ms Cynthia Govender had resigned in December 2012; and

11.3 the respondent is being managed (currently) by an ill-motivated employee who is not accountable to its creditors.

[12] The respondent's grounds of resisting the application are among others, that Mohammed Sooliman ("*Sooliman*") and the applicant are attempting to place a solvent and viable entity into liquidation, the aim or

purpose being to cover up certain illegal and/or fraudulent activities perpetrated by Sooliman on the respondent. Furthermore, the respondent argues that the applicant is not a creditor of the respondent and that neither it or Sooliman are directors or shareholders of the respondent.

#### HISTORY OF THE RESPONDENT

[13] Farhad Mohammed ("*Farhad*") and Govender started a bookbinding business which collapsed or failed. Thereafter, according to the applicant's deponent, Mohammed Yazeed Ismail Sooliman ("*Sooliman*") the two decided to form another bookbinding business. On 28 September 2012 the respondent was floated, however, with only Govender as the director and shareholder.

[14] As the company or its founder(s) had no capital to equip it, Farhad approached Sooliman for a loan and the latter loaned the respondent R3,5 million so that the latter can purchase machinery and equipment. The parties to this "*loan agreement*" did not conclude a written instrument enshrining their alleged agreement or loan. Apparently it was a verbal agreement. However, it is not disputed that Sooliman did indeed lend to Farhad for the benefit of the respondent the said amount of R3,5 million as start-up capital.

[15] The applicant averred that it was a term of the agreement that this loan be repayable on demand. Although during argument in this Court counsel for the respondent attempted to refute this allegation, the respondent's answering affidavit did not deal with or deny it. The applicant further contended that it

was a term of their loan agreement that up to and until this R3,5 million was repaid to the applicant, 100% of the shareholding in the respondent would be transferred from Farhad's names into the applicant's names and that at his instance at any time, Sooliman should be made a director of the respondent.

[16] What is interesting about this is that at no stage whatsoever was Farhad a director of the respondent. Neither did he have any shares that could be transferred to anybody, let alone Sooliman or the applicant at any stage to date. I find the above contentions to be fabrications or figments of Sooliman's imagination.

[17] The question I asked myself was : why did these parties or people not draw up a proper written instrument wherein all the terms and conditions of their agreement, if it ever existed, could be recorded.

[18] It is so that the R3,5 million was paid over into the applicant's account piece-meal over a period of six (6) months.

[19] According to Sooliman further, in or about November 2012, i.e. less than two (2) months after the respondent was established, he learned of financial improprieties that were being perpetrated by Govender, who was allegedly misappropriating the respondent's finances or acting therewith recklessly.

[20] He confronted Govender about the purported improprieties during December 2012. In response, Govender resigned as a director of the respondent, leaving it rudderless or leaderless. The respondent's contention hereon is that Govender was pressurised by Sooliman to resign and out of fear and/or pressure he gave him a sham resignation letter which is not clear as to whether she was resigning as director or shareholder of the respondent.

[21] According to Sooliman, he physically took over the running of the respondent from that point as a vacuum thereat would have had disastrous consequences for it and its shareholders.

[22] Sooliman, who believed, albeit erroneously, that by virtue of his loan to the respondent or Farhad for the benefit of the respondent, he was entitled to embarked, on 4 December 2012, on an unlawful and/or potentially fraudulent conduct of writing what he termed a "*Board Resolution*" which he gave forth as an extract from minutes of a board meeting of the respondent held on 4 December 2012, in which he recorded that it was resolved, (by that non-existent board) that he is appointed a director of the respondent, also specifically stating therein that Govender had resigned as director of the respondent. He (Sooliman) labelled himself as the chairman of the "*board*" in that "*resolution*".

[23] Sooliman knew very well that he was lying and also committing a fraud by his above conduct. It is common cause that any resolution concerning the respondent could only have been passed by Govender. The next question is :

if the applicant's version is anything to go by, especially that Govender resigned as director of the respondent voluntarily during December 2012, why did she not pass such a resolution? The answer will come out herein under.

[24] In the answering affidavit at paragraph 24.1 the respondent avers specifically that Cynthia Govender discovered the applicant's deponent's fraudulent endeavours to have himself appointed as director and that she contacted the CIPC and had those endeavours annulled. It is also significant that the applicant elected or chose not to respond to this in his replying affidavit. In fact he responded to paragraph 22 of answering affidavit and thereafter jumped or omitted paragraphs 23 and 25 and went on to deal with paragraph 26 thereof.

#### APPLICANT'S CONDUCT AT RESPONDENT

[25] The applicant contends that he virtually took over operations at the respondent from the beginning of December 2012. He acted as chief executive officer and managing director albeit having appointed himself. In that capacity, I agree with the respondent's deponent that in those circumstances it was incumbent on the applicant or his chosen duty to ensure that this young or recently floated entity was registered for VAT and tax purposes – PAYE and otherwise. He thus cannot be heard raising this aspect as one of the misdemeanours that should or is being laid at the door of Farhad Mahommed or Govender.

WHETHER RESPONDENT WAS INSOLVENT

[26] It is not in dispute that Sooliman loaned Farhad money to use in the respondent, be it R3,5 million or any other amount, principally to purchase equipment or the tools of the trade. He did not transact with the respondent but with Farhad. I thus cannot disagree with the respondent's contention that he or his company, the applicant, are creditors of the respondent. In any event, he never made any demand from those that he loaned money from that they repay him. No grounds have been set out in this application that point to the respondent being unable to pay its debts, let alone being *de facto* insolvent. None of the creditors the applicant's affidavit deponent mentioned complained about non-payment.

[27] It can be that the book debts of the respondent are standing at R560 000,00. That does not *per se* equate insolvency. The applicant also contended that R200 000,00 of the alleged book debt is irrecoverable. There is no justification for this assertion. Nowhere in the papers herein does the respondent come up with a shred of evidence pointing to any debt being irrecoverable. What the applicant's deponent is conceding to is that he started re-paying himself from the income of the respondent as money flowed in but did not follow up on any moneys due and payable to the respondent.

## RECONCILIATION STATEMENTS

[28] At folios 29 to 33 of the paginated papers herein the applicant set out what he averred was a schedule of moneys received and payments made by the respondent. Those figures remain that – figures he presented in support of his allegations. However, these schedules do not prove any inability to pay debts. Instead, they point to the respondent being in a perfect position to service its debts. The most unfortunate aspect connected hereto is the fact that the schedule the applicant set out was a selective and woefully deficient set out of the receipts and expenditure of the respondent.

[29] This became apparent after the respondent produced a counter-schedule of its own which painted a totally different picture. This appears on folios 78 to 81 of the paginated papers.

[30] In folio 78 the respondent sets out all the moneys received by the respondent from the applicant. These amounts to a total amount of R2 045 000,00. This is way below the R3 500 000,00 the applicant bandied about as the total sum he lent or expended on the respondent. The respondent's schedule is substantiated by bank statements listed and set out in folios 56 to 77. On the contrary, the applicant had only attached one bank statement for the period 4 March 2013 to 4 April 2013 to substantiate its schedule.

[31] The respondent's schedule on folio 79 shows all moneys taken by the applicant or Sooliman from the respondent's books of account between 25

December 2012 and 5 April 2013. It amounts to a total of R2 485 000,00. When one subtracts the moneys paid into the respondent from the applicant up to this point, the result is that the applicant overpaid itself by a whopping R440 000,00.

[32] It should not be forgotten that this happened during the period Sooliman had got rid of Govender from the reins of the respondent and was in charge and full control there.

[33] In addition to the above, the respondent pointed out and proved that the respondent received cash payments amounting to R409 631,09. This was received by the applicant or Sooliman. Proof of the above in the form of receipts was presented by the respondent on folios 82 to 120 of the paginated record.

[34] On the bases of the above exposition this far, the applicant has not made out any case for the provisional liquidation of the respondent at best, let alone a final one.

[35] I do not think other issues relating to how Sooliman attempted to stage a sham break-in at the respondent's premises as well as where he connived with his former employers, the Industrial Development Corporation ("IDC") over a phantom sale of assets of the respondent are material to a decision this Court must make, being, whether or not it is just and equitable that the respondent be placed into final liquidation.

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### CONCLUSION

[36] I am satisfied that the applicant's *locus standi* to apply for the respondent's liquidation is suspect, to put it mildly. The applicant has not shown or proved that the respondent stands to be placed into liquidation.

[37] I am satisfied that Sooliman is engaged in some inexplicable egg-dance that is aimed at liquidating an entity that is in a position to pay its debts.

[38] I specifically find that it cannot be said, on the facts before me, that it is just and equitable that the respondent be wound up.

[39] It is my considered view and finding that the applicant or Sooliman are free to institute an action for re-fund of moneys, if any, that may be due to him by the respondent. He must prove that he is being owed. That is the subject that can be dealt with in another forum, not in an application such as this one that the applicant has instituted or launched.

[40] During argument in this Court, counsel for the applicant continued to contend that he is a *de facto* 100% shareholder of the respondent. That is not true. He is neither a shareholder nor director of the respondent. His conduct from December 2012 is akin to that of a company hi-jacker. He chased away the sole director and shareholder from the respondent, installed himself as

[41] The applicant is not only presumptuous and condescending in its actions but also is contemptuous of this Court. How he believed any reasonably competent court could proceed to act as he asked it to act defies logic. It is my view and finding that this application was not only frivolous but also reckless. It was a waste of time and money, thus being a flagrant abuse of court process.

[42] The respondent asked or submitted that this application be dismissed with costs on a punitive scale of attorney and client.

[43] A punitive cost order is not lightly granted. However, where it is apparent that a litigant acted with ostensible vexatiousness or recklessness, such an order can be granted. The trial judge has a discretion where costs orders are concerned.

[44] After considering all aspects presented to me in this matter it is my finding that the applicant cannot succeed with or in this application. It deserves to be dismissed with costs. Those costs should in the peculiar circumstances herein be on a punitive scale of attorney and client as prayed for by the respondent.

ORDER

[45] It is ordered that the application be and is dismissed with costs on a scale as between attorney and client.

  
**N F KGOMO**  
**JUDGE OF THE SOUTH GAUTENG**  
**HIGH COURT, JOHANNESBURG**

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DATE OF JUDGMENT	:	19 APRIL 2013