IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

Case Number: 7344/2013

In the matter between:

Dirk Johannes Van der Merwe **Applicant**

And

Duraline (Proprietary) Limited **Respondent**

(Reg No 1997/000960/07)

REASONS DELIVERED: 23 AUGUST 2013

Gamble, J

[1] The applicant, a former employee and admitted creditor of the respondent, sought to provisionally liquidate the respondent on the basis that it was trading in insolvent circumstances. The matter was heard by a Full Court because the applicant wished to challenge a decision by Binns-Ward, J sitting alone in this Division. In its answering papers, the respondent challenged only jurisdiction and did not deal with the allegations relevant to its financial position. It reserved the right to do so on the return day in the event of a provisional order being granted. The Court was therefore entitled to accept that the respondent was insolvent and unable to pay its debts. On 14 June 2013, the Court granted a provisional liquidation order with 5 August 2013 as the return date. On that day there was no further opposition and a final order was made.

[2] The applicant alleged that this Court had jurisdiction because the respondent's principal place of business was in the Strand, Western Cape, where its manufacturing plant was situated, where its administration was conducted and where its board of directors held their management meetings. It was common cause that the respondent's registered office was in Gauteng.

[3] The respondent challenged the jurisdiction of this Court on the basis, of the judgment of Binns-Ward J in **Sibakhulu Construction v Wedgewood Village Golf Country Estate (Pty) LTD** 2013 (1) SA

191 (WCC). Mr van Eeden for the Respondent contended that the High Court in Pretoria was the only Court that had jurisdictions, given that the company's head office was there.

[4] In **Sibakhulu**, Binns-Ward J found that in terms of the Companies Act, 71 of 2008 ('**the New Act'**), a company may have only one registered office and that that office must be at the company's principal place of business. Binns-Ward J also held that only the court in which a company's registered office is located has jurisdiction to hear a liquidation or a business rescue application. Mr Louis Olivier SC for the applicant contented that this finding was wrong and asked the Judge President to convene a Full Court to address the issue.

[5] Given the withdrawal of opposition after the granting of the provisional order, the plea of jurisdiction appears to have been a dilatory tactic adopted by the Respondent's directors. However, due to the importance of the issue, full reasons are now provided for the assistance of practitioners.

[6] **Sibakhulu** involved an application for winding up before the Western Cape High Court. In the course of those proceedings, which had became protracted for reasons which are not now material, there was an application for business rescue under section 131 (6) of the New Act. That application was brought in the Port Elizabeth High

Court which, it was claimed, had jurisdiction in relation to those proceedings.

[7] The applicants in the business rescue proceedings approached the Western Cape High Court for leave to intervene in the liquidation proceedings. This was granted. They thereafter sought to obtain the postponement of the liquidation proceedings pending the outcome of the business rescue application in the Port Elizabeth High Court.

[8] The issue of competing jurisdictions evidently did not feature in the arguments before Binns-Ward J. As appears from the report[1], His Lordship called for written submissions during the course of preparation of his judgment.

[9] In a comprehensive and detailed analysis of the provisions of both the Companies Act, 61 of 1973 **("the Old Act")** and the New Act, Binns-Ward J came to the conclusion, *inter alia,* that under the New Act a company's "place of residence" could only be in one place and that that place was to be its registered office.

[10] In the light of this finding the Court then grappled with the problem that arose in respect of dual jurisdiction which had become common practice under the Old Act. Binns-Ward J found that the New Act contemplated that a company's registered office was required to coincide with its principle place of business and that such

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office was to be its only office for purposes of general administration under the New Act and for the institution of litigation.

[11] This finding by Binns-Ward J immediately raised problems for a number of companies in that a practice has arisen over the years (as in the present case) where a company's registered office was at some location remote to its principle place of business (eg. often a firm of auditors in another Province.) This disjuncture permitted creditors in a winding- up application under Chapter 14 of the Old Act a choice of 2 jurisdictions in which to institute proceedings – either where the registered office was situated, or where the company's "main office" or "principal place of business" was located[2].

[12] Binns-Ward J found[3] that the transitional provisions under the New Act did not deal with the position where a pre-existing company's registered office was situated elsewhere than its principal place of business and accordingly came to the following conclusion:

> *"The result of this must be that a pre-existing company is obligated to change its registered office in terms of s23 (3) (b) of the [New] Act if the address of the office does not coincide with that of its principal place of business. The requirement that a company register the address of its principal office is plainly intended for the benefit of 3rd*

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[2] Diary Board v John T Rennie and Company (Pty) Ltd. 1976 (3) SA 76 at 8; Bisonboard Ltd. v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A)
[3] 198 F para 20

parties who might wish to obtain information about it, communicate with it, or in any manner formally transact with or in connection with it"

And, in the interim, until such change had been effected, Binns-Ward J found that only the court in which the registered office was located, had jurisdiction in matters such as this.

[13] In the proceedings before us, Mr Olivier SC, took issue with this finding of Binns-Ward J and submitted that, upon proper analysis, for so long as liquidation proceedings were governed by the Old Act, the dual jurisdiction approach available to petitioning creditors under the Old Act remained available to them under the New Act.

[14] Mr Olivier SC submitted that the facts in **Sibakhulu** demonstrate that the judgment of Binns-Ward J was *obiter dictum* as far as his finding in para 20 of that judgment was considered. This was because, counsel argued, on the facts before His Lordship, the company's principal place of business and registered office were both within the jurisdiction of the Western Cape High Court and the Port Elizabeth High Court accordingly did not have jurisdiction in the matter before it. There was, said counsel, therefore no need for a finding on the legal position in relation to the dual jurisdiction issue. Counsel went on to submit that the present case was in any event distinguishable on the facts.

[15] Mr Olivier SC's argument touched on issues which do not appear to have been fully argued before Binns-Ward J. I consider that had they been, Binns-Ward J may have come to a different view on the applicability of the dual jurisdiction approach in respect of the winding up of insolvent companies. However, to the extent that the views expressed by Binns-Ward J are not *obiter dictum,* for purposes of the present matter I decline to follow them since I am convinced of the correctness of the argument advanced on behalf of the applicant.

[16] Mr Olivier SC's analysis of the applicable statutory regime went as follows. Section 224(3) of the New Act provides that the repeal of the Old Act does not affect the transitional arrangements contained in Schedule 5, Item 9 of the New Act. In that schedule provision is made for the continued application of Chapter 14 of the Old Act. Accordingly, any winding up under the New Act, other than a winding up in respect of a solvent company, must take place under the Old Act as if the Old Act had not been repealed.

[17] The winding-up of solvent companies is dealt with in Part G of the New Act. The interplay between Sections 79 (2) and (3) and Items 9 (2) and (3) of Schedule 5 to the New Act make it clear that an application for winding-up of a solvent company must take place in accordance with the provisions of the New Act. However, if in the course of such proceedings it is found that the company is in fact insolvent the matter must then be determined in accordance with the provisions of Chapter 14 of the Old Act.

[18] Turning to Section 344 of the Old Act (which will apply, *inter alia*, in regard to the winding up of a company that is unable to pay its debts, or deemed to be unable to do so), the section reads as follows:

> *" **344. Circumstances in which company may be wound up by the Court.***
>
> *A company may be wound up by **the Court** if - …*
>
> (a) *the company is unable to pay its debts as described in section 345 …" (Emphasis added)*

[19] The "*Court*" referred to in Section 344 was assigned a particular meaning under the Old Act and was defined in Section 1 as follows:

> *"**Court**" in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate…"*

Further, the Old Act (unlike the New Act) had a specific section which determined which Court had jurisdiction in, inter alia, an application for winding up:

> ***"12. Jurisdiction of Court under this Act and review of decisions of Registrar.***
>
> *(1) The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any*

provisional or local division of the High Court of South Africa within the area of jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate."

[20] Under the Old Act, therefore, Section 12 was the source of the dual jurisdictional power to liquidate, a situation which has, for a number of decades, been recognised under Section 344[4]. At the risk of stating the obvious, the entire winding up process of an insolvent company on the basis of inability of a company to pay its debts must, until the transitional provisions of the New Act are varied, take place in terms of Chapter 14 of the Old Act. Once reliance is placed on those sections for such winding up, I consider that the definitions, internal references and interpretations which have applied to that Chapter of the Old Act will continue to apply, and it is not permissible to cross-reference to provisions of the New Act whilst so applying Chapter 14 of the Old Act.

[21] Chapter 14 of the Old Act does not only deal with the application for winding-up itself, it governs, *inter alia* the functions and duties of liquidators, meetings of creditors, the interrogation of directors and other persons in relation to the affairs of the bankrupt company,

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[4] Henochsberg on the Companies Act Vol 1; 5th Edition (by Meskin et al) at 692; Diary Board case *supra*; Bisonboard case *supra*

liability of directors for the mismanagement of the company and importantly, the incorporation of various provisions of the Insolvency Act of 1936. The many sections under this Chapter have over the years been interpreted by our Courts and there is therefore a substantial body of authority and established jurisprudence which continues to be of general application, notwithstanding the passing of the New Act.

[22] That the application of Chapter 14 requires resort to, and reliance upon, the definitions and other internal references to the Old Act, is further borne out by the following. There are several instances where definitions under the Old Act have a different meaning under the New Act, or where a term is not defined under the Old Act but is defined under the New Act. See for example *"Accounting Records", "Company", "Director", "External Company", "Member" "Memorandum", "Share" and "Special Resolution".*

[23] As I have said many of these terms have been interpreted by the Courts over the years, and in the continued interpretation of Chapter 14 of the Old Act (that is until the introduction of the promised winding up legislation referred to below), the Courts must continue to have regard to such definitions and internal references. It would be chaotic to have to to apply New Act definitions and provisions to Old Act provisions in Chapter 14 without an express direction in the New Act to do so.

[24] In **Sibakhulu**, Binns-Ward J was troubled by the provisions of Section 128 (1) (e) (i) of the New Act in which the word "*Court*" is defined for purposes of business rescue procedures as "*the High Court that has jurisdiction over the matter*". It must be emphasized that this definition of "Court" is the only section in the New Act defining a court, and it is notable that the definition is strictly limited to cases involving business rescue.

[25] Given that the New Act specifically directs that liquidation proceedings (save in respect of solvent companies) are to be brought under Chapter 14, I consider that the dual jurisdiction regime recognised under the Old Act by virtue of the definition of "Court" read with the provisions of Section 12 thereof, prevails in respect of such proceedings, notwithstanding the introduction of the New Act.

[26] I am satisfied, too that this view accords with the express wording of Item 9 of Schedule 5 to the New Act of which the relevant provisions read as follows:

> *"9.* ***Continued application of previous Act to winding- up and liquidation***
>
> *(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding- up and liquidation of companies under this Act, as if that Act had not been repealed and subject to sub-items (2) and (3).*

(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the Gazette, may -

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding- up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a)".

[27] It will be observed that Item 9 (3) directs the applicability of the New Act in regard to any conflict arising in the interpretation of Part G of Chapter 2 of the New Act – as I have said a Part which deals with the winding- up only of solvent companies. However, the proviso's to Item 9 (1) contained in Items 9 (2) and (3), which are applicable to

the winding- up only of a solvent company are not applicable to the sections of the Old Act mentioned therein which must be administered as before.

[28] The provisions of Items 9 (4) (a) and (b) are also relevant. It is apparent from those items that it is the intention of the Legislature to introduce new and distinct legislation sometime in the future to deal specifically with the winding-up and liquidation of **insolvent** companies. When that Legislation eventually sees the light of day, efficient transitional provisions will be introduced to facilitate a changeover from the Old Act to that new legislation. Such transitional provisions will, undoubtedly, have to deal with the problems identified by Binns-Ward J in **Sibakhulu** in regard to the interpretation of Section 23 of the New Act.

[29] But until such new legislation is introduced, the situation remains, as it were, fixed in time and insolvent companies will continue to be wound up as before under the Old Act with due regard for the extensive jurisprudence which has developed in relation to Chapter 14.

[30] Accordingly, I considered that the continued applicability of the provisions of Chapter 14 of the Old Act to the case before us included the entitlement of a creditor to approach the Court in whose jurisdiction the main or principal place of business was located, in

circumstances where the registered office of the company is located elsewhere.

[31] It follows in my view that this Court had jurisdiction to entertain the application. In consequence of this finding, it is unnecessary to consider the consequences of the failure of a company to align its registered office with its main place of business in terms of Section 23 (3) of the New Act

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Gamble J