IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Case No. : 779/2009

In the matter between:-

SOLIDARITY Applicant

In Re:

ARNO VAN WYK Applicant

and

ATLANTIS FORGE (PTY)LTD Respondent
Registration number: 2002/012551/07

CORAM: H.M. MUSI, JP

HEARD ON: 5 MARCH 2009

DELIVERED ON: 19 MARCH 2009

JUDGMENT

H.M. MUSI, JP

[1] On 18 February 2009 this court was approached on the basis of urgency with an application for the winding-up of Atlantis Forge (Pty) Ltd, a company which conducts business in the Western Cape and whose registered address has all along been in Bellville, Cape Town. The application was

brought by Mr. Arno van Wyk, who is chief executive as well as being a director of the said company. He had been authorised to bring the application by a resolution of a majority of the directors. One director, Mr. Khumalo, had apparently disagreed with the resolution. Since the urgent application was unopposed, Mocumie J, who was on motion court duty, granted a provisional order of liquidation with a rule *nisi* returnable on 2 April 2009. For the sake of convenience I shall henceforth refer to Atlantis Forge (Pty) Ltd simply as "the company".

[2] On 26 February 2009 Solidarity, a trade union, brought an urgent application under case number 986/2009 seeking, firstly, permission to join the winding-up application on behalf of some employees of the company, who are its members, in order to oppose the application. Secondly, Solidarity wants the provisional order of liquidation granted on 18 February 2009, to be set aside and, thirdly, to have the liquidation application itself transferred to the Western Cape High Court. The application brought by Solidarity is opposed by Mr. Arno van Wyk, again acting on behalf of the directors of the company, as well as the company itself. He has filed an

opposing affidavit to which is annexed a supporting affidavit by Mr. George Diedericks de Beer, an attorney and director of the firm Honey Attorneys, Cape Town. He confirms giving the advice that led to the application being launched in this court.

[3] I should point out that the opposing affidavit was served on Solidarity's attorneys at 12h56 on the eve of the hearing and Mr. Vorster, who argued the matter on behalf of Solidarity, indicated that he only got a copy of the opposing affidavit whilst on his way to Bloemfontein for the hearing. Incidentally the opposing affidavit was served after Solidarity had filed its heads of argument. Solidarity did not file a reply to the opposing affidavit.

[4] I should mention that in its founding affidavit Solidarity complained that the company had not served the winding-up application on either itself or its members and claimed that although the papers were served on its Welkom office in the morning of 18 February 2009, these only came to its attention on Monday, 20 February 2009. It insinuated that the company had deliberately avoided service of the papers

on its members so as to deny them the opportunity of opposing the application. It averred that the application was launched in this court, rather than the Western Cape High Court for the same reason. However, the opposing affidavit has clearly exposed as false the allegation that the papers were not served on Solidarity and its members. The complaint concerning service was not only baseless but was also false. The papers were served by the sheriff on all the interested parties and there had been full compliance with the provisions of section 346(4A) of the Companies Act, 61 of 1973 (the Companies Act).

[5] It is important to comment on the nature of the application brought by Solidarity. In the first place, Solidarity seeks permission to intervene. It will only become a party if it is allowed to intervene. In this context it is an applicant. It seeks to join in order to oppose the winding-up application and once it has joined the proceedings, it will become a respondent in such application. This is precisely how Mr. Vorster, for Solidarity, approached the matter and I think he was correct. The logical conclusion of this is that as regards the winding-up application, Solidarity's version will have to be

treated in the same way as the version of any other respondent in motion proceedings. It is noteworthy in this regard that Solidarity has answered in full, paragraph by paragraph the averments contained in Arno van Wyk's founding affidavit in the main winding-up application. This type of scenario where a party can be an applicant in respect of one aspect and a respondent in respect of another in the same matter, is not unheard of in our civil procedure. Compare **THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS** 2008 (12) BCLR 1197 (CC) at p. 1203 para 9 and 10.

[6] I deal first with the application for intervention. The company has raised a legal point to the effect that Solidarity has no *locus standi*. Mr. Steyn, for the company, contented that although section 200(1) of the Labour Relations Act, 66 of 1995, (the LRA) empowers trade unions to represent their members, this relates to negotiation on their behalf and generally assisting them, but does not include instituting or defending court actions on their behalf. He said that a union

can assist by providing funding and engaging lawyers to represent its members, but that the member himself will still need to be the party in the relevant proceedings.

[7] Mr. Steyn subsequently furnished me with a copy of a judgment in the matter of **NEHAWU obo A ADELAJA ADEKOYA v CENTRAL UNIVERSITY OF TECHNOLOGY: FREE STATE AND ANOTHER**, case number A1671/2008, an unreported judgment of Hancke J of this court, delivered on 19 June 2008. In this matter Hancke J referred to section 200(2) of the Labour Relations Act which reads as follows:

> "(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."

Based on this Hancke J ruled that a trade union can only join the proceedings as a party to assist a member who is already a party to such proceedings. Where a member to be assisted is not a party, as in the case before him, Hancke J held that the union would have no *locus standi*. He also

interpreted section 200(1) of the LRA in the light of section 161 of the LRA and concluded that section 200(1) empowers unions to represent their members in resolution of disputes as opposed to the standing in the place of their members in court proceedings.

[8] Mr. Vorster contended that Solidarity's members have a direct and substantial interest in the winging-up of the company and that Solidarity as representative of the majority of the company's employees is empowered by section 200(1) of the LRA to litigate on behalf of such members. He submitted that the winding-up of the company will adversely affect the employment of the employees and is therefore a labour related matter entitling Solidarity to intervene to protect their interests. He referred to section 346(4A) of the Companies Act and said that the fact that the Act makes it peremptory for a winding-up application to be served on a trade union representing the workers of the company concerned, means that it was envisaged that the union could join as a party on behalf of its members.

[9] It has long been accepted in labour jurisprudence that trade unions have *locus standi* to act on behalf of their members in court proceedings. See **MARIEVALE CONSOLIDATED MINES LTD v PRESIDENT OF THE INDUSTRIAL COURT AND OTHERS** 1986 (2) SA 485 (TPD) at 492 I – J; **GENERAL INDUSTRIES WORKERS UNION OF SOUTH AFRICA & OTHERS v EGGO SAND** (1990) 11 ILJ 179 (IC) at 181 A – C; **STEEL AND ENGINEERING INDUSTRIES FEDERATION AND OTHERS v NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (1)** (1992) 13 ILJ 1416 (T) at 1420 – 1421. John Grogan, **Workplace Law**, 9th Edition, at 325 says that such *locus* is not confined to the Labour Court but extends to the civil courts (read High Courts), but that in the latter courts the union must show that it has a direct and substantial interest in the subject matter of the dispute.

[10] *In casu*, it is common cause that the company owes some of its employees outstanding salaries and in addition there is an amount of R2 500 000,00 that the company was supposed to pay to the Provident Fund to which the employees belong which amount is still outstanding. The employees are

therefore the creditors of the company. Solidarity has a duty to safeguard the interests of its members in the winding-up application. It has a direct and substantial interest in the winding-up application.

[11] Besides, section 436(4A) of the Companies Act clearly recognises unions as interested parties in winding-up applications and this is an indication that they should be able to join in such applications on behalf of their members. I conclude therefore that Solidarity does have *locus standi* to intervene.

[12] It appears to me that the authorities cited above were not brought to the attention of my brother Hancke J in the matter of **NEHAWU obo A ADELAJA ADEKOYA v CENTRAL UNIVERSITY OF TECHNOLOGY: FREE STATE AND ANOTHER** referred to above, on the point of *locus standi* of a union representing its members.

[13] I now turn to consider Solidarity's opposition to the winding-up application. The main ground of its opposition is that this court has no jurisdiction in the matter. The basis of this

contention is that both the registered address and principal place of business are located in the Western Cape outside the area of jurisdiction of this court. The company, on the other hand, strenuously denied that this court has no jurisdiction. Whilst conceding that it operates in the Western Cape and that it conducts no business in the Free State, it averred that it changed its registered address to Bloemfontein prior to the launching of the winding-up application.

[14] Now Solidarity denies that the company has properly changed its registered address. In this regard Solidarity has set out in full the steps that were allegedly taken by the company in an attempt to change its registered address. In a nutshell, Solidarity's version is that one Ms Amanda Jacobs was given instructions by one Gavin Hartman, who is involved with Coopers Trust and one Estie of Honey Attorneys, Cape Town to change the registered address of the company to 52A Kellner Street, Westdene, Bloemfontein. Ms Jacobs works for Enco Business and Financial Administrators (Pty) Ltd, a company based in Pretoria which apparently provides company secretarial services relating to

the Registrar of Companies in Pretoria. It should be noted in passing that Coopers Trust is a firm of liquidators and insolvency practitioners based in Bloemfontein and that one of the liquidators appointed by the Master of the High Court in Bloemfontein pursuant to the provisional order, is from this firm, whereas Honey Attorneys is the firm of Mr. De Beer, who gave the advice to change the registered address of the company. In fact all the liquidators are based in Bloemfontein and appear to be linked either to Honey Attorneys or E G Cooper, Majiedt Inc.

[15] Ms Jacobs took the necessary steps to effect the change of address as instructed. She requested and was given written instructions to do so by a letter dated 13 February 2009 from the firm Honey Attorneys, Cape Town which is annexed to the founding affidavit as "TS6". She was furnished with the form CM22 which was partly completed and signed by a director of the company ("TS7"). She received confirmation from the Registrar of Companies to the effect that the CM22 had been accepted and that the change of address will take effect from 9 March 2009 ("TS9"). Ms Jacobs says on 16 February 2009 she was requested by Gavin Hartman to

bring forward the date of 9 March 2009. On 17 February 2009 the same request was repeated to her, this time by Mr. Chavonnes Cooper (one of the provisional liquidators). Her response was that this could not be done. Solidarity therefore contended that the change of address could not have been effected by the time that the winding-up application was launched on 17 February 2009.

[16] What I find puzzling is that the company's response to Solidarity's averments concerning the instruction given to Ms Jacobs to change the company's registered address and the steps that she took following the instruction is vague, if not evasive. The core of the averments is contained in paragraphs 8.3 to 8.11 of the affidavit of Mr. Tobias Johannes Scott, on behalf of Solidarity. The deponent to the company's affidavit, Mr. Arno van Wyk, who had been charged with bringing the liquidation application, professes lack of knowledge of these averments. All he does is to deny that this court has no jurisdiction in the matter and then simply producing a copy of a CM22 that bears the stamp of the Registrar of Companies and which was signed on 16 February 2009 and which reflects the date upon which the

change of address would take effect as 12 February 2009. This document is annexed to his affidavit as annexure "4".

[17] Now what clearly emerges from the uncontested version of Ms Jacobs is the following:

(a) She was instructed to change the registered address of the company on 13 February 2009 and was furnished with a partly completed CM22 which she lodged on 16 February 2009 with the office of the Registrar of Companies.

(b) A comparison of the CCM2 furnished to Jacobs with annexure "4" to the affidavit of Arno van Wyk shows that they are copies of the same document. I say this because everything above the signature of director or secretary of the company which is dated 12 February 2009 is the same and the handwriting is precisely the same in both documents. And it is noteworthy that the new registered address is written in a handwriting that is different from the rest of the handwriting on the document.

(c) Jacobs was advised by the company's office that the CM22 had been accepted and recorded and that the

change would take effect on 9 March 2009. In this regard it should be noted that section 170(2)(a) of the Companies Act requires a 21 days notice to be given to the Registrar of an intended change in the registered address of a company. The date of 9 March 2009 reflects the end of the 21 days period from the date of lodgement of the CM22 and corroborates the version of Jacobs.

(d) On 16 February 2009 and again on 17 February 2009 the people who had approached Jacobs on behalf of the company, requested her to bring forward the date of 9 march 2009 so that the change of address could take place earlier.

[18] The questions that arise are the following:

How could the Registrar of Companies have fixed the date on which the change of address was to take effect as 12 February 2009 when the CCM22 had not been lodged with his office by then? How come that annexure "4" was signed and endorsed with the Registrar's stamp on 16 February 2009 when on that very day and on the following day Jacobs

was being requested to change the dates? How could the effective date of the change be made retrospectively?

[19] These are glaring discrepancies that needed an explanation. When Arno van Wyk signed his affidavit he must have been aware of these discrepancies and yet chose not to deal with them. He simply produced annexure "4" with no explanation whatsoever. He did not even aver that it was properly endorsed by a competent person in the office of the Registrar of Companies. Not even that the requirements of section 170 of the Companies Act had been complied with, especially subsection 2(d). The onus was on him to establish that this court had jurisdiction and he has dismally failed to discharge such onus.

[20] Besides, these are motion proceedings and where there are disputes of fact that cannot be resolved on the papers, the rule enunciated in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) applies. The version of the respondent prevails. See **THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA AND ANOTHER v**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS, *supra*, at 1203 par. [8]. I have already ruled that Solidarity is the respondent in the liquidation application. Its version that when the winding-up application was launched the company's registered address had not been changed to Bloemfontein prevails. I therefore find that this court had no jurisdiction to entertain the winding-up application.

[21] Mr. Vorster acknowledged that in an application for the setting aside of a provisional order of liquidation the applicant must give a satisfactory explanation as to why it did not oppose the granting of such order. See **WARD AND ANOTHER v SMIT AND OTHERS: IN RE GURR v ZAMBIA AIRWAYS CORPORATION LTD** 1998 (3) SA 175 (SCA) at 181 A – D. Solidarity's explanation was that it only became aware of the application on 20 February 2009 when it was brought to its attention by its Welkom branch. Of course, it is common cause that the application was served on its Welkom branch in the morning of 18 February 2009. But one must take into account that this was short notice and that the case was to be heard far away in Bloemfontein. Also Solidarity is based in Pretoria whilst the members it was

to represent are based in Cape Town. Under those circumstances, the failure to oppose the urgent application is not inexcusable.

[22] Now there is merit in the company's contention that Solidarity is ambivalent in whether they support the winding-up of the company or not and indeed whether they have valid grounds for opposing the application. It must, however, be borne in mind that Solidarity does not seek to set aside the entire application and such issues can best be considered by the court finally hearing the matter. Moreover if this court had no jurisdiction in the matter it cannot now deal with the merits of the application.

[23] Solidarity has asked that this court should act in terms of section 3 in the Interim Rationalisation of Jurisdiction of High Court Act, 41 of 2009, and order the transfer of the application to the Western Cape High Court. Even apart from the question of jurisdiction, there can be no doubt that the Western Cape High Court would have been the appropriate court to hear this matter. The company's principal place of business is in the Western Cape. That is

also where its operations, its property, its employees and its management are located. Even the resolution authorising the institution of the application was passed and signed in Cape Town where the directors including, Mr. Arno van Wyk, are located. In short, all the interested parties are there.

[24] An interesting question arose during oral argument as to whether this court has the power to transfer the matter where it has no jurisdiction. Mr. Vorster drew my attention to the matter of **ROAD ACCIDENT FUND v RAMPUKAR; ROAD ACCIDENT FUND v GUMEDE** 2008 (2) SA 534 (SCA) in which Brand JA stated the following at 540:

> "As I have said before, in accordance with the wider interpretation, s 3(1)(a) does not bestow jurisdiction on a court which has no jurisdiction under s 19(1) of the Supreme Court Act to decide the case on its merits. All it does is to afford the 'wrong' court - ie the transferring court - limited jurisdiction to transfer the case to the 'right' court which does have jurisdiction under s 19(1)."

[25] On the issue of costs, Mr. Steyn submitted that Solidarity had falsely alleged that the company had deliberately avoided to

serve the papers on it and its members in an attempt to cast the company in a bad light. For that reason he submitted that Solidarity had been *mala fide* and should be penalised with costs. This may be so. On the other hand, I cannot ignore the fact that the company sought in a calculated, questionable manner to move its registered address from Cape Town to Bloemfontein purely in order to enable it to bring this application in a court of an area that has got absolutely no connection with it. Though apparently legal if done properly, it is a practice that should be frowned upon. It is a serious matter when the company's stakeholders have to be dragged all the way from Cape Town to Bloemfontein at substantial costs, for the convenience of a few individuals. And I am not persuaded that the reasons advanced for this move, are weighty or sound. This is an appropriate case where the court should express its displeasure by awarding punitive costs and I think it is only proper that such costs be borne by all the directors who passed the resolution that authorised the change of the company's registered address in order to bring the winding-up application in this court.

[26] It has also been contended that there was no justification for Solidarity bringing its application on the basis of urgency and that Solidarity could simply have prepared to oppose the granting of the final order on 2 April 2009. My view is that urgency was justified. Once Solidarity was convinced that this court had no jurisdiction, it was entitled to take immediate steps to correct the situation and set aside an order that should not have been granted. It is a matter that could not be delayed.

[27] In conclusion, I should mention that the provisional liquidators are aware of Solidarity's application and did not oppose it. Instead they have themselves launched an urgent application under case number 1105/2009 seeking *inter alia* leave to raise money on the security of the assets of the company as provided for in section 366(5) of the Companies Act. Their application was postponed in order to await the outcome of the instant application. The advocate who appeared on their behalf intimated that the liquidators did not intend opposing the instant matter.

[28] The following order is made:

1. Leave is granted to Solidarity to intervene in the winding-up application under case number 779/2009.
2. The provisional order for the winding-up of Atlantis Forge (Pty) Ltd granted on 18 February 2009 is set aside.
3. The winding-up application issued under number 799/2009 is transferred to the Western Cape High Court;
4. The directors of Atlantis Forge (Pty) Ltd who passed the resolution authorising the change of the registered address and launching of the winding-up application in this court, including Mr. Arno van Wyk, shall pay the costs of suit on an attorney and client scale, jointly and severally, the one paying the others to be absolved.

H.M. MUSI, JP

On behalf of Solidarity: Adv. J. Vorster
Instructed by:
De Kock Attorneys
c/o Du Toit Louw Botha Inc.
BLOEMFONTEIN

On behalf of Arno van Wyk:	Adv. J.W. Steyn Instructed by: c/o Saffy and Associates BLOEMFONTEIN
On behalf of respondent:	Adv. J.W. Steyn Instructed by: c/o Saffy and Associates BLOEMFONTEIN

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