IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1704/2014

In the matter between

VIKELA INSURANCE BROKERS (PTY) LTD Applicant

And

FINANCIAL SERVICES REGULATORY AUTHORITY Respondent

In re:

FINANCIAL SERVICES REGULATORY AUTHORITY Applicant

And

VIKELA INSURANCE BROKERS (PTY) LTD Respondent

Neutral Citation: *Vikela Insurance Brokers (PTY) LTD Vs Financial Services Regulatory Authority (1704/2014)*

[2015] SZHC 131 (17th July 2015)

Coram: Hlophe J.

For the Applicant: Miss M. Boxshall Smith

For the Respondent: Mr. Z. D. Jele

Date Heard: 09 July 2015

Date Delivered: 17 July 2015

Summary

Application Proceedings – Review proceedings brought by the director of a Company under provisional liquidation – Challenging a decision taken by the Respondent prior to the liquidation of the company – Review proceedings brought in the course of the liquidation proceedings without knowledge or consent of the liquidator – Liquidation proceedings set down for a specific date – agreed between the parties that given the nature of liquidation proceedings and their effect in the event of the provisional liquidation order being confirmed, the review proceedings would have to be dealt with prior to the hearing of the liquidation proceedings – Agreed further that in view of the point raised in limine in the review proceedings, namely whether the Director who purported to bring the Review Proceedings in question had the locus standi to do so, considering that the said application is brought after the company has already been placed in liquidation and its effect if

upheld, it was agreed that that this point alone be dealt with preliminarily and disposed of – Effect of provisional liquidation order as concerns the powers of the directors considered – Powers of the Directors cease upon commencement of the provisional liquidation order or winding-up with them becoming functus officio – Directors however retain same residual power – Meaning and extent of the residual power retained by the Directors – Whether the bringing of the current review proceedings in the surrounding circumstances amounts to such residual power – Residual power only entails the power to oppose the confirmation of a provisional order of liquidation – Current review proceedings not about opposing confirmation of the provisional liquidation order but independent proceedings of their own – review proceedings ill-conceived in these circumstances and dismissed with costs.

JUDGMENT

[1] Sometime in October 2014, the applicant was placed under provisional liquidation by the Respondent. This situation resulted from an application filed by the current Respondent seeking an order placing Applicant under provisional liquidation. Consequent to this application a provisional liquidator was appointed. To this day the Applicant Company remains

under such liquidation. As a result all its affairs, and by operation of, now fall under the control of the provisional liquidator in question. It is important to reveal that the

[2] The Applicant was placed under liquidation because, according to the Respondent herein, it was running an insurance business without a licence and was also in general violation of the state regulating the Finance Services Industry. These contentions in their general nature were said by the Respondent to have entitled it to place the Applicant under provisional liquidation, acting in terms of the powers granted it by the applicable statute.

[3] The Applicant, who is Respondent in the liquidation proceedings, which constitute the main matter herein, opposed the confirmation of the order placing the Applicant under the said liquidation. The thrust of its argument or contention being that its business was not an insurance one but was merely a legal consultancy business which did not necessitate it to obtain a licence from the Respondent in the current interlocutory proceedings. Its business claimed the Applicant did not infringe on or violate the applicable statute, as it conducted a business distinct from an insurance one.

[4] I must say I do not, for purposes of determining the current proceedings, find it necessary to encapsulate all the facts and allegations advanced by the current Respondent in its quest to have the provisional liquidation confirmed including those advanced by the Applicant on why the Interim Order ought to be discharged including why the provisional liquidation could not be confirmed.

[5] It suffices in my view to state that the papers reveal that, apparently suspecting that the current Applicant was operating an insurance business without a licence and in general violation of the applicable Act or statute, the Respondent acting though its officers, conducted an investigation at the Applicant's offices where it concluded that indeed the Applicant was operating as suspected. The business hitherto run by the Applicant entailed the taking of certain monthly instalment payments from its clients. Applicant says these were aimed at facilitating its legal consulting business. the Respondent was of the view this was actually conducting an insurance business without a licence and in violation of the applicable statute. As a result of its findings, the Applicant was advised to apply for a licence. It applied to the Respondent for the said licence. The application was dismissed in October 2014.

[6] Notwithstanding both parties having been aware of the said decision, none, including the Applicant took any action until December 2014, when the Respondent instituted the application proceedings for the provisional liquidation of the Applicant. An interim order placing the Applicant under provisional liquidation was granted. The liquidation application was however opposed by the current Applicant. Thereafter the parties in the liquidation proceedings changed all the necessary pleadings such that as of today the said proceedings are now ripe for hearing.

[7] It is common cause that after the Replying Affidavit had been filed and even before the matter could be argued around April 2015, a fresh interlocutory application by the current Applicant seeking among other things to have the decision of the current Respondent, refusing it the grant of an Insurance Licence, reviewed and set aside. This is the application dealt with in these proceedings and this judgment relates to it.

[8] The current Applicant contended in this application that the decision refusing it the grant of the licence was handled irregularly and that same was legally incompetent hence the request that it be reviewed and set aside.

[9] The Respondent opposed the application contending *inter alia* that the decision it took was in essence proper. More importantly it raised three points in limine in support of its position namely that the current Applicants have no *locus standi* in judicio to move the current proceedings in so far as the Applicant was now in liquidation. It was argued further in support of this point that neither the consent of the liquidator nor a Court Order had issued clothing Applicant with the authority to institute these proceedings on behalf of a company in liquidation. It was contended as well that the Application for review was moved unreasonably out of time when considering that same was moved after some six months had lapsed since the decision being challenged was made. It was alleged this would in the meantime occasioned the Respondent serious prejudice. It was also alleged that the Applicant was approaching this court with dirty hands because it had allegedly continued to carry on with its illegal activities even after the order of court placing Applicant under provisional liquidation had already issued.

[10] With the Respondent having filed an Answering Affidavit setting out the above, and without a Replying Affidavit having been filed; there was instituted by the Applicant, an Application to strike out certain paragraphs in the Applicant's Founding Affidavit for various reasons including the same

were vexatious and vague and embarrassing. This application was in the form of a Notice of Motion accompanied by an affidavit. The application to strike out was also issued under the same case number as the main matter (the liquidation application) and the other interlocutory one (the review proceedings). The current Respondent responded thereto by means of a Notice of Application in terms of Rule 30, claiming that the manner in which the application to strike out was moved, was irregular and that same had to be struck out or set aside. The thrust of the application in terms of rule 30 was simply that an application to strike out ought to be made in the main proceedings by means of a simple notice and need not be heard separately as a distinct application.

[11] This was the status of the matter when this court was allocated same to deal with following a Notice of Set Down for it meant for the 3rd July 2015. The application to strike out was moved in April 2015 and the application in terms of Rule 30 had been made in May 2015.

[12] When the matter was placed before this court, the only proceedings in which the pleadings were closed with Heads of Argument and Book of Pleadings

having been filed was the Liquidation Proceedings and these were the only ones I had acquainted myself with, in preparation for the initial hearing.

[13] After the parties counsel had clarified all the matters involved under the same case number; mainly the liquidation proceedings, Review Proceedings and application to strike out as well as the rule 30 application which it was clarified was no longer being pursued,, it was clear the matter could not be proceeded with as I felt I needed to consider all the matters filed of record. The situation was further complicated by the fact that as of then, Miss Boxshall Smith for the Respondent in the Provisional Liquidation proceedings and for the Applicant in the Review Proceedings and the Application To Strike Out, informed the court that she was only prepared for one matter only and that was the application to strike out and possibly the Rule 30 application by the Respondent. These applications she claimed should always precede a substantive application in any matter. As for the review proceedings, she claimed notwithstanding the several months they had taken pending in court they were not yet ready because according to her she had not filed a Replying Affidavit as she said she awaited the filing of a record of proceedings by the Respondent.

[14] With Mr. Jele having submitted firstly that the application for review was the first one to be heard and that we should deal with it first followed by the application to strike out, both of which he submitted were relatively shot arguments and him having addressed the court deeper on the Review application, particularly the three points why same was inappropriate taking into account the manner in which same was moved; I directed that the matter be postponed to the next day for the matter to be dealt with in its entirety with the court having also read all the papers. Applicant's Counsel, Miss Boxshall Smith was directed as well to come prepared to argue the entire matter, that is the Review Application, the striking out and the liquidation application. I did this because she had initially stated that she would only be ready to argue the striking out application contending that in the review application she still needed to file a Replying Affidavit, which she was still awaiting a record of proceedings to file. This I could not allow in view of the time it had taken to prepare as well as the fact that there were obvious points of law that we needed to deal with in the review proceedings which would most likely be preliminary. Furthermore it did not sound right that the Applicant in the review proceedings would, after filing same with the other party who had gone on to file his opposing papers, would be allowed to stall the proceedings under the guise that she was awaiting a record of

proceedings. In any event all the letters founding the basis of the application were now before court and therefore strictly speaking no record was outstanding.

[14] At the commencement of the matter on the 9th July 2015, I directed the parties that having read all the papers filed of record in all the three matters, it was apparent in my view that the main matter, the liquidation proceedings could not be dealt with prior to the Review proceedings and the application to strike out. As the main matter, on which these other two were made contingent by being filed under the case number as interlocutory applications, a hearing and finalization of same would render the others moot. I was therefore of the view that the review proceedings be dealt with first, and that depending on their outcome, the application to strike out and subsequently the liquidation proceedings, would follow in that respective order.

[15] The parties counsel agreed that going forward the matter was to be dealt with in line with the directive I had made. It was then agreed that at that stage, the review application, and in particular the point in limine raised

therein to the effect that the company that the deponent to the Founding Affidavit in the review application claimed to be acting on behalf of was already in liquidation, with all the powers of the Directors having by operation of law ceased to exist with the Directors themselves having become functus officio. There being no allegation that the liquidators power or a court order had been sought and granted to entitle him to institute such proceedings, the review proceedings were ill conceived.

[16] It was agreed that if this point were to be decided in favour of the Applicant having *locus standi* notwithstanding the current status of the company, then the proceedings would possibly have to be postponed to allow the Applicant to file the Replying Affidavit under certain specified time frames. Miss Boxshall Smith clarified she needed a chance to be able to file the Replying Affidavit. Again if the conclusion was to be that indeed there were no review proceedings or put differently that the Applicant had no *locus standi*, the review proceedings would have to be dismissed there and then.

[17] Applicant's Counsel was the first one to address the court and in doing so, submitted that the point raised by Mr. Jele that the Applicant could not

legally institute these proceedings without the consent of the liquidator was ill conceived. In so far as the Applicant had purported to do so, there was no merit in the application. On the contention that the director who purported to act on behalf of the company had no power to do so as he was by now functus officio, the Applicant's Counsel contended there was by now authority allowing a company in the Applicant's situation, to move such an application. After short adjournment to enable her come up with such authority, the Applicant's Counsel quoted what she said was stated in Henochisberg's Commentary in the complaints Act. She submitted according to the alleged authority that the directors of the company, notwithstanding a provisional liquidation order, remained vested with the authority concerned if the proceedings contemplated were aimed at protecting the company from liquidation. I was referred in that regard to ***O'connel Manthe & Partners v Vryheid Mineral (EDMS) BPK 1979 (I) SA*** at 558 C-D where the following was stated:-

> *"It is in my opinion clear that the company against which a final liquidation order is granted may appeal against such order acting through its Board of directors and without the cooperation of the liquidation. This being the position there is no reason why the company acting as aforesaid*

> *cannot take the necessary steps to oppose the confirmation of a Provisional Liquidation Order. This would include not only opposition and appearance on the return day but also any proceedings to anticipate such a return date".*

[18] Reference in this regard was made as well to such cases as ***Attorney General v Bluementhal 1961 (4) SA 313 (T) and Ex Parte G. Pagan Enterprises (PTY) LTD 1938 (2) SA 30 at 31H*** where in the latter case the position was put in the following words:-

> *"[D]espite the wide wording of the dicta in **Attorney General v Bluementhal**, in the case of a company under provisional liquidation at the instance of a creditor, the board of directors retains the residual power to instruct attorneys to oppose the confirmation of the rule and, if it was made final, to appeal. This could be done without the cooperation of the liquidator".*

[19] These extracts according to Counsel for the Applicant in the review proceedings, mean that the director of a company under liquidation in the position of the Applicant's Mr. Carmichael has *locus standi* to institute

review proceedings of a decision taken way before the liquidation, such as the refusal by the Respondent herein to grant a licence to the Applicant some two months prior to the institution of the provisional liquidation proceedings. This she submits is because this application seeks to prevent the confirmation of the Rule Nisi which according to the foregoing authorities the Directors of a company would be entitled to do and that in that sense they retain residual authority or powers to act on behalf of the company.

[20] Counsel for the Respondent submitted to the effect that even though the directors of a company would in law have the *locus standi,* even without the provisional liquidator's consent, to oppose the confirmation of a *rule nisi* placing the company in liquidation, the review proceedings in this matter were nowhere near the proceedings to prevent the confirmation of a *rule nisi* placing the company under liquidation. Instead, Mr. Jele submitted that the review proceedings, were independent proceedings from the liquidation ones, and were based on a cause of action the liquidated company had the power to rely upon and to institute proceedings prior to liquidation. Otherwise it was part of those rights of the company or powers that transferred to the liquidator as soon as provisional liquidation was granted.

[21] In support of this argument Mr. Jele referred to the above extract from the ***O'Connel Manthe and Partners vs Vryheid Mineral (EDMS) BPK (Supra)*** and the Ex parte G. Pagan Enterprises (PTY) LTD (Supra) which he said were not supporting the argument of Miss Boxshall-Smith but that advanced by him, namely that the current review proceedings are not proceedings aimed at opposing the confirmation of the *rule nisi* placing the company under liquidation, but are independent proceedings enforcing a right the company had prior to its being placed under liquidation which however transferred to the liquidator upon the placing of the company under provisional liquidation.

[22] I agree with Mr. Jele that the current review proceedings by the Applicant herein, are not proceedings akin to or similar to taking the necessary steps to oppose the confirmation of a provisional liquidation order or put differently, these review proceedings cannot be said to be instituted in exercise of the residual powers in law retained by the directors of a company that has been placed in liquidation to oppose the confirmation of a *rule nisi* placing it under liquidation. I have no hesitation, these proceedings have nothing to do with such an exercise.

[23] I am of the view that the position put forth by Miss Boxshall-Smith allowing the Directors of a company to retain certain residual powers so as to oppose the confirmation of a *rule nisi* placing the company under liquidation, is distinguishable from the prevailing one herein. I agree that, these review proceedings have nothing to do with the confirmation or otherwise of the *rule nisi* placing Applicant under liquidation. This application is not different from the directors of a company under liquidation seeking to claim a debt owed by the company after a provisional liquidation order has already been entered which is a position not allowed in law as that power remains with the liquidator.

[24] I am supported in the view I hold in this regard by what was stated in the ***Rennian Accident Insurance Co. Ltd (1972) I ACC ER 1105***, case as quoted in the Ex Parte G. Pagan Enterprises (PTY) LTD 1983 (2) SA 30 at 32 A-B, as was expressed in the following terms:-

> *"The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to*

enquire if whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator, and therefore the board retains it".

[25] In the present matter, the power to review the decision of the Respondent refusing to grant Applicant a licence is one of enforcing the rights of the company which in my view was assumed by the Liquidator upon the grant of the Provisional Liquidation which means that the board of directors cannot claim to have retained after liquidation.

[26] It seems to me therefore that the applicable position with regards these review proceedings is that expressed in the general rule set out in Attorney-***General vs Bluementhal 1961 (4) SA 313 (T)*** to the effect that after the issue of a provisional order of liquidation, the directors of the company

become functus officio – See also **Haklo's South African Company Law through the cases, 6th Edition 1999, Juta and company at page 586.**

[27] I have therefore, come to the conclusion that the Applicant's application for review, cannot succeed on this point alone and I find it unnecessary to decide the other points in limine raised. Consequently I make the following orders:-

1. The Applicant's application for review be and is hereby dismissed.

2. The Applicant be and is hereby ordered to pay the costs of this application.

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N. J. HLOPHE

JUDGE – HIGH COURT