IN THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL PROVINCIAL DIVISION]

CASE NO. 13375/06

In the matter between

JOHANNES FREDERIK KLOPPER N.O	First Applicant
LISL ANNA LAUBSCHER N.O.	Second Applicant
MARIA PETRONELLA YSSEL N.O.	Third Applicant

and

ANTHILLSAP (PTY) LTD	Respondent

JUDGMENT

ISMAIL A J

[1] This is an application brought by the applicants as joint liquidators appointed by the Master of the High Court (Witwatersrand Local Division) in terms of section 386(1)(a)(b)(c)(d)(e) and 4(f) of the company TEMSO TECHNOLOGIES (PTY) LTD (the insolvent company).

[2] The respondent is a company duly registered and incorporated on terms of the law operating from 130 Kestrel Avenue, the Reeds Extension 10, Pretoria.

NATURE OF THE APPLICATION

[3] The applicants seek an order that the respondent pay to them certain amounts which were attached from the bank accounts of the insolvent company and paid over to the Sheriff after the effective date of the winding-up of the insolvent company. These amounts were thereafter paid over to the respondent.

[4] The applicants contend that in terms of the provisions of section 359(1)(a) of the Companies Act, 61 of 1973 the attachment and steps taken thereafter were *void* after the effective date of the winding-up.

Mr Vorster, acting for the respondent, on the other hand submitted that since the sheriff attached the monies from ABSA Bank prior to the winding-up the provisions of section 359(1)(b) applied and for that reason the monies were paid to it need not be paid over to the applicants as the attachment was not void and the issue at hand was whether the respondent's execution took place prior to or after the effective date of the winding-up of the insolvent company.

[5] Section 359 of the Act states that:

" 359. Legal proceedings suspended and attachments void.-

(1) When the court has made an order for the winding-up of a company or a special resolution for the winding- up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-

(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.

[6] The following facts were common cause between the applicants and the respondent;

[6.1] the effective date upon which the insolvent company was wound up was the 2nd November 2004;

[6.2] the sheriff attached the funds in the ABSA bank account of the insolvent company on the 1st November 2004;

[6.3] the funds were paid by ABSA Bank to the Sheriff on the 1 November 2004 and a further sum on the 3 November 2004.

[7] The respondent relied upon the decision of *Pols v R Pols – Bouers en Ingeniers (Edm) Bpk* 1953 (3) SA 107 (T) where the Court held that where a cheque was sent to the Registrar prior to winding up of a company but the Registrar had not deposited the cheque prior to the winding-up but only thereafter, the execution was still put into force prior to the winding up and therefore the execution was not void.
This issue was also decided in the matter of *Rennies N.O. v Registrar of Deeds and Another* 1977 (2) SA 513 (C)

[8] In the *Rennies* matter, supra, Schock J, at 515 stated:

"Execution is, in my view, "put in force" within the meaning of those words in the said section when, in pursuance of a writ of execution, the Sheriff or the messenger of the court, as the case may be, enters

into possession of the property, i.e when execution is levied. This has always been the interpretation of those words placed on the corresponding and substantially similar section in the English Companies Act from which these words in our Companies Act (and its predecessors) were taken. Moreover this interpretation has been applied in our courts by MAASDORP, J (as he then was), in the case of In re Cape Cold Storage and Supply Co.Ltd.: v Trollip, (1908) 25 S.C 502, in construing similar words in the Cape (Pre-Union) Companies Act. It is also in accordance with the interpretation applied by Clayden, J. in the case of Pols v R Pols-Bouers en Ingenieurs (Edms) Bpk., 1953 (3) SA 107 (T) at p. 110E-H in construing similar provisions of the 1926 Companies Act. There is a dictum to the contrary by JENNETT, J. in Ex parte Flynn; In re United Investments & Development Corporation Ltd. (in liquidation), 1953 (3) SA 443 (E) at p.445B-C, but it appears that he did not at the time have the benefit of the Pols' case, supra. The reasoning of JENNETT,J. seems to me, with respect, quite unconvincing. An execution is surely put in force once and for all and not – as JENNETT, J., suggest in the above cited passage- every time a further step in the process of execution is taken. The weight of authority thus clearly supports the view that execution- in terms of the said section – was "put in force" when the messenger of the court attached the said erf and this the meaning which contends itself to me"

[9] Mr. Leathern, acting for the applicants, submitted that he agreed with *Pols* supra, however, the decision was based on section 359(1)(b) and not s 359(1)(a) which he was relying upon. In this regard he based his submissions upon the matter of *Liquidator, Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd* 1982 (4) SA 607 (W).

[10] At page 609 E-G of the *Goldies* case Margo J stated:

" The aforegoing is a summary of Kotze JA's exposition of the Roman Dutch Law in Liquidator, Union and Rhodesia Wholesalers Ltd v Brown & Co 1922 AD 558-559.

The question in the present case is whether or not that position, under the common law, has been altered by any of the provisions of the Companies Act 61 of 1973 as amended.
In the Union and Rhodesia Wholesalers *case supra the court held that, under the statutory provisions then in force, an execution creditor enjoyed no preference over goods of a company which had not yet been sold when the company was subsequently placed under the winding-up order.."*

[11] It was submitted on behalf of the applicants that although the monies were attached by the Sheriff it was paid over to the respondent only after the winding-up of the insolvent company. *Ergo* the payment by the Sheriff to the respondent was void in terms of the provisions of section 359(1)(a). Mr Leathern submitted that the situation would have been different had the monies attached been paid over to the respondent prior to winding-up of the insolvent company, in which case s 359(1)(b) of the Act would have applied. In such an instance the monies would not have to be repaid to the liquidators.

[12] In view of the monies only being paid over by the Sheriff to the respondent, the execution creditor, on 14 November 2004 and the other payment early in 2005, the liquidators were entitled to reclaim the monies from the respondent. Clayden J in *Pols* supra stated:

"I come to the conclusion, therefore, but almost on sections and cases which have not been referred to in argument, that if the money is still under attachment the creditor is not entitled to it, but is entitled

only to a preference for his costs of execution, but if the money has passed to the creditor before winding-up commenced, the liquidator has no claim to it."

[13] I find that the applicants have made out a proper case for the relief they seek in the Notice of Motion.

[14] Accordingly I make the following order:

(i) the respondent is ordered to pay to the applicants, in their capacities as liquidators of Tomoso Technologies (Pty) Ltd (in liquidation) the sums of:
   (a) R3 038,02;
   (b) R132 170,01
   (c) interest on each of these amounts mentioned in (i)(a) and (i)(b) at a rate of 15,5% per annum a *temporae morae* to date of payment;

(ii) the respondent is ordered to pay the costs of this application..

_____

ISMAIL AJ

For the Applicants: Adv D M Leathern instructed by Schabort & Bekker Inc. Pretoria.

For the Respondent: Adv J Vorster instructed by J C Grobler & Burger Inc Pretoria.

Date application Argued: 18 August 2006.

Judgment delivered on : August 2006