

**Joinder application and Section 340 of the
Companies Act, Section 29 of the
Insolvency Act, applications:**

**Marboe en Seuns (In Liquidation) – Hendrie
Andries Marais N.O**

Christina Maureen Penderis N.O

Vs

Nortiger Logistics-Sa (Pty) Ltd

Adriana Maria Van Wyk (Honibol)

Case Number: 2022/14866

Key Notes

1. The reason for a joinder.
2. Steps to be taken by the Respondent (The Applicant for the joinder) after a successful joinder application.

Introduction

This discussion relates to an application in terms of Section 340 of the Companies Act and Section 29 of the Insolvency Act in which the Respondent, Nortiger, applied to join Mrs. Van Wyk whom Nortiger paid for a Tandano Crane, the property of Marboe (In Liquidation), the crane being the subject of the Section 340 and 29 application.

Background

Marboe (In Liquidation) for whom we act (The Executors) was the owner of a Tandano Crane. A director of Marboe, Mrs. van Wyk, also known as Ms. Honibol sold the crane to Nortiger a month before Marboe was liquidated and after the liquidation was issued (Concursus Creditorum, Section 348, Companies Act).

Application was made for the return of the crane to the estate of Marboe from Nortiger. This application was in terms of Section 340 of the Companies Act and Section 29 of the Insolvency Act. This application was opposed by Nortiger who subsequently applied and succeeded to join Mrs. van Wyk as Nortiger paid her for the Tandano crane which money she retained for herself notwithstanding the Tandano crane she sold was the property of Marboe. This joinder application and what subsequently transpired is the theme of this discussion.

The Joinder

The Respondent (Nortiger) who subsequently became the 1st Respondent (after the joinder) successfully joined Mrs. van Wyk as she had received the purchase price. It is common knowledge that Mrs. van Wyk sold the Tandano crane which was the property of Marboe and retained the money which she was not entitled to do.

However, what the 1st Respondent did not understand or take note of when launching the successful joinder application is our (Marboe) prayers in the Section 340 and Section 29 application. **We only requested return of the Tandano crane from Nortiger and not claim for the funds at all from wherever.** This misunderstanding or lack of knowledge by Nortiger ultimately lead to the floundering of the 1st Respondent's (Nortiger) case. I shall explain.

Reading Nortiger's notice of motion for joinder and more specific paragraphs 4.1 and 4.3 one reads the reason for the joinder which is quite correct, to avoid multiplicity of actions and costs and then in 4.3 the brazen statement by Nortiger to join Mrs. van Wyk as she is liable for payment towards Marboe (In Liquidation). The purpose is quite correct, however after the joinder was granted, Nortiger did not amend or do a counter application.

Further discussing the joinder application to indicate the extent Nortiger or its legal representatives total lack of knowledge is the argument made in paragraph 6.5 which relates to Section 82 of the Insolvency Act. The reference to Section 82 is so irrelevant it is actually scandalous. Section 82 refer to sales after the 2nd meeting which this application in terms of Sections 29 and 340 did not apply to.

Post Joinder

The 1st Respondent succeeded in its joinder of Mrs. van Wyk but most surprisingly the 1st Respondent's legal team did not take the joinder any further. Take note the Applicant claimed the vehicle only, not the proceeds of the sale paid by Nortiger to Mrs. van Wyk.

Of course, just to join Mrs. van Wyk does not suffice, she does not have the vehicle, she has the money which money Nortiger wanted back. The 1st Respondent's legal team did absolutely nothing after the joinder was granted. They must have been mistaken and thought that the joinder, joined Mrs. van Wyk for all purposes.

The 1st Respondent's legal team may after their successful joinder, lodged a counter claim against the 2nd Respondent, Mrs. Van Wyk, for payment to the 1st Respondent of the purchase price.

After all, in paragraph 4.3 of the joinder application Nortiger states that Mrs. van Wyk is liable for payment. I am not discussing the merits of such a claim now and I even doubt if our application for the return of the crane would have been the correct forum for a counter claim by the 1st Respondent to the 2nd Respondent. Thereafter the application was heard with only the application for the return of the Tandano crane from the 1st Respondent and not any relief for the 1st Respondent from the 2nd Respondent. Should the 1st Respondent have "perfected" the joinder they "may" have succeeded with a claim against Mrs. Van Wyk when the application was heard.

Now due to the lack of knowledge of the 1st Respondent's legal team or Nortiger, the 1st Respondent may have no claim against the 2nd Respondent Mrs. van Wyk. Note it is a fact and a Judgement by the court that Mrs. Van Wyk's sale of the crane to the 1st Respondent was unlawful and set aside. What would have been easier than for the 1st Respondent to claim the price it paid, simultaneously with this application. It stated so in paragraph 4.3 of its joinder application!!! However, now more than 3x years has passed and a different cause of action. I doubt if the 1st Respondent will succeed with such an application.

Conclusion

It is all good doing a joinder but then make use of your remedies. I do not understand what the 1st Respondent's legal team even contemplated will transpire if the joinder was granted. The documentation (our application for return of the vehicle) does not serve the joinder application (for money) and does not automatically reset for the 1st Respondent.

Legal teams need to carefully consider what they wish to achieve with a joinder and not to err as the 1st Respondent and / or its legal team did.

For transparency herewith again the court order of the Section 340 and 29 application as well as the pages containing paragraphs 4 and 6 of the joinder application.

Guillaume David Ficq.