

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A228/2019

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

Date: 18 May 2023

Signature:

In the matter between:

MACNEIL PLASTICS (PTY) LTD

Appellant

and

VAN DER HEEVER, THEODOR WILHEM N.O

First Respondent

PEMA, JAYANT DAJI N.O

Second Respondent

STANDER, MONIQUE N. O

Third Respondent

**RONNIE DENNISON AGENCIES (PTY) LTD t/a
WATER AFRICA SYSTEM (PTY) (IN LIQUIDATION)**

Fourth respondent

Electronically submitted.

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 18 May 2023

Date of hearing: The matter was heard via video conferencing or otherwise. The matter may be determined accordingly. The matter was set down for a court date on 12 April 2023.

Date of Judgment: 18 May 2023

Summary: Companies Act 71 of 2008 – effect of Section 131(6) order on liquidation proceedings underway – Section 131(6) order suspends and does not terminate liquidation proceedings already underway – previous *conkursus creditorium* reinstated rather than forming a new one. Placing the company in business rescue cannot validate or undo the void disposition; the appeal is dismissed.

JUDGMENT

MOGALE AJ

INTRODUCTION

[1] This appeal is before us with the leave of the court *a quo*. The appeal is against the judgment and order granted by Mngqibisa-Thusi J on 21 August 2022, in terms of which she found (in an application instituted against the appellant by the respondents) that payments totaling R407 010.30 made by the fourth respondent to the appellant after the date of the final liquidation by the court ought to be declared void, and for the appellant to return the monies paid with interest and costs of suit to the respondents.

CONDONATION FOR LATE FILING OF THE HEADS OF ARGUMENT

[2] The appellant seeks condonation for the late filing of the heads of argument, and the application is not opposed.

[3] The factors a Court must consider when exercising its discretion on whether to grant condonation includes the degree of lateness and the explanation for the delay.¹ The delay was not willful; therefore, I conclude that condonation should be granted.

BACKGROUND

[4] On 28 October 2015, an entity duly incorporated as DIP Plastic (Pty) Ltd was granted an order by Hughes J (under case number 10136/20114) for the final liquidation of Water Africa Systems (Pty) Ltd ("Water Africa"), the fourth respondent herein, on the ground that Water Africa was unable to pay its debts.

[5] Despite the final liquidation order having been granted, on 02 November 2015, the fourth respondent (Water Africa) made two payments to the appellant, Macneil Plastics (Pty) Ltd ("Macneil"), in the amounts of R189 288.74 and R217 721.56, totaling R407 010.30. The payments were made to repay a credit facility that Macneil had granted to Water Africa for the provision of goods.

[6] Subsequent to the final liquidation order of Water Africa, and after the payment of the amount of R401 010.30 by Water Africa to Macneil, on 09 December 2015, Tuchten J granted the order (under case number 93057/2015), placing Water Africa under supervision and in business rescue in terms of section 131(1) of the new Companies Act 71 of 2008 ("Companies Act"). The order read as follows:

2. *The winding-up (liquidation proceedings) of Water Africa System (in liquidation) (the company) commenced in terms of the order issued by this Honourable Court under case no: A10136/14 on 28 October 2015 be and is hereby suspended.*
3. *The company be and is hereby placed under supervision and business rescue in terms of section 131(1) of the Company Act, 2008 (the Act).*

¹ See section 84 of the Magistrates' Court Act, 32 of 1944 and the discussion by Erasmus et al Superior Court Practice 2015, D1-669-678,688 and see Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) 477A-B

4. *Niel Michael Hobbs be and hereby appointed as the interim business rescue practitioner in terms of section 131(6) of the Act.*
5. *The applicants, the business rescue practitioner of the company, and all affected persons as contemplated in section 128(1) of the Act are granted leave to apply to this Honourable Court (after having notified affected persons of the intention to do so in the prescribed manner) on the same papers, amplified to the extent necessary, for an order to end the business rescue proceedings and for an order in terms of section 354 of the Companies Act, 1973 to set aside the winding up of the company, alternatively, for an order to discontinue the business rescue proceedings in respect of the company and reinstate the final winding up of the company, for other relief as may be appropriate.*

[7] During Water Africa's business rescue, the business rescue practitioner paid its various creditors (excluding Macneil) the aggregate amount of R25 483 536.00 before the business rescue practitioner applied for the setting aside of the business rescue and reinstatement of the final winding-up order granted on 28 October 2015.

[8] On 12 April 2016, under case number (93057/2015) Potterill J set aside the order dated 09 December 2015, and the winding up order dated 28 October 2015 was reinstated.

[9] **The order read as follows:**

2. *Setting aside the Court Order that began the Business Rescue Proceedings in respect of Water Africa System (Pty) Limited in terms of Section 131(6) of the Companies Act 71 of 2008 ('the Act').*
3. *Declaring that the Business Rescue Proceedings in respect of have ended by virtue of the provisions of Section 132(2) of the Act in that:*
 - 3.1. *An order has been made setting aside an order that began the Business Rescue Proceedings and*

- 3.2. *A Business Rescue Plan has been proposed and rejected, and no affected person has acted to extend the proceedings in any manner contemplated in sections 153, and*
- 3.3. *The practitioner has filed with the Commission a notice of the termination of the rescue proceedings.*
4. *Re-instate the final winding up of the Company.*
5. *Direct that the costs of the Business Rescue intervention be in the winding-up of the Company.*

[10] On 30 June 2016, the Master appointed the first to the third respondents as liquidators of Water Africa.

GROUND OF APPEAL

[11] It is a common cause that the payments made to the appellant on 02 November 2015 totaling R407 010.30 are void in terms of section 341(2) of Companies Act, 1973², which provides that:

“Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up shall be void unless the court otherwise orders.”

[12] The crux of the appeal is about what the legal effect of section 131(6) order on the existing liquidation proceedings. Are the proceedings terminated and then started afresh upon the failure of business rescue, or are they suspended and then resumed from where they left off in the instance that business rescue fails to adequately turn the company around?

² Companies Act 61 of 1973

[13] Whether the judgment and order granted by Mngqibisa-Thusi J should be set aside because the payments that the liquidators seek to reclaim from the appellant were made after the fourth respondent's final liquidation proceedings, which were later replaced or superseded by being converted to business rescue proceedings.

APPELLANT'S ARGUMENTS

[14] The appellant argued that the final liquidation order granted on 28 October 2015 was replaced by the order granted on 09 December 2015, converting liquidation proceedings under supervision in business rescue. This brought the winding-up proceedings in terms of the pre-existing winding-up order to an end and undoing the *concurso creditorum* that was formed, thus allowing the business rescue practitioners to deal with the assets of the company, which was in liquidation in terms of section 134 of Companies Act, 1973³.

[15] The appellant submits that the fourth respondent's business rescue proceedings granted on 09 December 2015 were terminated by business rescue practitioners after paying creditors R25 483 536,00, re-instate its final winding up proceedings granted 28 October 2015. As a result, placing a company in business rescue into liquidation, everything starts afresh in the sense that a new *concurso creditorum* is formed; it does not revive a previous liquidation order or a previously formed *concurso creditorum*.

[16] The point of law was raised by the appellant in the sense that there is a lacuna in section 131(6) of Companies Act⁴ in that the Act is silent on the effect that a court order placing the company into a business rescue (as opposed to the application for such an order) will have upon the pre-existing winding up order.

[17] It further argued that the orders granted on 09 December 2015 (Tuchten J) and 09 April 2019 (Potterill J) were granted contrary to the authority by giving the order suspending liquidation proceedings. The phrases "re-instate the final winding up of the company and re-instating the final winding up of the company should be interpreted to place the fourth respondent in final liquidation once again or to bring about the fourth

³ Companies Act 61 of 1973

⁴ Companies Act 71 of 2008

respondent's final liquidation once more pursuant to an application brought by a business rescue practitioner under a different case number (93057/2015) to that under which it had formally been liquidated (10136/2014)

RESPONDENT'S SUBMISSIONS

[18] The respondents submits that the appellant brought parts A and B application in court on 10 February 2020 wherein the appellant sought an order that parts A of the application, which was brought on an urgent basis, the main application be stayed, pending the final determination of part B (presumably to be heard in due course). In part B, the appellant sought an order from Tuchten J, and Potterill J to be rescinded and set aside.

[19] Part A application was dismissed based on self-created urgency and further found that the appellant has not made out a *prima facie* case. The appellant did not persist with the determination of part B, which is the rescission application; therefore, Tuchten J and Potterill J's orders still stand and are in force.

[20] It was argued that it is trite that the effect of a winding-up is to establish a *concursum creditorum*, and nothing can after that be allowed to be done by any of the creditors to alter the rights of the other creditors. No transaction can be entered into regarding estate matters by a single creditor to the prejudice of the general body of creditors. Each creditor's claim must be dealt with as it existed when the *concursum creditorum* was formed.

[21] It was further argued that the remedy of a liquidator who seeks repayment of the amount paid by or on behalf of a company that has been placed under winding-up depends on the stage when the payment was made; in this case, the payment the liquidators seek to impugn was made after a winding up order had been granted but before the company was placed under business rescue, thus, at that stage, the *concursum creditorum* was formed.

[22] The legal position regarding the disposition made after granting the winding-up order is that they are void because control rests with the Master and the liquidator. When

the impugned payments were made on 02 November 2015, the company was already placed under final winding-up. Therefore, those payments were void, and the fact that the company was placed under business rescue cannot undo the fact that the payments were void.

ISSUES TO BE DETERMINED

[23] This court must consider the following: the effects of Tuchten J and Potterill J orders in this application, the general principles of payments made by or on behalf of a company placed in liquidation, the legal position of dispositions made after granting of winding up order, and before the company in liquidation was placed under business rescue.

THE EFFECTS OF TUCHTEN J AND POTTERILL J ORDERS

[24] Tuchten J's Judgment suspended the order issued on 28 October 2015 (which placed the company under liquidation proceedings) and put the company under supervision and business rescue in terms of section 131(6) of Act⁵. On my reading of the order, it is my view that Tuchten J's order was suspending, not terminating Hughes J's order.

[25] The business rescue practitioner of the company was granted leave to apply to the Court on the same papers, amplified to the extent necessary, for an order to end the business rescue proceedings and for an order in terms of section 354 of the Companies Act, 1973 to set aside the winding up of the company, alternatively, for an order to discontinue the business rescue proceedings in respect of the company and reinstate the final winding up of the company.

[26] On 12 April 2016, Potterill J granted the order of termination of business rescue proceedings brought on the same papers and re-instating the final winding up of the company. This order re-enforces that the Tuchten J order merely suspended the liquidation rather than terminated it. This is explored more fully below.

⁵ Companies Act 2008

[27] Based on the appellant's attempts to rescind these two orders, the principle by Tasima, and the evaluation of the evidence presented, I find that the two orders were not set aside or rescinded; therefore, they remain binding.

THE GENERAL PRINCIPLES OF PAYMENTS MADE BY OR ON BEHALF OF A COMPANY PLACED IN LIQUIDATION

[28] In terms of section 341 (1) of the Company Act,1973,⁶

“the dispositions made after the commencement of the winding-up of the company are void. Section 341(2) also emphasized that every disposition of its property (including rights of action) by any company being wound up and unable to pay its debt made after the commencement of the winding up shall be void unless the court otherwise orders.”

[29] In terms of section 348 of the old Company Act⁷:

“...the winding up of a company shall be deemed to commence at the time of the presentation to the court of the application for the winding up.”

[30] These principles were also laid in *Pride Milling Company (Pty) Ltd v Bekker No. Another*:⁸

“where the Supreme Court of Appeal confirmed that payments made by a company in liquidation after the granting of a provisional or final order of liquidation are void and cannot be validated by the court in terms of the rider to section 341(2) of the Companies Act 61 of 1973 because once a court grants a provisional or final order of liquidation, a concursus creditorum is established, the effect of which is that the claim of each creditor falls to be dealt with as it existed at the time when the final provisional order was granted.”

⁶ Act 61 of 1973

⁷ Act 61 of 1973

⁸ Case no 393/2020 (2021) ZASCA 127 (30 September 2021) par 17-19

[31] In *Eugen Petroleum Ltd v Goudis Carries (Pty) Ltd*⁹ the court held that:

“after the final winding-up order, a company could not effect valid transactions precisely because of the concursus. From that moment, the control of a company is removed from its bearers. The Master and the liquidators alone can affect a valid disposition after the concursus. Any purported disposition after the final winding up by an office bearer of the company cannot be valid; it is void ab initio.”

[32] I find that when the impugned payments were made (on 02 November 2015), the company had already been placed under the final winding up, and the payments were per se void. I also concur with the courts a quo’s finding that the respondents (applicants a quo) have shown sufficient cause on a balance of probabilities that the dispositions made by Water Africa were void and should be repaid.

THE LEGAL POSITION OF DISPOSITIONS MADE AFTER THE GRANTING OF THE WINDING UP ORDER AND BEFORE THE COMPANY IN LIQUIDATION WAS PLACED UNDER BUSINESS RESCUE

[33] The legal position of dispositions made after the granting of the winding up is that they are void *ab initio*. The court does not have the power to validate such disposition.

[34] The next step for this court to determine is the legal position of dispositions made after granting the company’s final liquidation before the liquidation was placed under business rescue.

[35] The appellant argued that granting an order placing a company that is already in liquidation, under the supervision of business rescue, has the effect of suspending the pre-existing liquidation proceedings or of replacing or superseding the pre-existing liquidation proceedings so that the same are converted to business rescue proceedings with the effect that the *concursus creditorum* brought about the pre-existing liquidation proceedings, fall away. As a result, when the liquidated company is converted from business rescue to liquidation proceedings, it does so afresh in the sense that a new

⁹ 2015(6) SA 21 (GJ)

concursum creditorum is formed; it does not revive a previous liquidation order or previously formed *concursum creditorum*.

[36] Section 131(6) of Act¹⁰ provides that:

“if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those proceedings until:

- a. The court has adjudicated upon the application; or*
- b. The business rescue proceedings end if the court makes an order applied for”*

[37] In *GCC Engineering v Maroos*¹¹, the facts were that the company was placed under business rescue, and Mr. Gerhard Vosloo was appointed as a provisional business rescue practitioner. A year later, the business rescue practitioner launched an application wherein he sought an order that the company’s business rescue proceedings be terminated and placed under liquidation. The first to the fourth appellants launched a counterapplication, which was granted, where they sought an order that their powers as provisional joint liquidators be extended to oppose the application launched by the applicants.

[38] The court held that since liquidation proceedings have already commenced, they are suspended by an application for business rescue in terms of section 131(6). The powers of the liquidators are suspended, and control of the company’s assets falls within the Master. Section 131(6) does not change the company’s status in liquidation, nor does it suspend the court order that placed the company under liquidation in the hands of the Master. The court stated as follows:

¹⁰ Act 71 of 2008

¹¹ 2019(2) SA 379 (SCA) par 17-19

“In terms of the Act, liquidation proceedings, not the winding-up order, are suspended. What is suspended is the process of continuing with the realization of the company’s assets in liquidation to distribute them to the various creditors ultimately. The winding-up order is still in place, and prior to the granting or refusal of the business rescue application, the provisional liquidation secures the company’s assets in liquidation for the benefit of the body of creditors.

...in Section 131(6), the legislature used the word ‘suspend’, which does not mean termination of the office of the liquidator. In my considered view, the term liquidation proceedings refer only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation to bring about its dissolution. What is suspended is the process of continuing with the realization of the company’s assets to distribute them to the creditors ultimately. The winding-up order is still in place, and prior to the granting or refusal of the business rescue application, the liquidators secure the company’s assets in liquidation for the benefit of the body of creditors, not the legal consequences of a winding-up order.”¹²

[39] In *Richter v Absa Bank Ltd*¹³, Dambuza AJA, as she then was, stated the following: *“For these reasons, a proper interpretation of ‘liquidation proceedings’ in relation to section 131(6) of the Act must include proceedings that occur after winding-up order to liquidate the assets and account to creditors up to deregistration of a company.”*

[40] The provision in Section 131(6) of the Companies Act is clear on the effect a court order placing a company in business rescue has upon the pre-existing winding-up order. The pre-existing winding-up order is still in place, not terminated but suspended until the court, upon the application of the business rescue practitioner, determines that such suspension is lifted.

¹² Id

¹³ ZASCA 100; 2015(5) SA 57 (SCA) para18

[41] Having regard to all the facts and the law, I hold that the disposition made to the appellant was void *ab initio*; the *concursum creditorum* was established/formed when Water Africa was placed under final liquidation on 28 October 2015; therefore, placing the company in business rescue cannot validate or undo the void disposition that occurred on 2 November 2015. The disposition should not have occurred because the company's control was already vested with the Master and the liquidators to be appointed.

[42] The order by Potterill J explicitly mentions the **Reinstating** of the final winding up of the company, which was **suspended** by Tuchten J. I find the appellants' view or argument that a court that grants an order placing a company that is in business rescue into liquidation does that afresh in the sense that a new *concursum creditorum* is formed rather than reviving a previous liquidation order or previously formed *concursum creditorum* untenable.

[43] Despite the wording of the court orders and the pronouncement of various authorities concerning the meaning of the word suspended and reinstating, this court is concerned about the persistent argument raised by the appellants' counsel with the interpretation of the words "superseded, replacing, and conversion to have effect in ending the liquidation proceedings and not suspending them.

[44] In the circumstances, I find that the trial court had not misdirected itself; placing the company in business rescue cannot validate void disposition.

CONCLUSION

[45] In the result, an order is made in the following terms:

[46] Condonation is granted for the late filing of the appellants' heads of argument.

[47] The appeal is dismissed with costs.

KJ MOGALE
ACTING JUDGE OF THE HIGH COURTGAUTENG DIVISION,
PRETORIA.

I agree, and it is so ordered.

**L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA**

I agree

**N C SETHUSHA-SHONGWE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA**

Appearances

For the Appellant:

Adv. A R Newton
Cape Bar

For the Respondent:

Adv. P van Der Berg SC
Johannesburg Bar