

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

CASE NO: 3182/2021

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| 1. | REPORTABLE: YES/ NO |
| 2. | OF INTEREST TO OTHER JUDGES: YES/ NO |
| 3. | REVISED. |

22 July 2022

(SIGNED ELECTRONICALLY)

DATE

SIGNATURE

In re: The matters between:

FA KONSTRUKSIE CC

Applicant

and

MHONYINI TRADING ENTERPRISE CC

Respondent

CASE NUMBER: 554/2021

and

ASPHALTIC (PTY) LTD

Applicant

and

MHONYINI TRADING ENTERPRISE CC

Respondent

The proceedings were conducted over the Teams platform. A copy of these reasons shall be forwarded per email to the applicants and the respondent on 22 July 2022.

REASONS

Roelofse AJ:

[1] The respondent, Mhonyini Trading Enterprises CC (Mhonyini) is being wound-up by virtue of a provisional winding-up order of this court and in liquidation by another final winding-up order, also granted by this court. The orders were granted by this court under different proceedings at the instance of two separate creditors on the basis that Mhonyini is unable to pay its debts.

[2] It must be immediately apparent that this is a rare circumstance which raise challenges in the process of liquidation. These challenges include whether it is at all possible for a company (or close corporation) to be in liquidation and in the process of being wound-up by virtue of two orders that operate at the same time; when is it deemed that the winding up commenced; what order leads to the appointment of a liquidator.

Background

[3] On 19 July 2022 I granted a final winding-up order of Mhonyini after hearing counsel for FA Konstruksie CC (FA), the applicant in case number 3182/2021 and counsel for Asphaltic (Pty) Ltd (Asphaltic), the applicant under case number 554/2021. There was no appearance on behalf of Mhonyini.

[4] I gave no reasons for my order. I have resolved to furnish reasons for the in order to pronounce the difficulties that arise in this application. In addition, after reflection, I supplement the order that I have granted in order to address

FA's winding-up proceedings. This I do in order to clear away any doubt that may remain despite my order.

The course of the litigation up to 19 July 2022

[5] On 17 February 2021, Asphaltic launched an application for the winding-up of Mhonyini under case number 554/2021 (the Asphaltic application). On 10 August 2021 a provisional winding-up order was granted (the provisional order). The return day of the provisional order was on 19 November 2021. The *rule nisi* that was issued when the provisional order was granted was extended on 19 November 2021 to 19 July 2022. When the matter was before me, it was therefore the return day of the *rule nisi* in Asphaltic's application.

[6] On 26 August 2021, FA issued an application for the final winding-up of Mhonyini under case number 3182/2021 (the FA application). A final winding up order was granted by this court on 25 October 2021 (the final order).

[7] Therefore, Mhonyini was finally wound-up by an order of this court upon the application of FA that was instituted while the provisional order was still pending.

[8] On 11 March 2022, FA delivered an "Amended Notice of Motion" (motion) ostensibly seeking to amend the relief it sought in the FA application.

[9] In essence, FA sought the following relief in the motion: that FA be granted leave to file a supplementary affidavit in the FA application; a declaratory that Mhoyini is in final winding-up by virtue of the final order; that the effective date of the winding-up of Mhonyini is 17 February 2021 (i.e., when the Asphaltic application was issued); that costs of both FA and Asphaltic be costs in the

liquidation; alternatively, that FA be granted leave to intervene in the Asphaltic application; and, that unless the provisional order in favour of Asphaltic is made final, that the Asphaltic order be discharged and a final winding-up order be granted.

[10] Asphaltic delivered a notice of intention to oppose the motion. No answering affidavit was delivered by Asphaltic or Mhonyini.

The hearing on 19 July 2022

[11] At the hearing, FA persisted with the relief it sought in the motion while Asphaltic requested that the *rule nisi* be extended and that FA's application be case managed in terms of this court's Practice Directive as it has become opposed.

[12] I raised with counsel for FA whether it is in law possible to seek an amendment of a notice of motion in a matter where a final order was already granted. Counsel for FA could not give me any authority on this issue. Procedurally there is no way in which a notice of motion where final order had already been granted can be amended or additional relief be sought. An order was granted and that is the end of the matter.

[13] FA articulated the difficulty it faced as a result of the Asphaltic order and its own order as follows in its supplementary affidavit in support of the motion:

‘There is also uncertainty at the Masters office relating to which order is effective, and furthermore the person nominated by FA Konstruksie for appointment as liquidator is also concerned as to which one of the two orders is the operating order in respect of the winding-up of Mhonyini. There is a degree of uncertainty in the matter in the sense that

finality must swiftly be obtained relating to the confirmation of the final winding-up of Mhonyini'.¹

and

'I submit respectfully that the FA Konstruksie order is valid because unlike the Asphaltic order, it is not a provisional order for the winding-up but a final winding-up order. On the other hand, the attorney for Asphaltic holds the view that FA Konstruksie was not entitled at all to procure a final order for winding-up as a result of the existing provisional order in respect of the Asphaltic application. It is consequently necessary in this context to resolve the actual existing controversy between the parties and this Honourable Court will therefore be requested to issue an appropriate declaratory order in order to settle the conflict and to give clarity on the status of the final a winding-up of Mhonyini'²

The law

[14] Section 347(5) of the Companies Act 61 of 1973 provides as follows:

'The Court shall not grant a final winding-up order in the case of a company or other body corporate which is already being wound up by order of Court within the Republic.'

[15] In terms of the provisions of section 348 of the Companies Act, the winding up of a company (or close corporation) shall be deemed to commence at the time of the presentation to the court of the application for the winding-up. The application is presented to the court, within the meaning of this section, when it has been duly lodged with the Registrar of the court.³

[16] The Asphaltic application was issued on 17 February 2021. That is therefore when Mhonyini's winding-up was deemed to commence. The final

¹ Para 25 of the affidavit.

² Para 26 of the affidavit.

³ See: Venter NO v Farley 1991 (1) SA 316 (W) at 320

order was granted on 25 October 2021, that is, after Mhonyini's winding-up commenced on 17 February 2021.

[17] In *Commissioner for the South African Revenue Service v Zikhulise Cleaning Maintenance and Transport Service; Mpisane v Zikhulise Cleaning Maintenance and Transport CC and Another*⁴, SARS brought an application for the liquidation of a company who was already under provisional winding-up. Collis J said⁵:

‘....[a]s I see it, where a third party other than the parties cited in the [a] liquidation application as is the position before this court, wishes to apply for the liquidation of an entity against whom a provisional order for winding-up has already been granted. This step so undertaken by a third party would then be impermissible as logically the process of provisional winding-up ought first to be concluded.’

[18] The provisions of section 347(5) therefore barred the granting of the final winding-up order while the provisional order was still pending. To put it differently, the final order could not have been granted and in my view although granted, constitutes a nullity because it offends the provisions of section 347(5) of the Companies Act. Although granted, the final winding-up order is therefore of no force and effect. The difficulty however is that the order exists. I employ the provisions of section 354(1) of the Companies Act to address this difficulty.

[19] In terms of the provisions of section 354(1) of the Companies Act, a court may at any time after the commencement of a winding-up, on the application of

⁴ (14886/16; 18101/16) [2020] ZAGPPHC 561 (14 October 2020).

⁵ At paragraph 24 of *South African Revenue Service v Zikhulise Cleaning Maintenance and Transport Service*.

any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit. FA seeks in the motion that the final winding-up order be ‘.....*substituted and replaced with a final winding-up order of the Respondent.....*’. What FA is in effect seeking is the setting aside of the final winding-up order. FA, as a creditor, may, in terms of the provisions of section 354(1) of the Companies Act seek the setting aside of the proceedings, that is, the final winding-up order. In *Ward & another v Smit & others, In re: Gurr v Zambia Airways Corporation Ltd*⁶, it was said:

‘The language of the section is wide enough to afford the court a discretion to set aside a winding up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events.’

[20] On the basis that the final winding-up order should not have been granted at all, I shall set aside the proceedings in the FA application.

FA’s intervention application

[21] FA has *locus standi* to intervene in the Asphaltic application for it is a creditor of Mhonyini. However, FA has not brought an application to intervene. Instead, FA sought to amend its notice of motion upon which the final order was already granted. In that amended notice of motion, FA seeks leave to intervene.⁷ I have already set out that FA cannot seek to amend its notice of motion in terms

⁶ [1998] 2 All SA 479 (A).

⁷ Para 6.1 thereof.

of which a final order has already been granted. In light of the view I take regarding the provisional order, there would be no purpose for FA to intervene.

Fate of the provisional order

[22] Mhonyini has not opposed either of the applications and had filed no papers. Both on Asphaltic's papers and on FA's papers, a proper case is made out for the final winding-up of Mhonyini. There is no reason for the extension of the *rule nisi* and no reason why the Asphaltic order should not be confirmed.

I make the following order:

1. The proceedings under case number 3182/2021 is hereby set aside.
2. Mhonyini Trading Enterprise CC is finally would-up in the hands of the Master.
3. The costs in respect of the proceedings under case numbers 554/2021 and 3182/2021 shall be costs in the liquidation.



JH Roelofse

Acting Judge of the High Court

APPEARANCES

FOR FA KONSTRUKSIE (PTY) LTD: ADV WELGEMOED

Instructed by Coetzee and Van der Merwe
Attorneys

FOR ASPHALTIC (PTY) LTD:

ADV JACOBS

Instructed by Strydom Bredenkamp Inc.

DATE OF HEARING: 19 JULY 2022

DATE OF JUDGMENT: 22 July 2022