IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4901/2015

In the application of:

TSIU VINCENT MATSEPE N.O. **FIRST APPLICANT**

ANTON OTTLIE NOORDMAN N.O. **SECOND APPLICANT**

and

ELIZABETH MARIA VENTER **FIRST RESPONDENT**

MASTER OF THE HIGH COURT
BLOEMFONTEIN **SECOND RESPONDENT**

CORAM: NAIDOO, J

HEARD ON: 12 NOVEMBER 2015

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 21 APRIL 2016

NAIDOO J

[1] This is an application in which the applicants seek the following order (loosely translated):

1. That the order under case number 3510/2015 is extended;
2. That the order set out in 1.5 herewith is extended;
3. The distribution of the estate of Sebal Beleggings (EDMS) Bpk, with registration number , must take place on or before 30 April 2016;
4. That the date of 16 October 2015 be amended to 15 March 2016;
5. Paragraph 1.4.2 be amended to read that seven days after the receipt of the report of the Commissioner, the applicants are to be informed, in writing, of which claims of proven creditors have been accepted;
6. Advocate Charles Stewarts be appointed as Commissioner in terms of section 418 of the Companies Act 61 of 1973 (the Act).

Prayer 6 further sets out orders sought in respect of the powers and duties of the Commissioner, procedural aspects of a commission of enquiry as well as costs. The first respondent opposes the application. The applicants were represented in this court by Mr PJJ Zietsman and the respondent by Mr FG Janse Van Rensburg.

(For the sake of clarity, I mention that the prayer 6 which originally appeared in the Notice of Motion was deleted so that all following prayers were sequentially re-numbered, hence prayer 7 became prayer 6, prayer 8 became prayer 7, and so on. The re-numbered Notice of Motion is what is referred to in this judgment.)

BACKGROUND

[2] This matter is the ninth application in a history of acrimonious litigation between the parties. It is perhaps useful to sketch a very brief background to the current application. The company Sebal Beleggings (EDMS) BPK (Sebal) was placed under voluntary liquidation as a result of a special resolution passed by Sebal on 8 August 2012 and registered on 13 August 2012. The first and second applicants were appointed as liquidators of Sebal by the Master of the Free State High Court (the Master) on 22 November 2012. A number of applications to this court were subsequently launched (between March and November 2015) by the applicants as well as the first respondent. The first respondent tried more than once to have the applicants removed/suspended as liquidators. After one such attempt, the Master found, in February 2015, that there were no grounds for the suspension/removal of the applicants as liquidators.

[3] It is unnecessary in this judgment to traverse each and every application that came before this court. The applications that are of relevance in this matter, and which bear mention, are those bearing case numbers 1716/2015, 3510/2015 and 3671/15 respectively. In case number 1716/2015, the first respondent sought, in April 2015, the removal of the liquidators, which according to the Founding Affidavit has not yet been finalised. In August 2015, the first respondent brought an urgent application under case number 3510/2015 in which she sought the lifting of the voluntary liquidation of Sebal on certain condition, one being that she pay security. Not long thereafter the trustees of an entity known as Robyn Trust, allegedly a creditor of Sebal, brought another application under case number 3671/2015 for the

conversion of the voluntary liquidation of Sebal into a compulsory liquidation (the Robyn Trust application).

[4] I mention at this point that preceding the Robyn Trust application, an agreement was entered into, on 6 August 2015, by Robyn Trust, and entity known as FVR Investment Holdings (Edms) Beperk (FVR) and the first applicant in her capacity as the sole shareholder and director of Sebal, which was, at that stage, in voluntary liquidation. In terms of the agreement, Robyn Trust ceded its claim, in an amount of Eight Hundred and Forty three Thousand Five Hundred and Fifty Six Rand and Fourteen Cents (R843 556.14), against Sebal to FVR, which was obliged to pay the said amount to Robyn Trust within 21 days of the signing of the agreement. It was also agreed, inter alia, amongst the parties that if FVR failed to make the payment within the stipulated time, Robyn Trust will be entitled to obtain an order, on an unopposed basis, for the compulsory liquidation of Sebal. The first applicant consented to the liquidation of Sebal (as contemplated). FVR failed to make payment as agreed, hence the moving of the Robyn Trust application.

[5] On 27 August 2015, my brother Daffue J granted an order (the Daffue order) in case number 3510/2015, lifting the liquidation of Sebal on certain conditions, inter alia, the provision of security by the first respondent. The order also authorised and ordered the applicants to hold a meeting of creditors, in consultation with the Master, on or before 30 September 2015, for the purpose of proving of creditors' claims. Such a meeting of creditors was held on 22 September 2015. The Daffue order also prescribed dates by which certain conditions had to be fulfilled and certain actions had

to be taken. The amendment of some of these dates is being sought by the applicants in this application.

[6] On 17 September 2015, Murray AJ, granted an order in the Robyn Trust application, converting the voluntary liquidation into a compulsory liquidation and placing Sebal under provisional liquidation. A *rule nisi* was issued, returnable on 29 October 2015. It seems that on 29 October 2015, following an agreement by the representatives of Robyn Trust, FVR and the first respondent, the *rule nisi* was discharged. I pause to note that at the time the Founding Affidavit in this matter was deposed to (16 October 2015), the *rule nisi* in the Robyn Trust application had not been discharged.

[7] The first respondent's Answering Affidavit in this matter was filed on 2 November 2015, in which she raised two points *in limine*. Firstly, she alleges that the applicants have no *locus standi* to bring this application because the voluntary liquidation of Sebal was converted to a compulsory liquidation and the *rule nisi* placing Sebal under provisional liquidation was discharged. The first respondent's contention is that the conversion of the voluntary liquidation into a compulsory liquidation had the effect of rendering the Daffue order a nullity. The applicants were, therefore, not entitled to act in terms thereof. The discharge of the *rule nisi* meant that Sebal was no longer in liquidation and thus the applicants were no longer liquidators of Sebal, depriving them of locus standi to bring this application.

[8] The second point *in limine* is that this application is premature. The contention in this regard is that the order converting the voluntary

liquidation to a compulsory liquidation was made on 17 September 2015. The Daffue order was rendered a nullity by that order. Therefore the creditors meeting held by the applicants on 22 September in pursuance of the Daffue order is also a nullity, as the liquidators did not have the authority to hold that meeting. The first respondent alleges further that the applicants ought to have investigated creditors' claims in terms of section 45 of the Insolvency Act 24 of 1936 (the Insolvency Act), prior to the launching of this application, which they failed to do. The application should for the reasons set out above, be dismissed with costs.

[9] The applicants filed a Replying Affidavit, countering the allegations in the Answering Affidavit. I will highlight a few of these counter-allegations. Firstly, the applicants allege that the discharge of the provisional order for compulsory liquidation has the effect that the status quo prior to the granting of the provisional order is revived, meaning that the voluntary liquidation of Sebal is revived and that they remain the liquidators of Sebal. Mr Zietsman pointed out in the Heads of Argument that the Daffue order was made on 27 August 2015, prior to the provisional order on 17 September 2015, placing Sebal under compulsory liquidation, and in terms of the Daffue order, the (voluntary) liquidation was lifted on certain conditions. The provisional order of 17 September 2015 could not have had the consequence of causing the Daffue order to fall away or become a nullity. The Daffue order remained in force and the applicants were entitled to act in terms of thereof in holding the creditors' meeting on 22 September 2015. The applicants also aver that the provisions of section 45 of the Insolvency Act are insufficient to hold a proper investigation into and to properly assess the

discrepancies and contradictions in this matter (as contained in a letter they addressed to the Master of the High Court). They allege that, in any event, section 417(1) of the Act makes provision for the holding of an enquiry at any time after the grant of a liquidation order, and for the purposes of the Act a liquidation order is interpreted to mean either a provisional or final order of liquidation. Therefore the orders they seek in the Notice of Motion will be the appropriate course to follow and persist with the application.

ISSUES

[10] The issues in this matter are therefore whether

10.1 the court order of 17 September placing Sebal under provisional compulsory liquidation had the effect of extinguishing the voluntary liquidation;

10.2 the Daffue order became a nullity upon the grant of the order on 17 September 2015;

10.3 the discharge of the provisional order for compulsory liquidation on 29 October 2015 extinguished entirely the liquidation proceedings against Sebal, depriving the applicants of locus standi in this matter, and

10.4 the launch of this application was premature because an investigation in terms of section 45 of the Insolvency Act should first have been held.

The Law

[11] Section 344 of the Act is the source of a court's power to grant a winding up order, and sets out the circumstances in which a company may be wound up by the court. It has been held in a

number of cases that the purpose of winding up proceedings is not to recover a debt but to establish a *concursus creditorum* , where payment of creditors' claims may be recovered in terms of the Act. (See **Henochsberg On The Companies Act, p692**) In the case of a voluntary liquidation, the *concursus* is established upon the registration of the special resolution to place the company in liquidation (section 352 of the Act) and in the case of compulsory liquidation, the *concursus* is established when the application is presented to court (section 348). The intention in any winding up (compulsory or voluntary) is that a *concursus* should ensue in order that there is an orderly and controlled realisation and distribution of the company's assets and property. **(see Henochsberg, page 738).** In the established case of **Walker v Syfret NO 1911 AD 141**, (a copy of which Mr Zietsman kindly furnished to this court), Innes J, at page 166 affirmed that "The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences."

[12] Section 347 of the Act sets out the powers that the court hearing a winding up application has, and the various orders it is capable of making, for example, it may grant or dismiss the application, adjourn the application, conditionally or unconditionally make an interim order, or any other order it deems appropriate. Section 350 sets out the requirements to be complied with before a voluntary liquidation is deemed to have been instituted. Section 354 empowers a court, upon proof to its satisfaction, to make an order staying, setting aside or continuing winding up proceedings. Section 388, which deals only with a voluntary winding up gives the liquidator, member or creditor the right to apply to court to determine any question in the winding up, for example whether

the company is able to pay its debts or not, determining the manner in which the company's assets are to be distributed, etc. Section 417 makes provision for the Master or the court to summon and examine any person in relation to the affairs of the company, while the provisions of section 418, empower the Master or the court to delegate his/its powers in terms of section 417 to a commissioner.

[13] The main object of a winding up is therefore to ensure that the rights of the general body of creditors are taken into account and that all creditors are treated fairly. (see the **Walker** case, referred to above, at p166). I have referred in paragraph 11 above to the dates stipulated in the Act when the winding up process both in a voluntary and a compulsory liquidation are deemed to commence. In the case of **Nel and Others v The Master of the High Court and Others 2002(3) SA 354 (SCA),** at paragraph 6, the court remarked that an order for winding up of a company, be it a provisional or final order, is not personal to the petitioning creditor but determines the status of the company, which in that case was that the company was provisionally in liquidation, which carried all the consequences of such a status, including the creation of *concursus.* Such *concursus* was established on the date that the application was presented to court and endured even when the provisional order was discharged and the application of an intervening creditor for a final liquidation order was granted. The court found that the discharge of the provisional order did not terminate the *concursus*. The court in Nel cited with approval the case of **Milne N.O. v Deputy Sheriff and Others 1955(3) SA 160 (N) at 161 A-F,** where the court held a similar view.

[14] In the present matter, Mr Zietsman validly points out that the Daffue order conditionally lifted, on 27 August 2015, the voluntary liquidation of Sebal stipulating the fulfilment of certain conditions. At the time the Robyn Trust application was launched on 17 September 2015, therefore, the voluntary liquidation of Sebal had been lifted, albeit conditionally. There is no dispute in the current matter that the requirements for a voluntary liquidation were complied with and that the special resolution (in terms of section 349 of the Act) was properly registered in terms of section 200. In my view therefore, there can be no dispute that the *concursus creditorum* was established on the day that the special resolution was registered, namely, 13 August 2012. The Robyn Trust application, which resulted from a failure by FVR to honour the terms of an agreement entered into with Robyn Trust and the first respondent, was that of a single creditor, which sought to better protect its rights. By the return date, the claim of the creditor (Robyn Trust) against the company had been paid by FVR, thus fulfilling the terms of the contract and making it unnecessary for the provisional order (for compulsory liquidation) to be made final.

[15] The applicants contend that the other creditors did not intervene in or react to the application for conversion of the voluntary liquidation into a compulsory liquidation because they did not know that the petitioning creditor (Robyn Trust) no longer had *locus standi* because a third party (FVR) paid the debt. To my mind, FVR would, in any event, have replaced Robyn Trust as a creditor of Sebal and would have become part of the already established *concursus*. The cession of Robyn Trust's claim in terms of its agreement with FVR was a transaction between them, with the concurrence of the first respondent, who consented to an order for compulsory liquidation being taken, on an unopposed

basis. From the wording of the cession agreement and the rest of the papers before me, it appears that the intention of the parties was to secure the rights of Robyn Trust and obtain payment of its claim against Sebal. Once this claim was paid by FVR (prior to the return date), Robyn Trust, FVR and the first respondent saw no further necessity to confirm the provisional order for compulsory liquidation and agreed to the discharge of the order.

[16] The crisp point to be decided in relation to the Robyn Trust application is whether the discharge of the provisional order for the compulsory liquidation of Sebal terminated the liquidation proceedings and rendered the Daffue order a nullity. As I pointed out earlier in this judgment, the *concursus* was established on 13 August 2012. Several steps were taken by the liquidators since their appointment in November 2012 in pursuance of the finalisation of the winding up process, including the proof of creditors' claims at the first and subsequent meetings of creditors. The conversion of the voluntary liquidation into a compulsory liquidation and the order for the compulsory liquidation of Sebal were provisional. The words in the cession agreement, *"...aangepas tot die mate wat nodig mag wees inaggenome die opheffing van die bestaande likwidasiebevel, al dan nie...."* indicate that the parties to that agreement were, at that stage, well aware of the Daffue order and the import thereof. In my view it could not have been within the contemplation of the parties in the Robyn Trust application that the *concursus,* established almost three years prior, or the liquidation proceedings should be permanently terminated. I am therefore, constrained to find that the Robyn Trust application could or did terminate the *concursus* which was established a few years prior to the application. In addition, the only logical conclusion to be drawn from the first

respondent's consent to such an order (in the context of the cession agreement) is that she acknowledged that the company (Sebal) was unable to pay its debt to Robyn Trust.

To interpret the legislation in the manner contended for by the first respondent would lead to an absurdity and would fly in the face of the objects of the Companies Act and the Insolvency Act, with regard to the liquidation of companies. In my view the discharge of the provisional order on 29 October 2015 had the effect that the status quo in respect of the voluntary liquidation was revived and it continued as it was prior to the date of the grant of the provisional order. I also hold the view that the Daffue order was not rendered a nullity by the grant of the provisional order on 17 September 2015, and the applicants were entitled to act in accordance therewith. The first respondent herself appears to have acknowledged the validity of the Daffue order, when she brought a subsequent application for the creditors' meeting, held by the applicants on 22 September 2015, to be set aside and for such a meeting to be re-scheduled.

[17] With regard to the effect of a compulsory winding-up order on a voluntary winding-up order, the remarks of the court in the early case of **Schlesinger v Ingle Colonial Broom Co. Ltd 1924 CPD 255 at 258** (a copy of which was also part of the bundle compiled by Mr Zietsman) are still applicable:

"It would certainly be a surprising thing if the mere making of a compulsory order were to have the effect of setting aside all the acts done by the voluntary liquidator who may have been conducting the liquidation for a considerable time and may have made all kinds of contracts under the powers given to him by secs 182 and 149**

I do not think that sec 194** of the Act has that effect. I find that under the corresponding sections in the English Acts it has been held that a compulsory winding-up order does not nullify or abrogate what has been done under a voluntary winding-up order nor avoid *ab initio* all proceedings taken in it" (** a reference to Act 25 of 1892).

The first respondent's contentions in this regard cannot, therefore, be sustained.

[18] With regard to the second point *in limine*, taken by the first respondent, I am similarly of the view that this contention cannot be sustained. I have already found that the grant of the provisional order did not nullify the Daffue order and that the eventual discharge of the provisional order for compulsory liquidation caused the voluntary winding up of Sebal to be revived. The liquidators (applicants) were, therefore, not deprived of *locus standi,* nor was this application premature on that ground. In any event, I agree with Mr Zietsnman's submission that the Daffue order was never set aside and, as such, continues to be of force and effect. The conditional upliftment of the voluntary winding-up by the Daffue order would also fall away in the event of the conditions stipulated therein not being fulfilled. As at the date of the launch of this application, the applicants allege that the conditions imposed on the first respondent by the Daffue order had not been fulfilled. The applicants complied with one of the conditions, in holding the creditors' meeting on 22 September 2015.

[19 The other leg of the second point *in limine* is that an investigation in terms of section 45 of the Insolvency Act should first have been held before this application was launched. The applicants allege that such an investigation was held and that the provisions of section 45 were not adequate to allow for the extensive investigation of the contradictions and disputes in this matter that is required. The letter to the Master which the applicants rely on starts out by indicating that an investigation was done in respect of claims of creditors and sets out in detail the situation pertaining to the respective creditors' claims that have been proved, as well as the necessity to undertake a detailed investigation in respect of such claims, given the discrepancies, and disputes that have arisen. I am in agreement that the provisions of section 45 of the Insolvency Act may well be inadequate to achieve the results that the applicants intend, in the interests of all creditors of Sebal. It seems that the wider and more extensive enquiry sought by the applicants is necessary in this matter. On this score too, the first respondent's contentions cannot be sustained.

[20] Section 417 of the Act, which should be read with section 418, applies only to the compulsory winding up of a company which is unable to pay its debts, and does not apply to a company being wound up voluntarily by creditors. Henochsberg (page 887 and the cases cited therein), submits that the court, acting in terms of section 388 of the Act, can order that section 417 be applicable to a voluntary winding-up. In my view, the papers raise many questions, especially with regard to large sums of money which must be accounted for and the fact that the company appears to be unable to pay its debts pay its debts. It would certainly be in the interests of all creditors that these matters be properly and thoroughly investigated. Section 418 permits the court to delegate its powers in terms of section 417 to a commissioner. **Henochsberg** (page 888) correctly makes the point that, in practice, the court does not usually undertake the examination itself but directs that a commission of enquiry be held, under the direction of a commissioner appointed by the court. I see no reason why the present case should be an exception. I am

accordingly satisfied that the applicants have made out a case for the relief they seek.

ORDER

[21] In the circumstances, I make the following order:

21.1 The order under case number 3510/2015 is extended;

21.2 Paragraph 1.5 is amended to read that the distribution of the insolvent estate of Sebal Beleggings (EDMS) BPK with registration number 2006/012369/07 must be finalised on or before 31 October 2016;

21.3 The date of 16 October 2015 mentioned in paragraph 3 of the order under case number 3510/2015 is amended to read 15 September 2016;

21.4 Paragraph 1.4.2 of the order is amended to read *"die eise van die bewese skuldeisers binne 7 (sewe) kalenderdae nadat die verslag van die Kommissarisn ontvang is, di Applikante skriftelik verwittig word van welke eis anvaar word"*

21.5 That Advocate Charles Stewarts (the Commissioner) is hereby appointed as Commissioner in terms of the provisions of section 418 of the Companies Act 61 of 1973;

21.6 An order in terms of prayers 6.1 to 6.7 of the Notice of Motion, relating to the powers and duties of the Commissioner, as well as processes and procedures to be followed, is granted;

21.7 An order in terms of prayers 7, 8, 9 and 10 of the Notice of Motion is granted.

NAIDOO, J

On behalf of Applicants:	Mr PJJ Zietsman
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On behalf of Respondent:	Mr FG Janse Van Rensburg
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