EPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION (MAIN SEAT)

Case Number: A80/2022

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

DATE: **14 March 2024**

SIGNATURE: **[SIGNED]**

In the matter between:

PARADISE CREEK INVESTMENTS 34 (PTY) LIMITED — **Appellant**

and

PETRUS ZEELIE N.O
[Administrator of the MJEJANE TRUST IT 6[...]] — **Respondent**

In re:

PETRUS ZEELIE N.O
[Administrator of the MJEJANE TRUST IT 6[...]] — **Applicant**

and

MJEJANE FARM MANAGEMENT (PTY) LIMITED [in final liquidation] — **First Respondent**

T C RAMPATLA N.O. **Second Respondent**

T W VAN DEN HEEVER N.O. **Third Respondent**

PARADISE CREEK INVESTMENTS (34) (PTY) LIMITED **Intervening Party**

This judgment will be handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 14 March 2024.

JUDGMENT

Coram: **Mphahlele JP; Roelofse AJ *et* Bam AJ**

Roelofse AJ:

[1] On 22 September 2022, the first respondent (MFM), was finally liquidated by an order of the court *a quo* per Ratshibvumo J (hereinafter referred to as 'the court' unless the context indicates otherwise).[1] In addition to the final winding-up order, the court granted the appellant (Paradise Creek) leave to intervene and directed that an enquiry in terms of section 417 and 418 of the Companies Act 61 of 1973 (the Companies Act) be conducted into MFM's affairs.

[2] With leave of the court, Paradise Creek appeals the court's judgement and orders.

[3] The order was granted upon an application by the Respondent in this appeal (Zeelie[2]) (the liquidation application). The notice of motion in the liquidation application

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[1] Paragraph [27.2] of the order. The provisional winding-up order was granted on 15 November 2021.

[2] Who is the court-appointed trustee of the Mjejane Trust (the trust). The trust is alleged to be one of MFM's creditors.

was signed on 3 May 2021. The founding affidavit in the liquidation application was deposed to on 1 May 2021.

[4] MFM was initially wound-up voluntarily upon a resolution that was taken by two of its directors on 12 April 2021. The voluntary winding-up was set aside by the Gauteng Division, Pretoria (per Davis J) on 28 May 2021. Zeelie's application for leave to appeal the Davis J order was dismissed. On 21 January 2022, the Supreme Court of Appeal dismissed Zeelie's petition in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013.

[5] Therefore, the voluntary winding-up was set aside subsequent to the liquidation application being instituted and an appeal of that order was exhausted by the time the court heard the liquidation application.[3] The voluntary winding-up no longer exists.

The relief that was sought by Zeelie in the court *a quo* and the orders granted

[6] In his notice of motion in the liquidation application, Zeelie sought: the final winding-up of MFM[4]; that the proceedings in the voluntary winding-up be confirmed, including the Master's appointment of the liquidators[5]; an order that the commencement of the court ordered winding up shall be the date of the resolution for the voluntary winding-up[6]; and that a commission of enquiry into the affairs of MFM be held in terms of the provisions of sections 417 and 418 of the Companies Act[7] together with relief ancillary to such an enquiry[8].

[7] The court only granted: the application of Paradise Creek to intervene; the final

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[3] 19 July, 6 and 22 September 2022.
[4] Prayer 1 of the Notice of Motion.
[5] Prayer 2 of the notice of motion. The liquidators being the second and third respondents in the liquidation application.
[6] 15 April 2021.
[7] Prayer 4 of the Notice of Motion.
[8] Prayers 4.2 to 4.5 of the Notice of Motion which includes directing the scope of the enquiry, the appointment of a commissioner, that section 418 apply to the enquiry, and that the proceedings before the commissioner be kept private.

winding-up of MFM, and the enquiry in terms of section 417 and 418 of the Companies Act. The proceedings of the voluntary winding-up and the commencement date of the winding-up to the date of the resolution was not granted.

[8] Paradise Creek raised nineteen grounds of appeal. The grounds of appeal traverse the provisions of section 346(e) of the Companies Act and the finding that MFM is insolvent.

[9] I commence with section 346(e) of the Companies Act.

[10] Section 346(e) of the Companies Act provides:

> '346. Application for winding-up of company.—(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made—
>
> ….
>
> (e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company;
>
> ….'

[11] The starting point in my view is to consider what Zeelie prayed for in the trust's notice of motion and what relief the court ultimately granted. Prayers 2 and 3, read with prayer 1 of the notice of motion clearly sought what would in effect be a "conversion" of the voluntary winding-up to a creditor's winding-up. Zeelie, at paragraph 16 in the trust's founding affidavit in the liquidation application says:

> 'This is firstly an application in terms of Section 346(e) of the Act [Companies Act]. The applicant seeks an order that the first respondent, which is presently in

voluntary liquidation, be finally wound up by an order of this Court. This is a so-called conversion application, wherein a voluntary liquidation is converted into a forced liquidation or a court liquidation.'

[12] In paragraph 62.3 of the trust's founding affidavit, Zeelie submits:

'that a Court liquidation as envisaged in section 346(1)(e) ought to be granted.'

[13] The trust delivered a supplementary affidavit that was deposed to on 17 August 2021. In the supplementary affidavit, Zeelie refers to the judgment of Davis J that set aside the voluntary winding-up and confirms that Davis J refused leave to appeal his judgment, that Zeelie petitioned the Supreme Court of Appeal and the petition to the Supreme Court of Appeal suspends Davis J's order which results that the voluntary winding-up is still in force.

[14] The trust therefore clearly proceeded on the basis that it sought a conversion of the voluntary winding-up to a winding-up by the court. Of course this was no longer possible after the Supreme Court of Appeal refused leave to appeal Davis J's judgment.

[15] The trust's persistence with the conversion of the voluntary winding-up to a winding-up of the court must be seen in the light of the order of the court. The court did not grant prayers 2 and 3 of the notice of motion. What the court therefore ordered was a winding-up by the court.

[16] The granting of prayer 4 of the notice of motion also does not translate to the conversion of the voluntary winding-up. Prayer 4 of the notice of motion that was granted could in any event have been granted without invoking section 346(e) because section 388[9] of the Companies Act allows for leave to be granted by the court to

[9] Which provides:

'388. Court may determine questions in voluntary winding-up.—(1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may convene an inquiry in terms of section 417 of the Companies Act. In *Michelin Tyre Company (South Africa)(Pty) Ltd v Janse Van Rensburg and Others*[10]

> 'There are at least two ways of procuring a s 417 enquiry even in a voluntary winding-up. The first is to convert the winding-up into a winding-up by the court under s 346(1)(e); and the other is an application to court under s 388 for leave to convene an enquiry.'

[17] Prayer 4 of the notice of motion is clearly aimed at procuring a section 417 enquiry and notwithstanding the trust not specifically mentioning section 388 of the Companies Act, I see no reason why the court could not have granted prayer 4 of the notice of motion, even in the absence of the voluntary winding-up. In this regard I, just as the court[11], took guidance from *Swart v Heine and Others*[12], that sets out as follows:

> '[7] In my view it is not necessary for a litigant who is relying on a statutory provision to specify it. It is sufficient if it is clear from the facts alleged by the litigant that the section is relevant and operative. This point was made clear in Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (A) 725H-726A, where this court stated the following:
>
> 'It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see Ketteringham v City of Cape Town 1934 AD 80 at 90) or, put differently, it is sufficient if the facts

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apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit.'

[10] (198/2001) [2002] ZASCA 55 (29 May 2002) at para. 5.

[11] At paragraph [12] of the judgment.

[12] (192/2015) [2016] ZASCA 16 (14 March 2016).

are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see Price v Price 1946 CPD 59, Wasmuth v Jacobs 1987 (3) SA 629 (SWA) at 634I).'

See also in this regard Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others [2004] ZACC 15; 2004 (4) SA 490 (CC) para 27.

In the present, case all averments necessary support the relief which they were granted were made by the respondents. A reading of the notice of motion, in particular paras 2 and 3, and the entire founding affidavit demonstrate clearly that what the respondents sought before Ledwaba DJP was leave to convene an enquiry in terms of ss 417 and 418 on the Act having stated the company had been wound-up voluntarily and that they were creditors of the company. It is of course difficult to imagine, in the circumstances of this case, that the application meant to achieve something other than an application contemplated in terms of s 388 of the Act.'

[18] The trust alleged (and the court accepted) that MFM's assets were being dissipated or attempts were made to dissipate MFM's assets and Zeelie believed that more money and assets may have been dissipated because *"…large parts of it belongs to the Trust or had to be paid out to the trust."*[13] The court proceeded to say the following:

'In light of the above, the Applicant [Zeelie] needed an inquiry to be conducted into the affairs of the First Respondent [MFM] in terms of section 417 and 418 of the Act as he [Zeelie] did not have a clear understanding of what happened in its [MFM] affairs and the dealings it had with the Trust. This situation was made

[13] Judgment at para. 11.

worse because the erstwhile trustees had until then ignored the court orders directing them to hand over documents pertaining to the affairs of the Trust.'[14]

[19] In its answering affidavit, Paradise Creek, challenges the allegations of Zeelie over the dissipation of assets by labelling these allegations as scurrilous and completely unfounded.[15]

[20] The factual findings of the court which ultimately lead to the order in paragraph [27.3] of the judgment should only be interfered with on appeal if such findings constitute a clear misdirection. I see no misdirection by the court. In my view, only an inquiry in terms of section 417 shall uncover the true dealings of the company insofar as it relates to the Trust and Paradice Creek. If there is nothing untoward as is alleged by Zeelie, MFM, Paradise Creek and its directors shall be able to demonstrate same. Section 417 of the Act is an indispensable tool to enhance openness and transparency where the artificial corporate veil fails.

[21] Paradise Creeks challenge of the court's order in paragraph [27.3] of the judgment must therefore fail.

[22] I proceed with the solvency challenge.

[23] Paradise Creek's challenge on this score is that: the court erred in finding that MFM was apparently insolvent; the court erred in exercising its discretion in favour of a final winding-up; the court ought to have found that the trust's alleged claim was *bona fide* disputed; the court erred in concluding that it was common cause that the trust was MFM's creditor.

[24] I logically first have to deal with the dispute that was raised over the trust's alleged claim for if it should have been found that the trust's claim was disputed on *bona*

[14] Judgment at para. 12.
[15] Paragraphs 88 and 89 at pages 452 and 453.

fide grounds, the findings that MFM was apparently insolvent, that the trust was MFM's creditor and the discretion that was ultimately exercised by the court to grant the final winding-up would have been be wrong.

[25] Regarding dispute Paradise Creek raised over MFM's indebtedness to the trust, the court found at paragraph 25 of its judgment:

> 'In light of the above, I conclude that the Intervening Party's dispute van be best described as consisting of a bald or uncreditworhty denials, raises fictitious disputed of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. It is clear from the evidence presented that the First Respondent is indeed insolvent and that the provisional liquidation should be confirmed.'

[26] The court made the aforesaid finding after considering the rent calculations in respect of a new lease agreement that was alleged by Paradise Creek but disputed by the trust. Even if it is accepted that the new lease agreement was indeed concluded and in force, MFM would still be indebted to the trust. Yet again the court's findings are not open to be challenged before this count in the absence of a misdirection by the court. No such misdirection exists in the court's judgment having regard to the facts in its totality.

[27] I turn to Paradise Creek's challenge that the court, in exercising its discretion, should not have granted the final winding-up order. In this regard, the court exercised a narrow discretion. In ***Imobrite (Pty) Ltd v DTL Boerdery CC*** [16] the nature of the court's discretion is explained as follows:

> '[19] It is well-established that the two types of discretion exercised by courts are often referred to as a discretion in the strict/narrow/true sense and a discretion in the broad/wide/loose sense. In the context of an application for business rescue, this

[16] (1007/20) [2022] ZASCA 67 (May 2022).

Court in Oakdene Square Properties v Farm Bothasfontein (Oakdene), observed that the term 'discretion' is sometimes used in the loose sense to indicate no more than the application of a value judgment. Furthermore, this Court in Oakdene explained that where the 'discretion' exercised by the lower court was one in the loose sense of a value judgment, the limitation imposed on the authority of the court of appeal to interfere does not apply. Moreover, it pointed out that 'in that event the court of appeal is both entitled, and in fact duty-bound, to interfere if it would have come to a different conclusion.'

[20] In Afgri Operations Limited v Hamba Fleet (Pty) Ltd, this Court reaffirmed that an unpaid creditor has a right, ex debito justitiae, to a winding-up order against a company that has not discharged its debt. Notably, it also reaffirmed the trite principle that the refusal of a winding-up order under such circumstances entails the exercise of a narrow discretion. The following observations in Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited appositely illustrate that the mere fact that there may be more value than the claim is not, without more, sufficient to sway a court towards exercising the discretion in favour of a debtor:'

….

[21] In summing up, it bears emphasising that the exercise of discretion in favour of not granting a liquidation order must be based on a solid factual foundation. As mentioned in the foregoing paragraphs, that factual foundation is missing from the facts presented by the respondent in the answering affidavit. In the face of a compelling case made by the appellant for granting a winding-up order, the respondent did not raise a bona fide defence to the claim. Instead, it relied on untenable technical defences. These were rightly rejected by the high court.

[22] It is well-established that an appellate court may interfere with the exercise of a discretion in the true sense by a court of the first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong

principle, or has not brought an unbiased judgment to bear on the question under consideration, 'or has not acted for substantial reasons'.' [Footnotes omitted]

[28] The facts demonstrate that the trust is a creditor of MFM and that there is no *bona fide* dispute over MFM's indebtedness to the trust. In addition, the facts illustrate that MFM's affairs are in such a state that its survival, either commercially or otherwise is impossible. There is therefore no reason to interfere with the court when it exercised its discretion to grant the final winding-up order.

[29] There is no reason why costs should not follow the result.

[30] In the premises, I made the following order:

(a) The appeal is dismissed with costs.

Roelofse AJ
Acting Judge of the High Court

I agree and it is so ordered.

pp.
Mphahlele JP
I agree and it is so ordered.

pp.
Bam AJ

DATE OF HEARING: 21 AUGUST 2023

DATE OF JUDGMENT: 14 MARCH 2024

APPEARANCES

FOR THE APPELLANT:

MP van Der Merwe SC instructed by Weavind and Weavind

FOR THE RESPONDENT:

EM Theron SC instructed by Du Toit Smuts Attorneys