# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

**CASE NO. 290/2000**
**Reportable**

**In the matter between**

**BASIL NEL NO AND 2 OTHERS** **Appellant**

**and**

**THE MASTER OF THE HIGH COURT**
**AND 2 OTHERS** **Respondents**

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CORAM: ZULMAN, STREICHER and NUGENT JJA

HEARD: 21 FEBRUARY 2002

DELIVERED: 8 MARCH 2002

Termination of *concursus creditorum* – Interpretation of s 348 of the Companies Act, 1973

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**JUDGMENT**

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**ZULMAN JA**

**[1]** The crisp issue in this appeal is what the effect is, if any, on the *concursus creditorum,* when a provisional order for the winding up of a company that was obtained at the instance of a creditor is discharged and immediately replaced by a final order for the winding up of the company granted at the instance of another creditor. In other words, whether the *concursus creditorum* (for the sake of brevity- *concursus*) that came into existence when the provisional order was granted remains extant.

[2] The court *a quo* (Blieden J) held that the *concursus* established by the grant of the provisional order terminated upon the discharge of that order. This appeal is brought with the leave of the court *a quo*.

[3] The relevant common cause facts are:

3.1 On 7 April 1998 one van Niekerk filed an urgent application at the office of the Registrar of the High Court, Johannesburg, for the winding-up of Prop Plant Hire (Pty) Limited (the company), (the van Niekerk application). It is common cause that this is the date on which the application was presented to the court as

contemplated by s 348(2) of the Companies Act, 1973.

3.2 Pursuant thereto and on 8 April 1998 a provisional order for the winding-up of the company was granted returnable on 19 May 1998.

3.3 On 9 April 1998 the Master of the High Court (the first respondent on appeal) appointed the appellants as joint provisional liquidators of the company.

3.4 On 19 May 1998 the van Niekerk application stood down until 22 May 1998 and the return day of the provisional order was extended to 2 June 1998. The object of the extension was to afford NBS Boland Limited (Boland) the opportunity of bringing a substantive intervention application together with a substantive application to wind up the company.

3.5 On 27 May 1998 Boland filed such an application. The notice of motion sought an order in the following terms:

"1. dat aan die tussenbei-tredende skuldeiser verlof verleen word om tussenbeide te tree in die hoofaansoek;

2. dat die respondent gelikwideer word ten behoewe van die skuldeisers;

3. dat die koste van die tussenbeitredende, koste in die likwidasieverrigtinge sal wees....."

The application bore the same case number which had been allocated to the van Niekerk application.

3.6 On 28 May 1998 Boland's application was served on the company and was placed in the file containing the van Niekerk application.

3.7 On 2 June 1998 Boland moved for an order in terms of its notice of motion. The Court (Flemming DJP) refused to entertain Boland's application until it had been duly stamped and properly issued by the Registrar under a separate case number. These requirements were attended to on the same day. Thereafter but still on 2 June 1998 the following orders were made:

In the van Niekerk application:

"3.7.1 The order of provisional liquidation is set aside;

3.7.2 The rule *nisi* is discharged"

In the Boland application:

"3.7.3 Dat die bogenoemde respondent maatskappy hiermee in finale likwidasie geplaas word."

The orders were granted in immediate succession although it is uncertain in precisely what order.

3.8 On 22 June 1998 and pursuant to Boland's application, the Master appointed the appellants as joint provisional liquidators of the company.

3.9 These appointments were made final on 7 August 1998.

[4] The appellants sought an order in the Court *a quo* in these terms:

"1. It is hereby directed that the winding-up of Prop Plant Hire (Pty) Limited ("the company") commenced on 8 April 1998.

2. It is hereby directed that the *concursus creditorum* in respect of the company was commenced on 8 April 1998.

3. It is hereby directed that all creditors intending to prove claims against the company are to calculate the values of their respective claims as at 8 April 1998.

4. That the costs of this application are to be paid by any party opposing the relief sought herein, in the event of no party opposing the relief sought herein, that the costs are to be costs in the liquidation."

(It is common cause that the date 8 April 1998 should read 7 April 1998).

[5] The application was dismissed with costs, such costs to include the costs of two counsel.

[6] It is trite that one of the effects of the grant of a winding-up order is to establish a *concursus*[1] . Section 348 of the Companies Act, 1973 provides a date when such winding-up is deemed to commence in that it states:

> "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

An order for the winding up of a company, be it a provisional or a final order, is not personal to the petitioning creditor but determines the status of the company. Accordingly when the provisional order was granted at the instance of van Niekerk on 8 April 1998 this brought about the commencement of the process of winding up which, in terms of s 348, was deemed to have commenced on 7 April 1998. The status of the company was therefore that it was provisionally in liquidation with all the consequences of such a status including the creation of a *concursus.*

[7] As pointed out in *Lief, N.O. v Western Credit (Africa) (Pty) Limited*[2] the section is designed to obviate:-

> "…a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court.."

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1 See for example *Walker v Syfret NO* 1911 AD 141 at 160

2 1966(3) SA 344 (W) at 347 B-C. See also Vermeulen and Another v CC Bauermeister (Edms) Bpk 1982(4) SA 159 (T) at 161 F-H

[8] As a consequence of the deemed commencement of the winding-up of the company on 7 April 1998 a *concursus* then came into being.[3] The respondents conceded that this *concursus* endured until some time on 2 June 1998. However, and contrary to what is contended for by the appellants, the respondents submitted that when the rule was discharged in the van Niekerk application on 2 June 1998, and even although it was immediately replaced with a final winding-up order at the instance of Boland, the *concursus* established by the provisional order ceased to exist and a new *concursus* came into being. I cannot agree. There was in reality no hiatus which brought the *concursus* established on 7 April 1998 to an end. The discharge of the provisional order, and the grant of the final order, were clearly intended to take effect simultaneously (as nearly as that could be achieved in reality) and there was thus no break in the status of the company. The purpose of the Boland application to intervene in the van Niekerk application and to seek a final winding-up order was to ensure the continuation of the already existing process of winding up (albeit provisional) and the *concursus* that this entailed.

[9] The situation which obtained was no different to that which occurred

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[3] Kalil v Decotex (Pty) Ltd 1988(1) SA 943 (A) at 961H – 962A and First National Bank Limited v EU Civils (Pty) Ltd 1996(1) SA 924 (C) at 933 G-H

in *Milne, N.O. v Deputy Sheriff and Others*[4] in which Caney J stated the following:

> "On 22nd March, Selke J, had made a provisional liquidation order against the company at the instance of one Ismail Hajee Moosa. This order was made notwithstanding resistance on behalf of the company at that stage of the proceedings, and the rule *nisi* in connection with the provisional liquidation order was returnable on 14th April. It was, however, extended until 26th April, on which date the petitioner, Moosa, applied for its discharge. Another creditor, however, one Mayet, had apparently come to know of the intention of Moosa to make that application, and he moved on the same day, the 26th April, for a provisional liquidation order. The two applications, that of Moosa for discharge of the order he had obtained and that of Mayet for a provisional liquidation order, were heard simultaneously, and both were granted. The contention of the second respondent before me was that the provisional liquidation order made at the instance of Moosa having been discharged, the applicant's appointment as provisional liquidator of the company ceased to operate, and that, as he had not been re-appointed after the making of the provisional liquidation order at the instance of Mayet, he no longer had any authority to continue the proceedings in which he had obtained the rule *nisi* on 7th April.
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> The contention of the applicant, in answer to this, was that he had not been appointed provisional liquidator in the matter of Moosa against the company, but provisional liquidator of the company in provisional liquidation; that the company never ceased after his appointment to be in provisional liquidation; that there was no space of time or hiatus between the discharge of the order which Moosa had obtained and the grant of the order which Mayet obtained; and that consequently he continues to be the provisional liquidator of the company until either it be discharged from liquidation, or a liquidator be appointed to it. On his behalf the submission was advanced that the Court had on 26th April deliberately heard the two submissions simultaneously with the object of avoiding any break in the continuity of the state of provisional liquidation in which the company was at that time.
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> The contentions advanced on behalf of the applicant appeal to me as being sound, and I consider that he continues to function at the present time as the provisional liquidator of the company and consequently has *locus standi* to apply for confirmation of the rule *nisi* granted on 7th April."

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[4] 1955(3) SA 160 (N) at 161 A - F

[10] Counsel for the respondents referred us to *Flax v Berliner: Houndsditch Warehouse (Pty), Ltd, Intervening,*[5] in support of his general submission that upon the discharge of the provisional winding-up order the *concursus* came to an end. A consideration of the judgment of Millin J in that matter reveals, however, that the learned judge merely referred to an assumption made by counsel that if an existing provisional sequestration order was discharged, no new order granted after this expiration of the six month period referred to in s 34(1) of the Insolvency Act, 1936, even if granted simultaneously with the discharge, could bring the section into operation (This section deals with the voidable sale of a business by a trader).

[11] It is, in my view, irrelevant whether Boland can properly be said to have intervened in the van Niekerk application (in the sense that it sought to pursue the same cause of action) or whether its application was a concurrent application for the same relief. In either event the effect of the order that was granted at its instance was to cause the winding-up process that had commenced on 7 April 1998 to continue uninterrupted.

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5 1950(2) SA 259 (W)

[12] Accordingly:

1. The appeal is allowed with costs such costs to include the costs of two counsel.

2. The order made by the court *a quo* is set aside and replaced with the following order:

"2.1 It is declared that the winding-up of Prop Plant Hire (Pty) Limited ("the company") commenced on 7 April 1998

2.2 It is declared that the *concursus creditorum* in respect of the company commenced on 7 April 1998.

2.3 All creditors intending to prove claims against the company are to calculate the values of their respective claims as at 7 April 1998.

2.4 The second and third respondents are to pay the applicants' costs such costs to include the costs of two counsel."

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**R H ZULMAN**
**JUDGE OF APPEAL**

**STREICHER JA )**
**NUGENT JA ) CONCUR**