THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1132/2023

In the matter between:

RESILIENT ROCK (PTY) LTD **APPELLANT**

and

VOLTEX (PTY) LTD T/A ATLAS GROUP **RESPONDENT**

Neutral citation: *Resilient Rock (Pty) Ltd v Voltex (Pty) Ltd t/a Atlas Group* (1132/2023) [2025] ZASCA 33 (31 March 2025)

Coram: MBATHA, KATHREE-SETILOANE and BAARTMAN JJA and VALLY and MOLITSOANE AJJA

Heard: 24 February 2025

Delivered: 31 March 2025

Summary: Insolvency law – section 347(5) of the Companies Act 61 of 1973 – whether an appeal court has jurisdiction to grant a final winding-up order, where a provisional order had already been granted by another court in respect of the same company – section 347(5) precludes another court from granting such an order.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mudau, Keightley JJ and Farber AJ sitting as court of appeal):

1 The appeal succeeds with costs, including the costs of senior counsel where so employed.

2 The order of the full court is set aside and replaced with the following:

'The appeal is dismissed with costs, including the costs of senior counsel where so employed.'

JUDGMENT

Vally AJA (Mbatha, Kathree-Setiloane and Baartman JJA and Molitsoane AJA concurring):

[1] The appeal in this matter relates to whether an appellate court can grant a final winding-up order in a proceeding against a company where another court has already granted a provisional order against the same company.

[2] The respondent, Voltex (Pty) Ltd t/a Atlas Group (Voltex) brought an application for the liquidation of the appellant, Resilient Rock (Pty) Ltd (Resilient) on the grounds that Resilient was unable to pay its debts. The high court per Movshovich AJ found that Voltex failed to prove that Resilient was commercially insolvent, that the debt was due and payable, and that Resilient had no defence to the claim of Voltex. On these findings, the high court dismissed the application.

Voltex applied for leave to appeal the order, which was dismissed by the high court. Voltex subsequently petitioned this Court for leave to appeal. This Court granted it leave to appeal to the full court. The full court, per Mudau J with Keightley J and Farber AJ concurring, took a different view and placed Resilient under a final winding-up order. Aggrieved, Resilient applied to this Court for special leave to appeal the order of the full court. The matter serves before us with the leave of this Court.

[3] On 17 January 2023 another Resilient creditor, Trencon Construction (Pty) Ltd (Trencon), applied to the high court for an order winding-up Resilient. On 9 May 2023 the high court handed down its judgment and order in *Trencon*. It provisionally wound-up Resilient and issued a *rule nisi,* returnable on 13 June 2023. On 31 May 2023, Voltex's appeal was heard by the full court. At the hearing Resilient applied for the postponement of the matter as the high court had already issued a provisional winding-up order in *Trencon*. The application for postponement was supported by Voltex. However, on 8 June 2023 the full court made an order finally winding-up Resilient. The issuing of the final order led to the removal of the Trencon application from the roll.

[4] Resilient contended before the full court that it lacked the jurisdiction to issue a final winding-up order as Resilient was already being wound-up in terms of the provisional order issued in *Trencon*. It relied on the provisions of s 347(5) of the Companies Act 61 of 1973 (the 1973 Act), which 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.'

Resilient sought support in the judgments of *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd, King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd*[1] (*King Pie*), *Pat Cornick & Co (Pty) Ltd; Bakker & Steyger (1960) (Pty) Ltd v Mimosa Meubels (Edms) Bpk (Pat Cornick and Co),*[2] *Ex parte WJ Upton Transport (Pty) Ltd; Man Truck & Bus (SA) (Pty) Ltd v W J Upton Transport (Pty) Ltd* (*WJ Upton Transport*)[3] and *FA Konstruksie CC Mhonyini Trading Enterprise CC In Re: Asphaltic (Pty) Ltd v Mhonyini Trading Enterprise CC (FA Konstruksie).*[4] The principles set out in the aforementioned cases were central to the argument presented in this appeal.

[5] First, in *King Pie*, King Pie Holdings (KPH) applied for the compulsory winding-up of King Pie (Pinetown) (KPP) and King Pie (Durban) (KPD) on 19 February 1998. On 28 May 1998, the members of KPP and KPD, taking advantage of the provisions of s 351 of the 1973 Act,[5] resolved to place each of them in voluntary winding-up. The resolutions were duly registered on 1 June 1998. On the other hand, the application for compulsory winding-up was heard on 3 June 1998. King Pie Holdings (KPH) contended that the fact that the two entities were voluntarily wound-up was no bar to the granting of a compulsory winding-up order. The court issued provisional winding-up orders in each application, and set aside the voluntary winding-up orders. On the return date, the liquidator appointed in terms

[1] [1998] 4 All SA 179 (D); 1998 (4) SA 1240 (D).
[2] 1961 (4) SA 119 (T).
[3] 1985 (1) SA 312 (W).
[4] [2022] ZAMPMBHC 59.
[5] Section 351 provides:
'**Creditors' voluntary winding-up**
(1) A voluntary winding-up of a company shall be a creditors' voluntary winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless it has been registered in terms of section 200.
(2) Unless otherwise provided, in a creditors' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court subject to such directions as may be given by the creditors.'

of the voluntary winding-up opposed the provisional winding-up orders being made final. The court held that there was no bar to proceeding with the compulsory winding-up and that it had a wide discretion to set aside the voluntary winding-up, where necessary. In making the final order the court stated that incidents of two winding-up applications being brought simultaneously was not unusual. The full court agreed with this, but did not deal with the holding that only one winding-up order can be given. It held that *King Pie* was of no assistance in determining whether a court is prohibited from issuing a winding-up order against a company that has already being wound-up in terms of a provisional winding-up order.

[6] Second, in *Pat Cornick and Co*, two applications for a winding-up of a company were brought simultaneously in the same court and heard on the same day. The court held that '[i]t is, nevertheless, now established practice and quite clear that I can grant one petition only'.[6] The full court accepted that the court in *Pat Cornick and Co* acknowledged that two provisional liquidation orders cannot be issued, but distinguished that case from the present one in the following terms:

'[*Pat Cornick*] related to two simultaneous competing applications, which had been enrolled for hearing by a High Court on the same day. This is not the situation facing the court in this appeal. The court accepted that two provisional orders should not be granted. However, the court in *Pat Cornick* was not required to and, …did not address the effect of a retrospective order on appeal on an existing provisional order.'[7]

It further distinguished *Pat Cornick and Co* from the case before it on the basis that it was an appellate court whose decision would have a retrospective effect.

[7] Third, in *WJ Upton Transport* the court dealt directly with the issue of whether a court is entitled to make an order liquidating a company when a provisional

[6] *Pat Cornick and Co* fn 5 at 121D.
[7] *Voltex (Pty) Limited t/a Atlas Group v Resilient Rock (Pty) Ltd* [2023] ZAGPJHC 675 (Full court decision) para 29.

liquidation order against that very same company is already in place. It held that it was not. The full court took the view that this case was not helpful as it dealt with 'competing liquidations' whereas that was not the case before it. It held that it was, in any event, exercising 'an appellate jurisdiction and is not precluded from doing so by virtue of the existence of a provisional order.'[8]

[8] Lastly, in *FA Konstruksie* the court dealt with a situation where there was a provisional winding-up order as well as a final one, issued by the same court against the same company but in two separate cases. The court was called upon to confirm the provisional order. The court concluded that the FA Konstruksie order should not have been issued and decided to set it aside. The provisional order was made final.

[9] The full court, with respect, did not understand the rationale for the decision in *FA Konstruksie* to be an impediment to the issuance of a final winding-up order by itself, despite the existence of the provisional one issued in *Trencon*. The full court distinguished *FA Konstruksie* on the basis that the court dealt with two applications in the same court, whereas it was sitting as a court of appeal. It said in this regard:

'Importantly, when a matter is taken on appeal as in this instance, the appeal is against the High Court. If the appeal is upheld, the effect of the order on appeal is to substitute the order given by the appeal court for the order given by the court of first instance.'[9]

It found further that as an appeal court it would be deciding the matter on the facts that existed at the time the high court, as the court of first instance, dealt with the matter, and not on the facts as they appeared at the time of the appeal before it. The full court dealt with the matter on the basis that the order in *Trencon* did not exist

[8] Full court decision para 30.
[9] Full court decision para 32.

because at the time the high court dealt with the matter the order in *Trencon* had not been made. In doing so it relied on *Weber-Stephen*,[10] which held:

'… this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existences afterwards.'[11]

[10] The full court's reliance on *Weber-Stephen* is misplaced for the following reasons:

1 First, on a plain reading of s 347(5), the court was obligated by the legislature to take the new fact of the existence of the order in *Trencon* into account;

2 Second, in *Weber-Stephen* this Court was faced with an application to adduce new evidence, which concerned facts that were not present when the matter was called in the high court. In this case, there was no such application.

3 Third, it was required to take into consideration the order in *Trencon* as that order was relevant to the issue before it.

4 Fourth, the *Trencon* order had a practical effect on the appeal in that it affected the date when the *concursus creditorum* was established.

5 Finally, a court is enjoined to enquire into the practical effect of the order it is asked to make. In other words, to inquire if the matter is moot or not. [12]

[11] The full court rejected the established law that a court is prohibited by s 347(5) from issuing a winding-up order against a company if it is already in the process of being wound-up. It concluded that as an appellate court it was entitled to issue an order which would have retrospective effect. As a result, it held that the prohibition

---

[10] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd & Others* 1992 (2) SA 489 (A).
[11] Ibid at 507C
[12] See *Public Investment Corporation SOC Ltd and Another v Trencon Construction (Pty) Ltd and Another* [2023] ZASCA 88; 2024 (1) SA 66 (SCA) para 9.

did not apply to it. The full court disregarded the plain meaning of the words in s 347(5) in arriving at this conclusion.

[12] At the hearing, counsel for Resilient referred us to *Standard Bank of South Africa Limited v Khewija Engineering and Construction (Pty) Ltd (Khewija)*[13] and to *Eamonn Courtney v Izak Johannes Boshoff NO and Others (Eamonn Courtney)*.[14] *Khewija* served before the high court shortly after the full court delivered its judgment. The facts in *Khewija* are similar to the facts in this case. In that matter the court held that the full court's decision cannot be relied upon to avoid the provisions of s 347(5).[15] It accordingly held that it was disbarred by the provisions of s 347(5) from issuing any winding-up order. The finding is consistent with the authorities referred to above. *Eamonn Courtney* dealt with the situation where a court in an unopposed application made a final sequestration order when no provisional order was in place. Two years after the order was made Mr Courtney decided to challenge the final order of sequestration on the basis that it was a nullity and was *'void ab initio'* as it was made without a provisional sequestration order being in place. This Court held that while the court that issued the final sequestration order did so without a preceding provisional sequestration order being in place, its order 'exists in fact and may have legal consequences until a court sets it aside. …Therefore, [it] continued to operate and had force and effect'.[16] *Eamonn Courtney* is of no assistance to Voltex: it does not detract from the findings in all the authorities cited above that s 347(5) prohibits a court from issuing a final winding-up order against a company that is already being wound-up in terms of an order that is already in place. On the contrary, it supports the case of Resilient that the order in *Trencon* had 'force

[13] (2022/16061) [2025] ZAGPJHC 5 (10 January 2025).
[14] (483/2023) [2024] ZASCA 104 (21 June 2024).
[15] *Khewija* fn 13 para 18.
[16] *Eamonn Courtney* fn 14 para 24. See the cases cited therein in support of this principle.

and effect' when the full court heard the appeal as a result of which the provisions of s 347(5) could not be avoided.

[13] Section 347(5) expressly prohibits a court from granting a final winding-up order in relation to a company that is already being wound-up. The words used, '[t]he Court shall not grant a final winding-up order', make it crystal clear that the prohibition is peremptory. The trite principles of interpretation require the court to consider the text, context and purpose of the statute in ascertaining the intention of the legislature.[17] In the present case, the plain, or rather natural, meaning of the words used, reveals that the injunction imposed on the court is absolute. It is noteworthy that the provision does not restrict its application to a court of first instance dealing with a winding-up application. It applies equally to a court of appeal. This much is clear from the definition of court in the 1973 Act, which is as follows:

'"**Court**", in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate's court having jurisdiction in respect of that offence.'

[14] Accordingly, the full court was required to give effect to the legislative intent by either postponing the appeal as sought by both Resilient and Voltex, or by striking it off from the roll on the ground that it was moot. The order sought by Voltex had already been granted by the court in *Trencon*, which order remained extant. The upshot of this is that by failing to give effect to the prohibition set out in s 347(5) the full court fell into error, which resulted in an incorrect order.

[17] See *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 para 28.

[15] In conclusion, I find that s 347(5) disbarred the full court from issuing a second winding-up order. Accordingly, the appeal succeeds with costs.

[16] For all the reasons set out above, the following orders are made:

1 The appeal succeeds with costs, including the costs of senior counsel where so employed.

2 The order of the full court is set aside and replaced with the following:

‘The appeal is dismissed with costs, including the costs of senior counsel where so employed.’

_____

B VALLY

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	J L Mÿburgh (with B H Steyn)
Instructed by:	Rina Rheeders Attorneys, Pretoria
	McIntyre van der Post Attorneys, Bloemfontein
For the respondent:	S Symon SC (heads of argument complied by S Symon SC and N Segal)
Instructed by:	Orelowitz Inc Attorneys, Johannesburg
	Lovius Block Inc., Bloemfontein.