THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 979/2018

In the matter between:

RYNETTE PIETERS NO **APPELLANT**

and

ABSA BANK LIMITED **RESPONDENT**

Neutral citation: *Pieters NO v Absa Bank Ltd* (979/2018) [2019] ZASCA 118 (23 September 2019)

Coram: WALLIS, MBHA and NICHOLLS JJA and WEINER and HUGHES AJJA

Heard: 12 September 2019

Delivered: 23 September 2019

Summary: Company dissolution – s 419 of Companies Act 61 of 1973 – date of dissolution is date when Registrar recorded dissolution in the Companies Register, not date of publication of notice of dissolution in Government Gazette – agreed facts – no proof that Registrar had not recorded dissolution of company – effect of Master's certificates in terms of ss 419(1) and 385 of Companies Act to discharge liquidator – Master lacks power to re-instate liquidator after discharge – purported reinstatement of liquidator invalid

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ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van der Linde J, as court of first instance):

The appeal is dismissed with costs, such costs to include those of two counsel where two counsel were employed.

JUDGMENT

Wallis JA (Mbha and Nicholls JJA and Weiner and Hughes AJJA concurring)

[1] On 14 August 2003 the Master of the High Court issued a certificate in terms of s 419(1) of the Companies Act 61 of 1973 (the Act) certifying that Cell F Services (Pty) Ltd (Cell F) had been completely wound up. Pursuant thereto the Master furnished the present appellant, Ms Pieters, the liquidator of Cell F, with a certificate of completion of her duties in terms of s 385(1) of the Act. That certificate provided that the bond of security she had furnished could be reduced to nil. Nearly five years later, Ms Pieters, wrote to the Master of the High Court asking him to 're-issue' her certificate of appointment to enable her to pursue recovery of a potential asset of Cell F. After the Master complied with this request, in terms to which I will revert, Ms Pieters launched proceedings against the respondent, Absa Bank Ltd (ABSA) claiming substantial damages. ABSA's special plea that Ms Pieters lacked *locus standi* to pursue the claim on behalf of Cell F was separated from the

other issues in the case and dealt with on the basis of a statement of agreed facts. The special plea was upheld by Van der Linde J sitting in the Gauteng Division of the High Court, Johannesburg. This appeal is with his leave.

The facts

[2] The facts from which this situation arose are simple and uncomplicated. On 9 October 2001 Cell F was placed under provisional winding-up on its own application. Ms Pieters was appointed as its provisional liquidator on 26 October 2001. A final winding-up order was made on 13 November 2001 and Ms Pieters was appointed as the liquidator on 7 March 2002. On 24 March 2003 she submitted an amended First and Final Liquidation Distribution Account to the Master. The Master confirmed this account on 3 July 2003 in terms of s 408 of the Act. The fact of its confirmation was published in the Government Gazette on 18 July 2003.

[3] On 14 August 2003 the Master addressed a letter to Ms Pieters which, so far as material, read as follows:

'With reference to your letter . . . I have to inform you that as all my requirements have been met, the final liquidation and distribution/contribution account herein has now been filed of record.

I hereby certify that in terms of Section 56(7) of the Insolvency Act 24 of 1936/385(2) of the Companies Act, No. 61 of 1973/66(1) of the Close Corporations Act, No 69 of 1984, the Bond of Security No. 605996 entered into by Rynette Pieters on behalf of the Trustee(s)/Liquidator(s) may, with effect from date hereof be reduced to nil.'

[4] On the same date, the Master addressed a letter to the Registrar of Close Corporations and Companies, embodying a certificate in terms of s 419(1) of the Act, and stating, *inter alia*, the following:

'In terms of Section 419(1) of the Companies Act, No. 61 of 1973, (as amended) read with Section 66 of the Close Corporations Act, No 69 of 1984, I hereby certify that according to record (sic) the affairs of the above Company/Close Corporation have been completely wound-up.'

The Registrar responded to receipt of the Master's certificate in terms of s 419(1) by way of a letter asking for further details of the company, as it could not be traced in the Registrar's records. The Registrar's letter had the incorrect name for the company, so that may have been the source of the confusion. The correct details were furnished to the Registrar under cover of a letter dated 16 September 2003.

[5] On 30 January 2008, Ms Pieters, then employed by Independent Trustees (Pty) Ltd, wrote to the Master stating that it had come to her attention that there might be a further asset of Cell F and that, as the company had not yet been dissolved in terms of s 419 of the Act, the Master was asked to 're-issue' her certificate of appointment urgently to enable her to take the matter further. This was duly done on 5 March 2008, the certificate from the Master recording that Ms Pieters had been 're-instated' as liquidator.

[6] On these facts, the sole issue before Van der Linde J and this court was whether Ms Pieters' 're-instatement' as liquidator was effective to give her the necessary *locus standi* to pursue the claim against ABSA. The basis of the special plea was that Cell F had been finally wound up on 14 August 2003, when the Master certified in terms of s 419(1) of the Act that it had been 'completely wound up'. Both the liquidator and the Master had fully and finally discharged their respective offices and it was therefore not open to Ms Pieters to request that her certificate of

appointment be re-issued, or to the Master to grant the request and 're-instate' her in that office. The Master was said to be *functus officio*.

[7] Ms Pieters' retort was that the company had not been dissolved because of the failure by the Registrar to record its dissolution and to publish a notice of its dissolution in the Government Gazette. She contended that the company remained in existence and in liquidation and that it was therefore permissible for the Master to re-issue a certificate of appointment to her to enable her to pursue the new matter that had come up in relation to the affairs of the company.

Was Cell F dissolved?

[8] Dissolution of a company is an inevitable consequence of its winding up. This is dealt with in s 419 of the Act, which at the relevant time read as follows:

'**Dissolution of companies and other bodies corporate**

(1) In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator.

(2) The Registrar shall record the dissolution of the company and shall publish notice thereof in the *Gazette*.

(3) The date of dissolution of the company shall be the date of recording referred to in subsection (2).

(4) In the case of any other body corporate the certificate of the Master under subsection (1) shall constitute its dissolution.'

[9] Little attention was given in the heads of argument to an analysis of the section. The prescribed procedure commences with the Master sending a certificate to the Registrar in terms of s 419(1) certifying that the affairs of the company have been completely wound up. The need for

that certificate flows from the Registrar's function of maintaining the register of companies. This register contains the founding documents of the company[1] and various statutory records such as the annual return including the annual financial statements,[2] notices relating to the appointment and resignation of directors, special resolutions and the like. For the sake of completeness of those records the Registrar must record the dissolution of the company. Otherwise the Registrar has no involvement in the winding-up of companies. That takes place under the supervision of the Master. This indicates that the purpose of the Master's certificate in terms of s 419(1) is to inform the Registrar of the fact that the company has been completely wound up, so that the Registrar can update the records in the register in relation to the company.

[10] The provisions of s 419(2) reinforce this approach. They require the Registrar to 'record the dissolution of the company'. That presupposes that the company has already been dissolved. One cannot record something until it has happened. That suggests that the dissolution of the company occurs prior to the Registrar receiving the notice in terms of s 419(1) and that the Registrar does not dissolve the company, but merely records the fact of its dissolution. Where the date of dissolution is relevant, s 419(3) provides that it will be the date on which the Registrar records its dissolution.

[11] This analysis points to the dissolution of the company occurring when the Master sends the s 419(1) certificate to the Registrar. However, there is a contrary indication in s 419(4), which provides that, in the case of other bodies corporate, it is the date of the Master's certificate that

[1] Companies Act 71 of 2008, ss 13 to 17.
[2] Companies Act 71 of 2008, s 33, read with s 187(4).

constitutes its dissolution. If that were the case with a company, why not include it with other bodies corporate? After all, the Master's certificate in relation to other bodies corporate has also to be furnished to the Registrar and reflected in the records kept by the Registrar. The inference is that a distinction was for some reason drawn between the case of companies and that of other bodies corporate. The difference is reflected in the provision in s 419 (3) that the date of recording by the Registrar is the date of dissolution, as opposed to the earlier date of the Master's certificate in terms of s 419(3). Because of this difference I will accept for present purposes, without finally deciding, that the date of recording is the date upon which dissolution occurs, even though the company will have been completely wound-up at an earlier date.

[12] There was a fundamental flaw in the argument advanced on behalf of Ms Pieters in both the heads of argument and, apparently, in the high court. That argument was based on the premise that the critical date was the date of publication of notice of the dissolution in the Government Gazette. Throughout the heads it was said that the dissolution of the company was a consequence of publication in the Gazette and that it was only after publication that dissolution was complete. This ignored the wording of s 419(3). The two are necessarily different because the Registrar's recording of the dissolution would inevitably occur before publication in the Gazette. Section 419(3) is a clear legislative choice that it would be the former and not the latter date that would determine when the company is dissolved. Publication is merely a public intimation of an existing fact, namely, that the company has been dissolved.

[13] This error may have affected the matter from the outset. In her letter asking for her certificate of appointment to be re-issued Ms Pieters said that:

'We have determined that the company has not as yet been dissolved in terms of section 419 of the Companies Act.'

No details were given of the basis for that statement. It was common cause that no notice of dissolution had been published in the Government Gazette. If that is what she had in mind, she was in error. Given the approach adopted on her behalf in argument, there is inevitably the suspicion that her view was based on the absence of publication in the Gazette and nothing more.

[14] The issue of dissolution was dealt with in the statement of agreed facts in the following terms:

'No proof that Cell f (in liquidation) was dissolved as contemplated in section 419(2) of the Companies Act 61 of 1973 could be found in the records of the CIPC.'

The CIPC[3] has succeeded to the functions of the Registrar of Companies under the Act and is obliged to maintain the register of companies in terms of s 187(4) of the Companies Act 71 of 2008.

[15] No further evidence was placed before the high court in regard to the processes followed by the former Registrar of Companies in recording the dissolution of a company in terms of s 419(2) of the Act. The regulations promulgated under the Act and in force at that time had no provisions dictating how this was to be done. Presumably, the Registrar maintained the register of companies in a form that enabled a record to be maintained of all documents, such as annual financial statements, or changes in directors, special resolutions and the like that required to be

[3] Companies and Intellectual Property Commission established in terms of s 185 of the Companies Act 71 of 2008.

filed with the Registrar. However, we do not know how this was done or whether the record was retained in a file or electronically. We do not know whether a separate register was kept in relation to the dissolution of companies or whether this was simply a matter recorded in relation to the company concerned as part of the overall records maintained in respect of it.

[16] Counsel for Ms Pieters assumed that the agreement that there was no proof of the dissolution of Cell F in the records of the CIPC was sufficient to establish that it had not been dissolved, but that assumption was misplaced. Absence of proof is not proof of absence. The absence of anything in the records does not prove that the Registrar did not record the dissolution of Cell F, and the absence of publication in the Government Gazette was irrelevant to dissolution, because under s 419(3) it was the date of recording by the Registrar that determined the date of dissolution.

[17] Unless there was a statutory or regulatory requirement stipulating how the Registrar was to record the dissolution of a company, and none has been produced, all that s 419(2) required was that the Registrar make a record of the dissolution of the company. As Van der Linde J noted in his judgment, this did not require the Registrar to exercise a discretion or perform any executive act. It was simply a matter of making a record of the company's dissolution. How that was to be done was a matter for the Registrar. I see no reason why that record could not have been made by the simple action of placing in the company's file the s 419(1) notice furnished to the Registrar by the Master.[4] Once the Registrar's office had

[4] I understand that the practice was formerly that all s 419(1) notices would be sent to the office of the Chief Master in Pretoria and on receipt would be taken and delivered by hand to the office of the

tracked down the relevant file in the light of the information furnished to it by the Master on 16 September 2003, filing the s 419(1) notice in Cell F's file (whether a conventional file or one kept electronically) would constitute an adequate recording of the dissolution of the company for the purposes of s 419(2).

[18] The inadequacy of the statement of agreed facts to establish that there had been no recording by the Registrar of the dissolution of Cell F is palpable. First, it does not disclose what documents if any existed in the CIPC records in relation to Cell F. It does not say whether there was a file for Cell F or whether it contained the s 419(1) notice and the two letters that flowed from the notice being lodged with the Registrar. Second, it does not deal with the procedures in the Registrar's offices for maintaining records in relation to companies and what form recording of the dissolution of companies took. Third, it does not disclose what investigations were conducted to ascertain the contents of the records in the Registrar's office in respect of Cell F. Nor does it disclose on what factual basis Ms Pieters informed the Master that the company had not been dissolved. Fourthly, it did not address the transition between the old and new Companies Acts and whether, in the course of transferring the functions of the Registrar to the newly created CIPC, documents and records could have been thrown away, lost or misfiled. Fifthly, we were not told whether the relevant paragraph in the statement was based on investigations made in 2017 or 2018, shortly before the determination of the separated issue, or in 2007 or 2008 shortly before Ms Pieters sent her letter to the Master seeking the re-issue of her letters of appointment as

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Registrar of Companies. Presumably they would then have been filed and instructions given to publish notice of the dissolution in the Government Gazette.

liquidator. Finally, it is significant that there is no evidence that the company was treated by the Registrar, or anyone else, as anything other than dissolved, in the nearly five years that elapsed between the issue of the two certificates and Ms Pieters' letter asking for the re-issue of her letters of appointment.

[19] Counsel sought to rely on Ms Pieters' statement in the letter to the Master of 30 January 2008 as proof of non-compliance with the requirements of s 491(2). This faced two insuperable difficulties. First, the letter was not admissible as proof of the correctness of factual statements made in it. Second, the statement was a conclusion of law in respect of which no facts were furnished. It provided no support for the submission.

[20] The onus of establishing that her appointment was legally effective and gave her *locus standi* to bring this action against ABSA rested on Ms Pieters. The foundation of her re-instatement as liquidator by the Master was the proposition that Cell F had not been dissolved in terms of s 419(2) and (3) of the Act. For the reasons set out above she failed to discharge that onus.

[21] It seems to me more probable than not that the s 419(1) notice was filed in the records of the Registrar, at least once the further information about the company had been furnished by the Master on 16 September 2003. If that was the case no reason was advanced why this did not suffice as a recording of the dissolution of the company. However, I do not need to go so far. It suffices for present purposes to say that Ms Pieters did not prove on a balance of probabilities that Cell F was not dissolved. That being so she failed to establish that her reinstatement as

liquidator by the Master was lawful and vested her with *locus standi* to bring proceedings as liquidator of Cell F. On that ground alone the appeal must be dismissed. However, as I think it falls to be dismissed on the point argued before the high court, I will deal with that issue as well

If Cell F was not dissolved, was the appointment valid?

[22] The s 419(1) notice recorded that Cell F had been completely wound up. Although the s 385(1) certificate may conceivably be sent after the s 419(1) certificate,[5] in this instance they were sent at the same time. The s 385 certificate provided that the bond of security could be reduced to nil. Counsel submitted that this did not amount to consent to the cancellation of the bond of security in terms of s 385(2) of the Act. I do not agree. A bond of security reflecting nil, is no security at all. The purpose of consenting to its reduction to nil is to enable the liquidator to go to the financial institution that issued it and have it cancelled. That is what happened in the present case, as Ms Pieters submitted a fresh bond of security in order to procure her re-instatement as liquidator.

[23] What then is the legal effect of the issue of the s 419(1) and s 385(2) certificates? In *Standard Bank v The Master*[6] Nienaber JA dealt with this in the context of a contention that the winding up was complete once the liquidation and distribution account had lain for inspection and been approved, and a distribution had been made to creditors. Two aspects of the judgment are relevant. First, he said that s 385 deals with the release of the liquidator. Second, he emphasised that s 419(1) contemplates a distinction between the company being wound up and it being completely wound up. In that case it had clearly not been

[5] *Standard Bank of S A Ltd v The Master and Others* 1999 (2) SA 257 (SCA) at 265J -266I.
[6] Ibid.

completely wound up, nor had the liquidator been released under s 385. The same is not true of this case.

[24] We were referred to a judgment of the full court of the Gauteng Division[7] in which, in the context of insolvency, the court held that the trustee of an insolvent estate remained obliged to collect debts owing to the estate of the insolvent even after confirmation of the account. The case is not in point. The trustee had not been discharged from office nor had the security furnished by her been released. The estate remained vested in the trustee, whereas that is not the case with a company being wound up.

[25] In my view the issue by the Master of a certificate under s 385, permitting the liquidator to cause the bond of security to be cancelled, in conjunction with the issue of a certificate under s 419(1) that the company had been completely wound up, brought the winding up process to an end and released the liquidator from office. Assuming in favour of Ms Pieters that the company had not been dissolved and remained a company in liquidation, it was nonetheless a company in respect of which the liquidator's appointment had been terminated. If it transpired that there were further assets and this occurred between the completion of the winding up and the company's dissolution that required, at the very least, a fresh appointment of a liquidator. (I express no firm view on whether a fresh application for liquidation would be necessary, or at least the setting aside on review of the certificate under s 419(1). Prima facie, until that happened the s 419(1) certificate stood and the Master was *functus officio*.) A fresh appointment could only be made in terms of s 377(1) of the Act. That route was not followed in the present case.

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[7] *Cook NO v S J Coetzee Inc* 2012 (2) SA 616 (GNP) para 10.

[26] It is interesting, but by no means decisive, that the approach I have adopted in regard to the effect of the certificates in terms of ss 385(2) and 419(1), accords with what happened in the present case. When the possible contract was drawn to her attention, Ms Pieters did not proceed as if her appointment had never come to an end. Instead she approached the Master asking for her letters of appointment to be re-issued. The bond of security had clearly been cancelled because she proffered a fresh bond of security and the Master required her to furnish this. The Master issued new letters of appointment and certified that Ms Pieters was re-instated as liquidator of Cell F. All of this was consistent only with her having been discharged as liquidator once the company was fully wound up.

[27] As a final point in oral argument counsel submitted that, in the absence of proof that the company had been dissolved, Ms Pieters had no choice but to follow the course that she did. He submitted that an application for reinstatement of the company to the register in terms of s 420 was not open to her because she could not establish that it had been dissolved and removed from the register. The point is without merit. Accepting that there was some uncertainty as to the position, Ms Pieters was no differently situated from any other potential litigant who is faced with factual uncertainty and needs to determine the correct course of action. She could have brought an application for restoration of Cell F to the register on the footing that the company had been dissolved. In the alternative she could have asked for declaratory relief as to the proper procedure to be followed by the Master if the company had not been dissolved. I accept that there would be a notional possibility of the court saying that it could not determine either way whether the company had

been dissolved, but do not believe that a judge would reach such a commercially insensible conclusion.

Result

[28] The appeal is dismissed with costs, such costs to include the costs of two counsel where two counsel were employed.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: C Hattingh (heads of argument prepared by R Michau SC and C Hattingh)

Instructed by: Wessels and Hattingh Inc, Pietermaritzburg;
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For respondent: D van Loggerenberg SC (heads of argument prepared by W H Trengove SC and D van Loggerenberg SC)

Instructed by: Jay Mothobi Inc, Johannesburg;
EG Cooper Majiedt Inc, Bloemfontein.