THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 756/2017

In the matter between:

FRANCOIS JEAN DE VILLIERS	**FIRST APPELLANT**
CAPE VETERINARY WHOLESALERS CC	**SECOND APPELLANT**
THE TRUSTEES FOR THE TIME BEING OF THE FRANCOIS DE VILLIERS SHARE TRUST	**THIRD APPELLANT**

and

THE TRUSTEES FOR THE TIME BEING OF THE GJN TRUST	**FIRST RESPONDENT**
CAPE ANIMAL HEALTH BROKERS (PTY) LTD (IN LIQUIDATION)	**SECOND RESPONDENT**
CRAIG PHILANDER NO	**THIRD RESPONDENT**
CONSTANT WILSNACH NO	**FOURTH RESPONDENT**

Neutral citation: *De Villiers v GJN Trust* (756/2017) [2018] ZASCA 80 (31 May 2018)

Coram: Shongwe ADP and Seriti and Van der Merwe JJA and Rogers and Schippers AJJA

Heard: 16 May 2018

Delivered: 31 May 2018

Summary: Practice – order avoiding the dissolution of a company in terms of s 420 of the Companies Act 61 of 1973 – order granted in the absence of the appellants – whether the appellants were affected parties within the meaning of rule 42(1)(a) – ambit of s 420 and effect of order thereunder – appellants not affected parties and had no *locus standi* to challenge section 420 order.

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ORDER

On appeal from: Western Cape Division of the High Court, Cape Town. (Hack AJ sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Van der Merwe JA (Shongwe ADP and Seriti JA and Rogers and Schippers AJJA concurring)

[1] The first appellant, Dr Francois Jean de Villiers, is the sole member of the second appellant, Cape Veterinary Wholesalers CC (the CC) and the duly authorized trustee of the third appellant, the trustees of the Francois de Villiers Share Trust (the Share Trust). As explained below, the Share Trust is the holder of all the shares in the second respondent, Cape Animal Health Brokers (Pty) Ltd (in liquidation) (the company). At the instance of the first appellant, acting as a creditor of the company, the Western Cape Division (the High Court) issued an order of liquidation of the company. As a result the company was in due course dissolved in terms of s 419 of the Companies Act 61 of 1973 (the Act).

[2] However, the first respondent, the trustees of the GJN Trust (the GJN Trust), launched an application for an order declaring the dissolution of the company to have been void in terms of s 420 of the Act (the section 420 application). Such order was granted by Blignault J in the High Court on 19 November 2015 (the section 420 order). Pursuant hereto, the Master of the High Court appointed the third and fourth appellants (the liquidators) as joint liquidators of the company. The appellants applied to the court a quo to have the section 420 order set aside on the ground that it had erroneously been made without notice to any of them, but Hack AJ dismissed the application (the rescission application). The appellants appeal against the

dismissal of the rescission application with the leave of this court. The central issue in the appeal is whether any of the appellants should have been joined in the section 420 application. The determination of the issue calls for an analysis of the ambit of s 420 of the Act and the effect of the section 420 order.

Background

[3] Prior to the liquidation of the company, the Share Trust gave notice of cancellation of the agreement in terms of which it had acquired the shares in the company and tendered retransfer thereof to the sellers. The right of the Share Trust to cancel this agreement is disputed by the sellers and forms the subject of pending litigation. Thus, the Share Trust remained the only shareholder in the company. By the same token the first appellant continued to be its sole director.

[4] It is not disputed that, at the time of the company's liquidation and immediately prior to dissolution, the first appellant was a creditor of the company in the amount of approximately R2 million for moneys lent and advanced to the company and for payments made as surety of the company. Nor is it in issue that the company owed the CC some R4,6 million. The bulk of this amount was for goods sold and delivered to the company and the balance for loans (payments to creditors of the company) and payments as surety of the company. The company was indebted to the GJN Trust in the amount of approximately R23 000 in respect of arrear rental.

[5] The company was finally liquidated on 8 March 2013. Neither the first appellant nor the CC proved claims in the liquidation. The GJN Trust also did not prove its claim, because the erstwhile liquidators of the company alerted creditors of the danger that a contribution might be payable by concurrent creditors. In the event, only Standard Bank proved its secured claims of approximately R340 000 and concurrent claims of approximately R370 000. Further unproved concurrent creditors of the company amounted to some R308 000.

[6] The first and final liquidation and distribution account was confirmed by the Master on 11 February 2014, whereafter a dividend equal to its secured claims and a

very small concurrent dividend were distributed to Standard Bank. In the result, concurrent debts of the company of some R7,4 million remained unpaid.

[7] In terms of s 419 of the Act the Master reported that the affairs of the company had been completely wound up. Although the precise date thereof does not appear from the record, the parties are in agreement that the company was thereafter dissolved in terms of s 419(2) of the Act. Therefore, the existence of the company came to an end and the erstwhile liquidators were discharged. All remaining assets of the company became *bona vacantia* (ownerless property) and automatically passed to the state without any form of delivery. See *Rainbow Diamonds (Edms) Bpk en andere v Suid-Afrikaanse Nasionale Lewensassuransie Maatskappy* [1984] ZASCA 41; 1984 (3) SA 1 (A) at 10-12.

[8] The section 420 application was launched during November 2015. The erstwhile liquidators of the company and the Master were cited as respondents. In essence, the GJN Trust averred that, according to the financial records of the company, the CC owed the company a debt in the amount of R1 232 847. 04, but that during December 2012 that debt had been written off on the instruction of the first appellant. The GJN Trust also alleged that trading stock of the company to the value of R650 000 had, on the instruction of the first appellant at more or less the same time, been transferred first to the CC and then to another business of the first appellant. In this regard the GJN Trust presented the evidence of a person who had at the time been the manager of both the company and the CC. The GJN Trust accordingly contended that it had presented sufficient evidence to justify an order in terms of s 420 of the Act for purposes of appointment of new liquidators to investigate these matters with a view of retrieving assets for distribution to creditors.

[9] In the rescission application, the first appellant admitted that the books of the company had been altered to remove the record of a debt owed to the company by the CC, but said that that simply entailed the correction of an error in the books. He explained that the CC supplied the company with products but had retained ownership thereof until payment took place. Because the company defaulted in paying for the products, the CC repossessed the products. This, according to the first appellant, should have been accompanied by the issuing by the CC of a credit note

but instead the CC was erroneously invoiced for the products that it had repossessed.

Section 420

[10] The Act was repealed by the Companies Act 71 of 2008 (the new Act), subject to the transitional arrangements set out in Schedule 5 thereto. Item 9(1) of Schedule 5 provides that, despite the repeal of the Act, Chapter 14 thereof continues to apply to the winding-up and liquidation of companies, as if not repealed, until a date to be determined. Chapter 14 of the Act comprises ss 337-426. Section 339 of the Act provides for the application of the laws relating to insolvency in the winding-up of a company that is unable to pay its debts. Section 420 of the Act provides:

'When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.'

It bears mentioning that the provisions of s 83(4) of the new Act are substantially similar to those of s 420.

[11] In *Goodman v Suburban Estates, Ltd (in liquidation) and others* 1915 WLD 15 at 26, Mason J stated the following with reference to s 193 of the Transvaal Companies Act 31 of 1909 (a forerunner of s 420 of the Act):

'Having regard to all these matters it seems to me that the Court ought not to avoid a dissolution unless some unforeseen event such as the discovery of new assets has occurred or unless there has been some fraud or concealment practiced or unless the dissolution has become either by reason of surrounding circumstances or through some contrivance of parties the instrument of injustice.'

In *Henochsberg on the Companies Act* 5 ed (2008) vol 1 at 902, it is contended that the application of s 420 should not be limited to the grounds set out in *Goodman*. The authors submit, with reference to inter alia *Ex parte Liquidator Natal Milling Co (Pty) Ltd* 1934 NPD 312, that the court may avoid the dissolution of a company in any circumstances where the interests of justice warrant such a cause.

[12] I agree with this submission. In *Natal Milling Co* Hathorn J pointed out that in *Goodman* the court had construed s 193 of the Transvaal Act, which corresponded with s 191 of the Companies Act 46 of 1926, with reference to s 196 of the Transvaal Act. He said that s 196 of the Transvaal Act corresponded with s 199 of the 1926 Act. Both these sections dealt with companies presumed to be defunct and empowered the Registrar of Companies to strike such a company from the register, resulting in its dissolution. These sections also specified the circumstances under which a court could reverse such a striking off and dissolution. Section 193 of the Transvaal Act and s 191 of the 1926 Act, in turn, dealt with the subject matter of s 420, namely the power of a court to avoid the dissolution of a company that took place after its affairs had been wound up. These sections did not enumerate any circumstances under which the power of the court could be exercised. Hathorn J indicated persuasively that these two sets of provisions dealt with matters which had little bearing on each other and that the meaning of s 191 of the 1926 Act was clear. He declined to follow *Goodman* and concluded:

'According to my view the power of the Court to make an order declaring the dissolution to have been void is unlimited in any respect, and as the circumstances under which the section may be brought into operation are likely to vary in every case, it seems to me inadvisable to lay down any principle upon which the Court will act.'

[13] There is no reason to differentiate in this regard between s 191 of the 1926 Act and its successor, s 420. In my judgment this dictum in *Natal Milling Co* is equally applicable to s 420. I hold that s 420 provides the court with a wide discretion that defies precise definition. Paragraph 12 of the judgment in *Motala and others v Master of the High Court (North Gauteng) and others* [2013] ZASCA 185; [2014] 2 All SA 154 (SCA) should be read in this light.

[14] The effect of an order under s 420 is to revive the company and to restore the position that existed immediately prior to its dissolution. Thus the company is recreated as a company in liquidation, with the rights and obligations that existed upon its dissolution. Property of the company that passed to the state as *bona vacantia* is automatically re-vested in the company by operation of law. An order under s 420 is only retrospective in this sense and does not validate any corporate activity of the company which may have taken place during the period of its

dissolution. The effect of an order in terms of s 420 must therefore be contrasted with the effect of the reinstatement of a company in terms of s 82(4) of the new Act after its deregistration by the Companies and Intellectual Property Commission in terms of s 82(3) thereof. See *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA). The abovementioned principles appear from *Henochsberg*, above p 900(1)-902 and Blackman et al*, Commentary on the Companies Act,* Vol 3, pp 14-506 – 14-507. See also *Pieterse v Kramer* 1977 (1) SA 589 (A) at 600-601. The findings of the court a quo that the aim of s 420 is to set aside the entire liquidation process of a corporation for purposes of commencing the liquidation anew, were therefore clearly wrong. The steps taken during the prior liquidation, up to the time of dissolution, stand.

[15] Paragraph 1 of the section 420 order, as rectified by agreement in respect of the name and number of the company by the court a quo, declared the dissolution of the company to have been void. Paragraph 2 of the order provided:

'The Master is authorized and directed to appoint new liquidator(s), which liquidator(s) shall be clothed with all powers and competencies as if the company is liquidated *de novo*.' (My translation)[1]

[16] The appellants interpreted this part of the order as providing that the company was to be liquidated *de novo* and that this would entail reopening the confirmed liquidation and distribution account in terms of which distribution has already taken place. This is incorrect. First, that is not what the words of para 2 of the order convey. The paragraph does not deal with the commencement of liquidation. It deals only with the appointment and powers of a new liquidator(s). These powers shall be as if the company is liquidated *de novo*. The words 'as if' indicate that in fact there will be no *de novo* liquidation. *De novo* liquidation is only postulated to define the powers of the new liquidator(s). Second, as I have shown, the legal consequence of an order under s 420 is no more than the restoration of a dissolved company to the position existing immediately prior to its dissolution.

[1] 'Die Meester word gemagtig en beveel om nuwe likwidateur(s) aan te stel, welke likwidateur(s) met alle magte en bevoegdhede beklee sal wees asof die maatskappy *de novo* gelikwideer word.'

[17] Section 104 of the Insolvency Act 24 of 1936 provides that a creditor who has proved a claim against the estate after the confirmation of an account by the Master is excluded from the distribution under that account, but may share in the distribution under a subsequent account. In terms of s 408 of the Act the confirmation of a liquidation and distribution account by the Master '. . . shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.' Therefore, save possibly in the case of fraud, a confirmed account may only be reopened before distribution in terms thereof commences. Even then, reopening will only be ordered on grounds for *restitutio in integrum* such as *justus error* or *dolus*. See *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (AD) at 626F-G. See also *Gilbey Distillers & Vintners (Pty) Ltd & others v Morris NO* 1991 (1) SA 648 (AD) at 65G in respect of the similarly worded s 112 of the Insolvency Act. As distribution in terms of the confirmed first and final liquidation and distribution account of the company was completed during 2014, the section 420 order could not in law have the effect of reopening that account.

[18] In the light of these considerations and of the explicit purpose of the section 420 application, namely investigation aimed at distribution of assets not dealt with in that account, para 2 of the section 420 order must in my view be interpreted to mean that the liquidators shall have the powers in terms of the Act to deal with further assets of the company. It follows that further assets of the company recovered by the liquidators must be dealt with in a further liquidation and distribution account in terms of s 403 of the Act. Section 403(1)*(b)* of the Act also provides that the Master may at any time and in any case where a liquidator has funds in hand, which ought, in the opinion of the Master, to be distributed or applied towards the payment of debts, direct a liquidator in writing to frame and lodge a liquidation and distribution account within a specified period.

[19] Section 44(1) of the Insolvency Act provides for late proof of claims by creditors. In terms thereof a creditor may prove a claim after the expiry of the prescribed period, with the leave of the Master or a court and on payment of such amount as either directs to cover the costs occasioned by the late proof. Where the dissolution of a company has been avoided under s 420 for the very purpose of

distribution of further assets of the company, the Master or a court may well be persuaded to allow late proof of claims, especially when the erstwhile liquidators had discouraged proof of the claims.

[20] The phrase 'any person who appears to the Court to have an interest' in s 420, is very wide. This broad language may encompass parties who do not have a direct and substantial interest of the kind which would necessitate joinder. It certainly encompasses an unpaid creditor, including, in my view, a creditor who intends to prove a late claim under s 44(1) of the Insolvency Act. It follows that the GJN Trust had *locus standi* to bring the section 420 application.

Rule 42(1)(a)

[21] Whether the section 420 order fell to be set aside on the ground that it had been granted without notice to any of the appellants, must be determined against this background. In the rescission application the appellants relied on Uniform Rule 42(1)(a). In terms of rule 42(1)(a) a court may, upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[22] In *United Watch and Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another* 1972 (4) SA 409 (CPD), Corbett J held that in order to establish *locus standi* under rule 42(1)(a), an applicant must show a direct and substantial interest in the judgment or order that the applicant wishes to have varied or rescinded. This means a legal interest in the subject matter of the action or application which could be prejudicially affected by the order in that action or application. This judgment has been cited with approval on numerous occasions, including by this court in, inter alia, *Aquatur (Pty) Ltd v Sacks and others* 1989 (1) SA 56 (A) at 62.

[23] The application of these principles is illustrated in the judgment in *Standard General Insurance Co Ltd v Gutman NO and others* 1981 (2) SA 426 (C). There the owner of a business entered into an agreement with the applicant insurance company in terms of which the property of the business was inter alia insured against destruction by fire. After the owner had sold the business, a fire destroyed certain property covered by the insurance policy. The owner submitted a claim in

terms of the policy, but the claim was repudiated on the ground that, because of the sale of the business, the owner no longer had an insurable interest in the property destroyed. Thereafter the estate of the owner was sequestrated. The trustee of the owner sued the purchaser of the business for an order declaring the sale of the business void and for the return of all the assets of the business and obtained such an order by default. The trustee then sued the applicant for indemnification under the policy. The applicant applied to have the default judgment rescinded in terms of the rule 42(1). The applicant contended that the sale was erroneously found to have been void and that the default judgment had deprived the applicant of its defence of absence of an insurable interest.

[24] The court accepted for purposes of argument that the effect of the sale of the business had been to eliminate the owner's insurable interest. However, the court held that the applicant had no *locus standi* in terms of rule 42(1). It accepted that the applicant's rights might have been affected by the order in the sense that it had deprived the applicant of a defence against the action of the trustee. It held, however, that this constituted a mere indirect financial interest in the subject matter of the litigation between the trustee and the purchaser.

[25] In the rescission application the appellants averred that the section 420 order adversely affected their interests in that they were not afforded the opportunity to respond to the serious allegations of impropriety that had been made in the section 420 application. This misses the point. Although the purpose of the section 420 application was to enable the liquidators to claim from the appellants, the subject matter of that application was the restoration of the dissolved company to a company in liquidation and not the enforceability of the alleged claims against the appellants. The prosecution of these claims will no doubt take place by due process, during which the appellants will be afforded the full opportunity to protect their rights. In his replying affidavit in the rescission application, the first appellant in fact declared that he had no reason to seek protection from investigation by the liquidators. Thus, no legal interests of the appellants were adversely affected by the section 420 order.

[26] For the sake of completeness it should be mentioned that, as unproved creditors, the first appellant and the CC also had no legal interest in the section 420

order. The rights of unproved creditors could clearly not be adversely affected by the revival of the company to a company in liquidation. The same must apply to the mere fact that the section 420 order restored the first appellant and the CC as the director and shareholder respectively of the company in liquidation. In this regard it will be recalled that the stance of the Share Trust is that it cancelled the sale agreement in respect of the shares. The first appellant's directorship is inextricably linked to the shareholding of the Share Trust.

[27] The appellants obliquely also relied in the rescission application on the common law. However, as explained in Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa* 5 ed (2009) at 929, rule 42 is for the most part a reinstatement of the common law and must be interpreted in the context of the common law principles of finality of judgments in the interests of certainty. This leaves no room for rescission of a judgment at the instance of a person who was not a necessary party to the litigation concerned. In the result I hold that the appellants had no *locus standi* to challenge the section 420 order.

[28] As a last resort, the appellants contended that the state, represented by the Minister of Finance, should have been joined in the section 420 application on the basis that the section 420 order deprived the state of the assets of the company (including the alleged claims against the appellants) that had passed to it on the dissolution of the company. I accept that in principle this is correct. But as the appellants have no *locus standi* to challenge the section 420 order, the section 420 application is not before this court. This is not a case such as *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), where both parties before the court desired it to deal with the merits of the matter in the absence of a necessary party thereto.

[29] For these reasons the appeal must fail. The following order is issued:
The appeal is dismissed with costs.

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellants:	L M Olivier SC (Heads of Argument prepared by P S Bothma) Instructed by: Terblance Slabber Pieters Inc, Malmesbury Hill McHardy & Herbst, Bloemfontein
For Respondents:	A J R van Rhyn SC Instructed by: Lamprecht Attorneys, Stellenbosch Symington & De Kok, Bloemfontein