SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 901/2017

In the matter between:

GCC ENGINEERING (PTY) LTD	**FIRST APPELLANT**
GERT LOUWRENS STEYN DE WET NO	**SECOND APPELLANT**
FRANS LANGFORD NO	**THIRD APPELLANT**
KGASHANE CHRISTOPHER MONYELA NO	**FOURTH APPELLANT**
ECSPONENT INVESTMENT HOLDINGS (PTY) LTD	**FIFTH APPELLANT**
MASTER OF THE HIGH COURT	**SIXTH APPELLANT**

and

LAWRENCE MAROOS	**FIRST RESPONDENT**
ZETABOA TRADING	**SECOND RESPONDENT**
ALL OTHER APPLICANTS AS SET OUT IN THE NOTICE OF MOTION IN THE MAIN APPLICATION	**THIRD TO SIXTY-FIRST RESPONDENT**
GCC ENGINEERING (PTY) LTD	**SIXTY SECOND RESPONDENT**
MAHOMED YASEEN CAMISA NO	**SIXTY THIRD RESPONDENT**

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISION	**SIXTY FOURTH RESPONDENT**

Neutral citation: *GCC Engineering & others v Lawrence Maroos & others,* (901/2017) [2018] ZASCA 178 (3 December 2018)

Coram: Cachalia, Seriti, Molemela, and Schippers JJA and Mothle AJA

Heard: 16 November 2018

Delivered: 3 December 2018

Summary: Interpretation of s 131(6) of the Companies Act 71 of 2008 - application for business rescue proceedings does not terminate the office of provisional liquidators nor does it result in the assets and management of the company in liquidation re-vesting in the directors of the company in provisional liquidation.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J sitting as court of first instance):

1 The appeal is upheld.

2 The first and second respondents are ordered to pay the costs of this appeal on an attorney and client scale including the costs of two counsel where so employed, jointly and severally, the one paying the other to be absolved.

3 Paragraphs 2 to 6 of the order of the court a quo are set aside and substituted with the following:

'(a) The application is dismissed.

(b) The first and second applicants are ordered to pay the costs of the application, and the costs of the counter-application, jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Seriti JA (Cachalia, Molemela and Schippers JJA and Mothle AJA):

[1] This is an appeal against the judgment and some of the orders granted by the Gauteng Division of the High Court, Pretoria (per Fabricius J) on 15 June 2017 at the instance of the first, second and third to sixty first respondents herein.

[2] The first to fourth appellants were granted leave to appeal to this court by the court a quo. The fifth and sixth appellants were not parties to the proceedings in the court a quo. After the judgment of the court a quo,

the fifth respondent launched an application to intervene as a respondent in the court a quo and as a co-appellant. On 2 August 2017 the court a quo granted the fifth appellant leave to intervene and leave to appeal. The sixth appellant was granted leave to intervene in the appeal by this court.

[3] The relevant parts of the order made by the court a quo read as follows:

'2. Mr E Naude is appointed as manager of the First Respondent with the powers and capacity of a director of First Respondent, to manage its business affairs from date hereof until date of finalization of the business rescue application for the business rescue of First Respondent, currently pending.

3. The said Mr E Naude is to provide security to the satisfaction of the Master of the High court for the proper performance of his duties.

4. He may not dispose of any assets of First Respondent without the written consent of this Court.

5. Mr E Naude is ordered to provide the Court hearing the business rescue application with a full report of his management of the company, and with specific detail as to the possibility of the First Respondent being rescued as a result of business rescue proceedings.

6. The costs of this application shall be costs in the business rescue proceedings.'

Factual background

[4] The first respondent was the director and the sole shareholder of the first appellant. The first appellant was established in 1994, initially as a close corporation and during 2012 it was converted into a company with limited liability. In 2013 the company experienced serious financial problems. In 2016 after realising that the business was ailing and would not survive, due to its financial difficulties, a business rescue application was launched and an order was granted. The first appellant herein was subsequently placed in business rescue and Mr Gerhard Vosloo was appointed as the provisional business rescue practitioner.

[5] On 6 April 2017 Mr Vosloo launched an application wherein he sought an order that the business rescue proceedings with regard to the first appellant be terminated and that the first appellant be placed under liquidation in terms of s 141(2)*(a)*(ii) of the Companies Act 71 of 2008 (the Act). In his founding affidavit in support of his application, Mr Vosloo stated that the proceedings should be terminated as there was no longer a reasonable prospect that the first respondent would be rescued. On 3 May 2017 an order placing the first appellant under a provisional winding-up order in the hands of the Master of the High Court was granted. On 15 May 2017 the Master appointed the provisional joint liquidators, who after their powers were extended, as contemplated in s 386(4)*(f)* of the Companies Act 61 of 1973 (the 1973 Act), suspended the company's business for operational reasons on 18 May 2017.

[6] On 30 May 2017 the first respondent served and filed an urgent application. In the said proceedings he sought an order and the relevant parts thereof read as follows:

'2 That Mr Etienne Naude be appointed as manager of the first respondent, with full powers and capacity of a board of directors of a company, to manage the first respondent from date hereof until date of finalization of a business rescue application for the business rescue of the first respondent currently pending.

3. That Mr Etienne Naude be ordered to provide the court hearing the business rescue application with a full report of his management of the company over the interim period, with specific reference to the possibility of the first respondent being rescued as a result of business rescue proceeding.'

[7] On 6 June 2017 the first to fourth appellants served and filed a counter-application. In the counter-application they sought an order that their powers as provisional joint liquidators be extended to the extent that they be authorised in terms of s 386(4)*(a)* of the 1973 Act to oppose the

application instituted by the applicants in the court a quo. Furthermore they sought an order authorising them as provisional joint liquidators, on behalf of the company in liquidation, to oppose the application launched by the applicants.

[8] On 15 June 2017 the court a quo granted the appellants an order authorising them to oppose the application and to sign and file all necessary affidavits. The court a quo further granted the orders mentioned in paragraph 3 above. It reasoned that since liquidation proceedings that have already commenced are suspended by an application for business rescue in terms of s 131(6) of the Act, the powers of the liquidators are suspended and control of the assets of the company 'falls under the Master in accordance with the provisions of s 131(2)'. If the particular company trades, and the powers of the liquidators are suspended, so the court held, the Master cannot assume the powers of the previous directors, which then 'are re-vested with the particular directors to control and manage the company pending determination of the pending business rescue application'.

[9] The main issues to be considered in this appeal are the following:

(a) Whether the appointment and the powers of the duly appointed provisional joint liquidators are suspended in terms of s 131(6) of the Act 71 of 2008.

(b) Whether the control and management of the property of a company already placed in liquidation by a court order, can validly and legally be re-vested in the director of that company.

(c) Whether the Master has any role to play in business rescue proceedings.

[10] Section 131(6) of the Act reads as follows:

'If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-

(a) the court has adjudicated upon the application; or
(b) the business rescue proceedings end, if the court makes the order applied for.'

[11] The functions of a provisional liquidator are essentially to take physical control and to manage the administration of the property and affairs of the company pending the appointment of a liquidator. In *Jansen van Rensburg NO & another v Cardio-Fitness Properties (Pty) Ltd & others* [2014] JOL 31979 (GSJ) para 43 Kgomo J, correctly, remarked that the responsibilities of the provisional liquidators are essentially to take physical control of and to superintend the administration of the insolvent company's property and affairs pending the appointment of a permanent liquidator. At paragraph 58 the learned Judge stated that s 131(6) of the Act does not affect the appointment of provisional liquidators.

[12] In *Knipe & another v Noordman NO & others* 2015 (4) SA 338 (NCK) the court also dealt with the effect of s 131(6). At paragraph 24 Mamosebo AJ said that the legislature did not intend to create a situation where the provisional liquidators would be disempowered to carry out their function. The learned Judge further said that the provisional liquidators cannot be hamstrung by the business rescue application.

[13] It is not the responsibility of the provisional liquidators to wind up the company, although under certain circumstances a provisional liquidator can, in terms of s 386(4)(*f*) request the Master or the court to extend their powers.

[14] In *Richter v ABSA Bank Ltd* [2015] ZASCA 100; 2015 (5) SA 57 (SCA) para 18, Dambuza AJA said:

'[F]or these reasons a proper interpretation of "liquidation proceedings" in relation to s 131(6) of the Act must include proceedings that occur after a winding-up order to liquidate the assets and account to creditors up to deregistration of a company.'

[15] Section 131(6) of the Act does not change the status of the company in liquidation nor does it suspend the court order that placed the company under liquidation in the hands of the Master in terms of s 141(2)*(a)*(ii) of the Act. The appointed provisional joint liquidators must proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company.

[16] Successful liquidation proceedings constitute a complete process by which a company is brought to an end and the liquidation process culminates in the dissolution of the company up to its deregistration (*See Richter* v *ABSA Bank* at 60D).

[17] In terms s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors.

[18] In *Rentekor (Pty) Ltd & others v Rheeder and Berman NNO & others* 1988 (4) SA 469 (T), the court granted a winding-up order. Some of the respondents were granted leave to appeal to the full court and when

granting leave to appeal, the court, directed that rule 49(11) of the Uniform Rules was applicable. The effect thereof was that the operation of the winding up order was suspended. In his judgment Kriegler J at 504G said that '[t]he liquidator's appointment and their powers and duties were suspended, as were all the other consequences of winding-up. Suspended means lifted, removed but subject to future reimposition'. The facts of that case are distinguishable. In the present matter, the winding-up order still stands. There is no appeal pending against the winding-up order.

[19] I find that the appointment, office and powers of the provisional liquidators are not suspended. In s 131(6) the legislature used the word 'suspend' and which not mean termination of the office of the liquidator. In my view the term 'liquidation proceeding' refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution. What is suspended is the process of winding-up and not the legal consequences of a winding-up order.

[20] The next question is whether the control and management of the company already placed in winding-up by the court order, can validly be re-vested in the director of that company. Section 361(1) and (2) of the 1973 Act read as follows:

'1. In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.

2. In any winding-up of any company, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.'

[21] In *Secretary for Customs and Excise v Millman NO* 1975 (3) SA 544

(A) at 552H, Botha JA said '[u]pon the compulsory winding-up of a company its directors cease to function as such . . . and they are, therefore, deprived of their control on behalf of the company of the property of the company which is then deemed to be in the custody or control of the Master or liquidator'. As stated earlier the order placing the company under winding up is still in place and has not been set aside. On the granting of the winding-up order, the directors of the company cease to function as directors and the property of the company falls under the control of the Master or the appointed liquidators. The directors of the company in liquidation have been stripped of their control and management of the company placed in winding-up by the court. There is no legal provision either statutory or at common law that sanctions the re-vesting of control and management of the company in liquidation to the director of the said company.

[22] The other question that needs attention is whether the Master has any role to play in business rescue proceedings. As stated earlier the sixth appellant was not a party to the proceedings in the court a quo. In their notice of motion in the court a quo the applicant never sought any order which had any impact or effect on the sixth appellant. In their founding and replying affidavits the applicants did not set out any facts which justified the granting of an order requiring the sixth appellant to perform any functions or duties. The sixth appellant, (the Master) has a direct and substantial interest in the order granted by the court a quo. In *Molusi & others v Voges NO & others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 28, Nkabinde J said '[t]he purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone'. The court a quo granted an order which was not sought by any of the parties and consequently denied the sixth

appellant an opportunity to be head prior to the granting of an order under consideration.

[23] The order of the court a quo required the sixth appellant to hold security for the performance of the duties by a manager having the same powers as a board of directors in a company. It also required the sixth appellant to monitor the utilisation or disposal of the assets of the company by the manager appointed by the court. The sixth appellant is a creature of statute and may perform only those duties and functions empowered by the enabling legislation. The sixth appellant exercises control and supervision over the winding-up, liquidation and sequestration processes, including rehabilitation of the insolvent and the deregistration of the company. The Master has no powers to deal with a 'manager' appointed by the court or the business rescue practitioner. The appointment of the 'manager' by the court a quo falls outside the scope of the winding-up, liquidation and sequestration processes. There is also no statutory provisions that permits the appointment of a 'manager' in these circumstances. Consequently paragraph 3 of the court a quo's order was incorrect.

[24] The respondents were not represented in this appeal nor did they serve a notice to abide. On 11 October 2018, on instruction of the presiding judge, the Chief Registrar of this court sent a letter to the respondents attorneys asking them to indicate promptly whether they were opposing the appeal and if so to file the heads of argument immediately. By way of correspondence dated 25 October 2018, addressed to the parties, the Chief Registrar advised the parties that the respondent must indicate to the court what they intend to do, failing which an adverse cost order might be made against them. The respondents failed to advise the court about their attitude to the appeal despite the correspondence dispatched to them by the Chief

Registrar. In my view this court must express its disapproval with the respondents' conduct. The respondents failed to indicate to this court their attitude to the appeal. The conduct of the respondents in this respect is unacceptable.

[25] As a result of the failure of the respondents to participate in this appeal, at the request of the presiding Judge, Mr L M Spiller prepared heads of argument and appeared as amicus curiae. His assistance is appreciated.

[26] For the reasons mentioned here above I make the following order.

1 The appeal is upheld.

2 The first and second respondents are ordered to pay the costs of this appeal on an attorney and client scale including the costs of two counsel where so employed, jointly and severally, the one paying the other to be absolved.

3 Paragraphs 2 to 6 of the order of the court a quo are set aside and substituted with the following:

'(a) The application is dismissed.

(b) The first and second applicants are ordered to pay the costs of the application, and the costs of the counter-application, jointly and severally, the one paying the other to be absolved.'

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LW SERITI

JUDGE OF APPEAL

APPEARANCES

For the 1st to 4th Appellants:	P A Swanepoel
	C A Boonzaaier
	Serfontein Viljoen & Swart, Pretoria
	Van Der Beg Van vuuren Attorneys, Bloemfontein
For the 5th Appellant:	J Hershensohn
	Lewies Attorneys, Pretoria
	Z Bezuidenhouts Inc, Bloemfontein
For the 6th Appellant:	ZZ Matebese SC
	A Gxogxa
	State Attorney, Pretoria
	State Attorney, Bloemfontein
Amicus Curiae	L M Spiller
For the Respondent:	
Instructed by 1st and 2nd Respondents:	Prinsloo Bekker Attorneys,
	Pretoria
	Symington & De Kok,
	Bloemfontein
Instructed by the 3rd to 61st Respondent:	Lucienne Murray Attorneys, Pretoria