

SOUTH AFRICA / JUDGMENT

Klass v Contract Interiors CC (in liquidation) and Others (08/31973) [2009] ZAGPHC 35 (23 February 2009) [2009] ZAGPHC 35

COURT
High Courts - Gauteng

BEFORE
Levenberg

CASE / FILE NUMBER
08/31973

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IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)
Case no: 08/31973

In the matter between: KCLASS, BRIAN DAVID Applicant
 and
 CONTRACT INTERIORS CC (IN LIQUIDATION) 1st
 Respondent
 WATNEY, LYNNE MOUNTFORD 2nd Respondent
 THE REGISTRAR OF CLOSE CORPORATIONS 3rd
 Respondent

JUDGMENT

I. INTRODUCTION

This is an application to set aside the winding-up of the First Respondent (“the corporation”) and to discharge it from liquidation, in terms of section 354 of the Companies Act 61 of 1973 (“the Companies Act”), read with section 66 of the Close Corporation Act 69 of 1984 (“the Close Corporation Act”).

All of the creditors of the corporation (including SARS) and the members have been paid and the liquidator supports the application

for relief.

The Applicant (“Klass”) is a member of the corporation, with a 30% members interest. The Second Respondent (“Watney”)

is Klass’ ex-wife. She holds a 70% members interest in the corporation.

The corporation was placed in liquidation at the instance of Klass because he claimed that, as a result of the breakdown in the

matrimonial relationship with Watney, Watney had conducted herself in a manner which was unfairly prejudicial and oppressive to him as a minority member. In that application, Klass sought an order compelling Watney to purchase his members interest at a fair market value, alternatively that the company be placed in liquidation.

Ultimately, as part of the divorce settlement between the parties, a final winding-up order was granted with Watney’s consent.

Accordingly, there has been no finding that Klass’ allegations that Watney behaved in a manner that was unfairly prejudicial to him were justified.

The corporation was solvent at the time of its winding-up as is demonstrated by the fact that it is now common cause that all of its creditors have been paid off.

II. SUMMARY OF THE FACTS

A. The Divorce

Klass and Watney were not only husband and wife. They were also business partners. They held interests in a number of companies and close corporations in various proportions and were actively engaged in those companies and close corporations.

Included among their business interests were their respective shares in the corporation.

During March 1999, Klass and Watney agreed that their marriage relationship had irretrievably broken down and that they should

divorce. Klass subsequently instituted action in this Court for divorce as well as a distribution of the assets of the estate in terms of section 7(3) of the Divorce Act 70 of 1979. Watney defended the divorce and counterclaimed for an order of distribution.

As a result of the breakdown in the parties’ personal relationship, there was a breakdown in their business relationship,

giving rise to various commercial disputes.

Klass launched the application to wind up the corporation on 23 March 2001 under case number 2001/7019 (“the liquidation

application”). Although the precise nature and basis of this application is not set out in the founding papers, I infer from the nature of the allegations made against Watney that the application for liquidation was based on the “just and equitable” ground set forth in section 68 of the Close Corporations Act.

While the liquidation application was pending, the Court presiding over the divorce action appointed two referees to determine the value of the parties’ assets, including the fair market value of the parties’ shareholdings in the corporation. On 31 October 2001, the referees valued Klass 30% interest in the corporation at R1 999 960.

B. The Divorce Settlement

On 26 April 2002, the parties entered into a written divorce settlement (“the first settlement agreement”).

The following provisions of the first settlement agreement are relevant to the present application:

[15.1] Clause 4 provides:

“4.1 Contract Interiors will be placed in final liquidation, with immediate effect, and more specifically by requesting the above Honourable Court to grant a liquidation order under case number 01/7019.

4.2 The Plaintiff and the Defendant will each one nominate a liquidator. However it is immaterial for purposes of this settlement whether one or both of the persons so nominated be appointed or not.”

[15.2] Clause 10 provides:

“It is recorded that the Plaintiff and the Defendant intend to proceed, or are considering whether to proceed, with enquiries in terms of the Companies Act and/or Close Corporations Act and/or Insolvency Act pertaining to the various entities and that nothing which is contained in this agreement, will either limit or restrict the Plaintiff or Defendant to do so, or to contend that the plaintiff/defendant is either indebted to the Plaintiff/Defendant and/or the entities.”

Clause 14 provides:

“The provisions of this agreement shall not be capable of being varied (save by a Court of competent jurisdiction), amended, added to, supplemented, novated or cancelled unless this is contained in writing and signed by both parties.”

Pursuant to the first settlement agreement, a final award liquidating the corporation was granted on 3 May 2002.

C. The Second Settlement Agreement

Unfortunately, the divorce settlement did not bring the parties’ disputes to an end. Acrimonious litigation between the parties continued appertaining to their various interests, including the corporation.

During May 2002, Klass, acting through a company of which he was the sole shareholder and managing director, applied to hold an insolvency enquiry into the corporation's affairs.

Klass alleges that:

"The main motivation to hold an enquiry into the affairs of Contract Interiors was to find out what the second respondent had done to the assets and business of Contract Interiors, more particularly if those assets had been unlawfully dealt with. Any recovery by Contract Interiors from the second respondent would benefit the creditors of Contract Interiors."

A retired Magistrate was appointed to conduct the enquiry. But the enquiry did not proceed as a result of a point in limine taken by Watney.

Watney states in her answering affidavit in this application that:

"23.2 Irrespective thereof, in view of the fact that I wanted to avoid any further acrimony with the Applicant and to continue with Contract Interiors as a going concern, retain its key staff, clients and goodwill, I did approach the Applicant, following which [the second settlement agreement] was concluded. In this regard, subsequent to the liquidation of Contract Interiors, I agreed

with the liquidators that notwithstanding the liquidation, several outstanding interior design and interior construction contracts would be completed to enable the liquidators to collect the outstanding debtors and this did in fact take place from the date of liquidation (3 May 2002) until October 2002. The goodwill of Contract Interiors was thereby preserved in the eyes of its customers."

The second settlement agreement ("the second settlement agreement") referred to in the previous paragraphs was concluded on 14 August 2002 between Klass and Watney. The material terms of the second settlement agreement were as follows:

"2. LYNNE and BRIAN wish to vary the Agreement of Settlement [i.e. the first settlement agreement] as set out hereunder and to record the subsequent agreement reached between them in regard to their affairs.

3. VARIATION OF AGREEMENT OF SETTLEMENT

This agreement is hereby varied as follows:

3.1 CONTRACT INTERIORS CC

It is recorded that:

3.1.1 LYNNE and BRIAN wish to apply to discharge the liquidation order granted by the High Court of South Africa (Witwatersrand Local Division) on the 3rd May 2001 and agree jointly to do all things necessary for this purpose. The costs of this application shall be paid equally by LYNN and BRIAN in equal shares.

...

3.2 It is also recorded that:

3.2.2 Upon the discharge of Contract Interiors CC from liquidation:

3.2.2.1 LYNNE shall purchase BRIAN's interest in Contract Interiors for the sum of R2,000,000.00 which shall be paid by LYNNE to BRIAN within thirty days of the payment by the purchaser in respect of the Stara sale referred to in paragraph 3.3.2 below, or

the 28th February 2003 whichever occurs first. The effective date of the purchase by LYNNE of BRIAN's interest shall be the date of the order discharging the liquidation of Contract Interiors CC.

8. Paragraph 10 of the Agreement of Settlement shall be regarded as pro non scripto.

9. LYNNE and BRIAN record that save for the variations to this agreement as set out above, the remaining provisions of the Agreement of Settlement of 26th April 2002 shall remain unaltered and of full force and effect.

10. FULL AND FINAL SETTLEMENT

Save as is recorded in this agreement and in the provisions of the agreement of settlement which remain unaltered, neither party shall have any further claim against the other arising out of their previous relationship with each other whether as spouses, members, shareholders, directors or otherwise."

The second settlement agreement also contained other provisions appertaining to the disposition of the parties' mutual interests in various enterprises which are not relevant for the purposes of this application. The provisions of the second settlement agreement insofar as they relate to the parties' interests (other than their interests in the corporation) were subsequently given effect to.

D. The First Application for Discharge

The corporation was not thereafter discharged from liquidation. Nevertheless, on 3 April 2003, Klass (through his attorneys) demanded

payment of the sum of R2 million together with interest from 18 January 2003.

Watney's attorneys responded on 4 April 2003. They took the position that Watney was not obliged to make any payment as it was a precondition to payment that the corporation be discharged from liquidation. Watney's attorneys stated:

"Our client is of the view that until Contract Interiors is discharged from liquidation she is not obliged to pay your client the sum of R2 Million, or any amount at all."

It is interesting to note that in that letter Watney did not contend, as she now does, that her obligation under the second settlement

agreement to pay the sum of R2 million would fall away if there was undue delay in the granting of a discharge, resulting in the corporation no longer having a "going concern value".

On 25 June 2003, Klass' newly appointed attorneys, Bell Dewar & Hall ("Bell Dewar") addressed a further demand to Watney's attorneys to apply for the discharge of the close corporation from liquidation. Watney's attorney responded on 3 July 2003 that she did not intend to apply for the discharge of the liquidation order and that there was no obligation on her to do so.

In the result, on 27 November 2003, Klass launched an application ("the first discharge application") for discharge of the company for liquidation. Watney was joined as a respondent in that application.

The first discharge application was not opposed by the liquidators or by any creditor. It was opposed only by Watney on the basis that adequate provision had not been made for SARS' claim.

The matter came before Grobler AJ, who dismissed the application because he concluded that adequate provision had not been made for payment of SARS' claim.

It is common cause that SARS' claim has since been settled and that there are no longer any other actual or potential creditors'

claims outstanding against the corporation.

In the answering affidavit, Watney contended that the judgment of Grobler AJ was res judicata and therefore had the effect of precluding Klass from making the present application. I do not think that this is a valid contention, as the impediment to discharge (i.e. the SARS claim, which resulted in the refusal of the previous application) has since been settled.

In any event, Watney's counsel very properly conceded that the res judicata defence was not good in law. Accordingly, Watney abandoned it.

E. The Present Application

Other disputes ensued between Klass and Watney concerning their respective claims against the corporation. These disputes have now been settled.

All of the proved claims against the corporation have now been discharged. In addition, the liquidator has refunded amounts to

Klass and Watney by way of a surplus on their members' interests.

On 20 May 2008, the liquidators' second account was confirmed. All creditors' claims against the corporation have now been discharged and the liquidators' fees have been paid.

On 18 June 2008, Klass' attorneys again called upon Watney to assist in making a further application to discharge the company from liquidation. Watney did not accede to the request.

Klass then launched the present application on 19 September 2008.

This application is brought with the support of the sole remaining liquidator of the corporation.

II. THE BASIS OF WATNEY'S OPPOSITION

Having abandoned the res judicata defence, Watney's counsel, advanced two main grounds for his client's opposition to the discharge application.

First, he contended that Klass had failed to "establish any grounds for the relief claimed apart from the provisions of [the second settlement] agreement."

In paragraph 11 of his heads of argument, counsel for Watney submitted:

"Indeed the applicant makes it clear that all the creditors have been paid in full and the liquidator has been paid in full. In regard to the members, they had been paid insolvency dividends in respect of the member's interests. In the circumstances none of the categories of interested persons, namely the creditors, the liquidator and the members have any direct interest in the winding up proceedings."

Second, Watney contended that clauses 3.1.1 and 3.2.2.1 of the second settlement agreement were ineluctably intertwined. Watney's

obligation to cooperate and assist in the application for liquidation was dependent upon her obligation to pay the sum of R2 million

in terms of clause 3.2.2.1 upon discharge of the company from liquidation.

Watney further contended that her undertaking to pay the sum of R2 million was premised upon the assumption that the business of the corporation would have a "going concern value" as at the date of discharge from liquidation. As the business allegedly no longer has any going concern value, there is no obligation to pay the R2 million. There is also no obligation to cooperate in applying for a discharge from winding-up.

During the course of argument, Watneys' counsel also contended that a tacit term to this effect should be read into the agreement.

However, Watney's counsel declined an invitation from the Bench to formulate that tacit term. He conceded that the tacit term was not formulated in the answering affidavit, except in very general terms in paragraph 24.3 as follows:

"24.3 I respectfully point out that there is a glaring omission from [the second settlement agreement], namely that [the corporation] would have to be discharged from liquidation within a very short period of time, a few months at most, to enable me to retain its goodwill and in particular the customer connections. Otherwise there would have been no reason whatsoever for me to have committed myself to acquire the Applicant's Membership interest for R2 million. The parties' intention was that Contract Interiors would be taken out of liquidation by 28th February 2003 at the latest. This is bourn [sic] out by line 15 on page 3 of [the second settlement agreement]."

[emphasis added].

This formulation of the parties' intention falls short of the precision required by our law for the formulation of a tacit term¹.

III. ANALYSIS OF SECTION 354 AND THE PRINCIPLES APPLICABLE TO IT

Section 354 of the Companies Act provides:

“354. Court may stay or set aside winding-up –

- (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions

as to the Court may deem meet.

- (2) The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.”

In *Ward & Another v Smit & Others: In Re Gurr v Zambia Airways Corporation Limited* 1998 (3) SA 175 (SCA) 180H Scott JA held:

“The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events.”

The meaning of the section was analysed extensively by Gautschi AJ in *Storti v Nugent & Others* 2001 (3) SA 783 (W). The primary issue before the learned judge in that matter concerned whether an applicant could avail itself of the section where it was being invoked for the rescission of a winding-up order on the basis that it should not have been granted in the first place. That is not the issue in this application.

Although reported after *Ward*, the judgment in *Storti* was delivered before the judgment in *Ward*'s case was reported. Accordingly, *Storti*, without reference to *Ward*, held that section 354 was not available to obtain what was in effect a rescission of the winding-up order on the basis that it should never have been granted in the first place. Although that part of the decision has been eclipsed by *Ward*, *Storti* serves as further confirmation that recourse to section 354 is available where the discharge is sought as a result of supervening events.

Storti contains a useful history of the legislation as well as a catalogue of foreign cases that have been concerned with the issue.

As appears from the learned judge's analysis in *Storti*, the original English legislation on which ours is modelled contemplated an application by a creditor to “stay” a winding-up proceeding. At page 793I, the learned judge states:

“The above history of s354(1) reveals that it was originally and still is used in England to provide the Court with the power to stay proceedings, but has been broadened in its wording in South Africa to include the setting aside of proceedings. But for that distinction (which I shall explain presently), the basic wording and purpose seem to have remained much the same in England and South Africa for almost a century and a half.”

Accordingly, English cases dealing with the concept of a stay of winding-up proceedings are relevant in interpreting the nature and ambit of the Court's discretion in deciding an application to set aside a winding-up under section 354 of our Companies Act.

Goodman v Suburban Estates Limited (In Liquidation) and Others 1915 WLD 15 was concerned with an application to "set aside a dissolution" under section 193 of the Companies Act of 1909. At p25 - 26, Mason J held:

"Sec. 193 empowers the Court to set aside a dissolution without enumerating any circumstances as a guide to its actions ...

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 the parties the instrument of injustice. Nor do I think this extraordinary relief should be afforded to an applicant, who has acquiesced in the action which he complains of, or has been guilty of laches in invoking the assistance of the Court."

In Ex Parte Liquidator Natal Milling Co (Pty) Ltd 1934 NPD 312, the Court considered an application declaring a liquidation void under section 191(1) of the Companies Act of 1926 which read as

follows:

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

Commenting on the section, the Court held:

"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."

The effect of Goodman's case (supra), on the other hand is that the Court ought not to avoid a dissolution unless some unforeseen event, such as the discovery of new assets, has occurred or there has been some fraud or concealment practiced or unless the dissolution has become, either by reason of surrounding circumstances or some contrivance of the parties, the instrument of injustice. But in coming to that conclusion the Court construed section 193 of the Transvaal Act, which corresponds to section 191, by reference to section 196 which corresponds to section 199. In my opinion, the two sections deal with matters which have little bearing on each other, and, as the meaning of section 191 is clear, I think it is safer to hold as I have already done that the power

of the Court under section 191 is unlimited. Each case I think, should be decided on its merits.

In the present case as all the creditors have been paid and the application is supported by all the shareholders and the liquidator and the avoidance of the dissolution will be an advantage to the shareholders, I see no reason why the Court should not allow them to carry through the transaction in the form which suits them best. No-one can suffer any prejudice.”

In Ward, the application under section 354 of the Companies Act was made based upon circumstances that existed at the time of a winding-up. The Court held that in the case before it “exceptional circumstances” had to be disclosed in order to grant a discharge of a winding-up order which was in effect a rescission.

It is implicit in the approach of the Supreme Court of Appeal in the Ward case that the discretion of a Court to set aside a winding-up as a result of subsequent events is much wider. This approach appears to accord more with the Natal Milling case than Goodman’s case.

In *In Re Telescriptor Syndicate Limited* (1903) 2 CA 174, 180 Buckley J held:

*“Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *In Re Hester* (1) some trenchant observations of Fry LJ will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country.”*

Accordingly, based upon “commercial morality” and the interests of the public at large, the Telescriptor Court refused to grant a stay of a winding-up proceeding. In this case we are dealing with the converse – i.e. whether a Court should consider “commercial morality” and “the interests of the public at large” in granting an application to set aside a winding-up order under section 354. I can see no difference in principle between these two situations.

In *Ex Parte Chenille Corporation of SA (Pty) Ltd & Another: In Re Chenille Industries (Pty) Ltd* 1962 (4) SA 459 (T), Trollip J considered whether he could sanction a compromise under section 103 of Act 46 of 1926 (the predecessor to section 311 of the current Companies Act) where it appeared that the directors or others associated with the company might have done a wrong to the company. At page 464 Trollip J held:

*“The contention was that the Court has a discretion under sec 103, which it should not exercise in favour of the compromise, when that will result in Street escaping prosecution for his wrong-doing. This is indeed a strange and unusual ground of opposition, but as it was earnestly urged by counsel it must be seriously considered. In support of his contention, Mr Preiss relied upon in *In Re Telescriptor Syndicate Ltd* (1903) 2 CH.174, as interpreted by *Mohomed v Kazi’s Agencies (Pty) Ltd* 1949 (1) SA 1162 (N). In the former case Buckley, J, had to decide whether it had been proved to his satisfaction that the winding-up proceedings of a public company ‘ought to be stayed’ under the section of the English*

Companies Act corresponding to our sec 120(1) where all the creditors and most of the shareholders had consented to such a stay. He applied the principle that (p180)

“the Court refuses to act upon the mere ascent to the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but whether it is conducive or detrimental to commercial morality and to the interests of the public at large”,

and refused to stay the proceedings. Insofar as it is relevant to the present enquiry, it appeared that, in that case, certain of the directors had prima facie committed breaches of duty towards the company by receiving bonus shares and secret profits, for

which the official receiver might have been able to recover compensation from them, which would have augmented the funds of the

company available for distribution for creditors and shareholders. The Court refused to stay the winding-up proceedings in order to enable the official receiver, who had opposed the application to investigate such claims, because ‘commercial morality’

and ‘public interest’ demanded that if the directors had done wrong, they should be made to account for the company for the benefit of its creditors and shareholders for their wrong-doing. I think that that is the correct interpretation of the

judgment.

The principle would also apply to the exercise of the Court’s discretion relating to the sanctioning of a compromise under sec 103; in other words, if it appears the directors or others associated with the company have done any wrong to the company for

which compensation could or might be recovered by the liquidator, or that an investigation in the winding-up proceedings might establish the validity of such claims, then the Court, in the interests of the public, and commercial morality, should weigh that, as one of the factors justifying the rejection of the compromise, against the other factors in favour of sanctioning. In the present case such a consideration did not arise at all because, whatever misdeed Street might have committed (and I wish to emphasise that I do not imply anywhere in this judgment that he is guilty of any misdeeds or offences) it was not contended that the company or liquidator could legally recover anything from him. Mr Preiss, however, also relied on *Mohamed v Kazi’s Agencies (Pty) Ltd* 1949 (1) SA 1160 (N) at p1171, where BROOME, J. ... said:

‘There is no doubt that questions of commercial morality in the interests of the public at large are relevant, as was held in the case of *In Re Telescriptor Syndicate Ltd*, 1903 (2) Ch.174. But I do not think that the matter can be put higher than this: that the Court ought not to sanction a compromise where the probable result of such a course will be to allow evil-doers to go unpunished.’ that is ‘cheat the criminal law of its legitimate prey’.

I am not sure that the principle is correctly stated in those wide terms, but, as that was not disputed between counsel, I shall assume its correctness and applicability to the present case.”

Counsel for the Respondent contends that, based upon *Chenille*, the applicability of Lord Buckley's dictum in *Telescriptor* is limited to cases where a discharge was sought as part of an order sanctioning a compromise in which there was risk that wrongdoers

might go unpunished.

I do not believe that any such limitation on the "commercial morality" principle is justified. Although not decisive, the doctrine of "commercial morality" can surely be raised as a factor in order to support an application for the discharge of a winding-up order where the only parties in interest have previously agreed to it.

In *In Re Calgary and Edmonton and Co Ltd* [1975] 1 All ER 1046, 1051d, the Chancery Division held:

"That brings me to the third point, that of the persons whose interests have to be considered on an application for stay. That must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors. Their rights are finite in that they cannot claim more than 100p in the £. I cannot see that in normal circumstances any objection to a stay could be made on behalf of the creditors if for each of them it is established that he has been paid in full, or that satisfactory provision for him to be paid in full has been made or will be made, or else that he consents to the stay or is otherwise bound not to object to it. Second, there is the liquidator. By s309, all costs, charges and expenses properly incurred in the winding-up, including the liquidator remuneration, are made payable out of the assets of the company in priority to all other claims. Where a liquidator has accepted office on this footing, I cannot see that in normal circumstances it would be right to stay the winding up unless his position had been fully safeguarded, either by paying him the proper amount for his expenses or by sufficiently securing payment. Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member, either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding-up proceeded to its conclusion. Each member has a right to a proprietary share in the surplus assets, and each should be protected against the destruction of that right without good cause."

In *Blackman Jooste Everingham, Commentary on the Companies Act*, p14-225, the learned author states with respect to section 354(2):

"The Court's power to have regard to the wishes of creditors or members is an unfettered discretionary power. Nevertheless, it has been held to be apparent from the Act and from the decisions of the Courts that the Courts ought to have regard to the creditor's wishes. Because it is a discretionary power, previous decisions concerning the circumstances in which the discretion should be exercised one way or the other are no more than guidelines as to the proper consideration to be borne in mind when deciding how the discretion should be exercised; they cannot fetter or limit the discretion or even create a binding rule of practice. The Court will not follow the wishes of the majority of the creditors except where they

are, on the face of them, reasonable.”

The cases cited to by Blackman in support of the proposition set forth in the previous paragraph are cases that concern the Court’s ability to take into account the wishes of creditors in deciding whether or not to grant a winding-up order where other requisites for the grant of such an order are present. Although slightly different considerations apply in those cases, the principle as to how the Court should apply its mandate under section 354(2) remains similar.

In summary, based upon the above cases, it is my opinion that the following principles apply to the exercise of the Court’s

discretion to set aside a winding-up proceeding under section 354 of the Companies Act:

[67.1] The Court’s discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties in interest, such as the liquidator, creditors and members.

[67.2] The Court should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision

has been made for the payment of their claims.

[67.3] Where the claims of the liquidator and all creditors have been satisfied, the Court should have regard to the wishes of the members, unless those members have bound themselves not to object to the setting aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.

[67.4] In deciding whether or not to grant a setting aside order, the Court should, where appropriate, have regard to issues of “commercial morality”, “the public interest” and whether the continuation of the winding-up proceedings would be a “contrivance” or render the winding-up “the instrument of injustice”.

IV. APPLICATION OF THE PRINCIPLES TO THE FACTS OF THE PRESENT CASE

Watney’s main contention is that the application should be denied because no good purpose would be served by setting aside a winding-up order made against a corporation that has become an empty shell. This argument assumes that a company cannot be discharged

from winding-up under the section unless there is a commercial purpose in setting aside the winding-up order. I do not believe that the Court’s discretion is so limited.

In the present case, there are a number of factors militating in favour of the grant of an order:

[68.1] Watney has contractually bound herself to support the present application. Public policy has an interest in upholding the sanctity of contracts – *pacta sunt servanda est*. The fact there is an agreement between the only two remaining parties in interest that the corporation should be discharged from liquidation is in itself a sufficient ground to set aside the liquidation order where no other party is likely to be hurt by the discharge.

[68.2] If the application to set aside the winding-up order is not granted as a result of Watney's objection, that would not be in line with "commercial morality", which requires, inter alia, that parties honour their contractual undertakings.

[68.3] If the winding-up is permitted to persist, it might allow the winding-up to become "an instrument of injustice" in that it may permit Watney to escape her obligation to buy out Klass' interest under clause 3.2.2.1 of the second settlement

agreement².

[68.4] Klass was the applicant for winding-up. Once a winding-up order was granted, the continuance of the winding-up was driven by issues of public policy. However, once all of the creditors had been satisfied, Klass effectively became the principal party in interest in relation to the continuation of the winding-up. As Klass now wishes to have the corporation discharged from winding-up, there is no good reason to refuse his request. This is especially so in the light of the fact he apparently sought an order on the "just and equitable" ground in the first instance.

[68.5] The liquidator supports the application to set aside the winding-up order.

[68.6] It does not appear that the members will receive any less as a result of the discharge of the company from liquidation than they would receive if the liquidation continues.

Certain of the factors that I have enumerated in the previous paragraph in favour of granting an order may depend for their efficacy upon the binding effect of Watney's promise to Klass to support him in bringing a winding-up application in terms of the second settlement agreement. It is therefore necessary for me to consider the enforceability of that undertaking.

First, in my opinion, the language of clause 3.1.1 is clear and unequivocal. It does not provide that Watney has an obligation to support the application to set aside the winding-up only as long as the business of the corporation remains a "going concern". To import a tacit term into the agreement to that effect would offend against the basic rule that a tacit term cannot be sustained where it is contrary to the express language of an agreement³.

Second, the limitation that Watney seeks to impose on the undertaking that she gave is not necessary to give "business efficacy" to the second settlement agreement. It is therefore not necessary or appropriate to imply the tacit term contended for⁴.

Third, the tacit term argument fails on the "officious bystander" test. Had an officious bystander asked Klass: "Would Watney have been able to resile from her obligations to support an application to set aside the winding-up if the corporation no longer has a viable business", I do not believe he would have responded: "Of course, it is so obvious that it was not necessary to deal with this issue in the agreement".⁵

Fourth, no facts, other than Watney's personal statement as to what she intended at the time that the contract was concluded have been put forward to justify the inference that there was a tacit term as contended for. Her statements as to intention are legally irrelevant and inadmissible⁶.

Fifth, Watney has not even attempted to formulate a tacit term in her answering papers. What she has suggested is not capable of “clear and exact formulation”⁷.

It is not easy to see how the concept of “retaining goodwill and customer connections” can easily be expressed or quantified in a tacit term.

Sixth, Watney’s contention that there is a tacit term depends in significant part for its efficacy upon her argument that she would never have agreed to pay R2 million to buy out Klass’ interest unless she could have been certain of obtaining a going concern enterprise. I do not believe that this intention is manifest from the second settlement agreement or the stated

background

circumstances against which it was executed.

It is quite possible that Watney’s undertaking to pay R2 million was motivated by other factors – her wish to

avoid further interrogations and litigation; a recognition that the true value of Klass’ interest at the time of liquidation was in fact R2 million and that he was therefore entitled to that amount; or a desire to neutralise the goodwill and name of the corporation’s business so that she could continue with the same business without interference from Klass or the liquidators.

For purposes of this judgment, I do not have to find these were factors that came into play. However, the possibility that those

factors were significant is sufficient to subvert the interpretation that Watney contends for. Her interpretation is not one that leaps off the page at the only possible commercially reasonable meaning of the agreement.

It is common cause that, as a consequence of the second settlement agreement, all enquiries and potential claims by the members against each other were brought to an end. This was indisputably a material benefit that Watney derived from the agreement. Thus, when Klass entered into the second settlement agreement, he gave up any right he had to make a claim against Watney arising out of misappropriation or mismanagement of the assets of the corporation. Whether or not Klass had a valid or provable claim against Watney to that effect, this was a significant concession.

Accordingly, it seems clear that the abandonment of this type of claim was at least part of the quid pro quo for the sale of the member’s interest to Watney. If Watney is not forced to honour her obligation to discharge the corporation from liquidation, Klass will have been deprived without compensation of any claim he might have had against Watney.

It may be that Watney’s case is not limited to a tacit term. She may also be contending for a “proper construction”, although this is not clear from her papers.

However, I consider this to be a distinction without a difference. A “proper construction” would fail for the same reasons as a tacit term. Among other things, it is inconsistent with the express language of the contract and it is not the only commercially reasonable interpretation of the agreement.

Accordingly, whether one speaks of a “tacit term” or merely a “proper construction” of the second settlement agreement, I see no reason to place the limitation on the obligation to assist in obtaining a setting aside of the winding-up order that Watney contends for.

I stress that, in reaching my conclusion, I am focused only on Watney’s undertaking to assist in the winding-up proceeding.

Although some of my remarks may have a bearing on how clause 3.2.2.1 is ultimately interpreted by a trial Court seized of Klass’

claim against Watney for payment of R2 million, I do not intend by this judgment to bind the trial Court in interpreting that clause. For purposes of this application, I find only that there is no reason to impose the limitation on clause 3.1.1 that Watney contends for in this application.

V. COSTS

Mr Beckerling SC appeared for the Second Respondent without a junior. Mr du Toit SC (for the Applicant) appeared with a junior. The question arises whether, if Klass is successful, he is entitled to the costs of two counsel. I believe that he should be entitled to costs of two counsel.

The claim is not inconsiderable. The issues involved are complex both factually and legally. Watney was represented by Senior

Counsel, which demonstrates that the appointment of Senior Counsel was appropriate. In such circumstances, it usually follows that the costs of two counsel is apposite.

VI. THE ORDER

In the result, I make the following order:

[83.1] All proceedings in relation to the winding-up of the First Respondent are set aside and the First Respondent is discharged from liquidation.

[83.2] The Third Respondent is directed to amend its records to reflect the provisions of this order.

[83.3] The Second Respondent is to pay the costs of the application, including the costs of two counsel.

LEVENBERG, AJ

Acting Judge of the High Court

Counsel for the Applicant: S. du Toit SC

H.F. Oosthuizen

Attorneys for the Applicant: Bert Meaden Inc.

Counsel for the Second Respondent: T. Beckerling SC

Attorneys for the Second Respondent: David Oshry & Associates

Date of Hearing: 4 February 2009.

1 Desai v Greyridge Investments (Pty) Ltd 1974 (1) SA 509 (A) 552-523; OK Bazaars v Bloch 1929 WLD 37, 44; Rapp and Maister v Aronovsky 1943 WLD 68, 75.

2 This consideration is applicable even if one adopts the more narrow formulation of Mason J in Goodman v Suburban Estates Ltd (In Liquidation) & Others 1915 WLD 15.

3 FJ Hawkes & Co Ltd v Nagel 1957 (3) SA 126 (W) 132C; Robin v Guarantee Life Assurance Co Ltd [1984] ZASCA 72; 1984 (4) SA 558 (A) 567A-F; Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) 487J; Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd 2005 (3) SA 54 (W) 65.

4 Wilkens v Voges 1994 (3) SA 130 (A) 137.

5 Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592, 605; Shirlaw v Southern Foundaries (1926) Ltd [1939] 2 KB 206, 227.

6 Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A).

7 Christie: The Law of Contract in South Africa, 5th ed, p173.

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