

SOUTH AFRICA / JUDGMENT

Macneil Plastics (Pty) Ltd v Van den Heever N O and Others (906/2023) [2024] ZASCA 181 (20 December 2024) [2024] ZASCA 181

COURT

Supreme Court of Appeal

BEFORE

Zondi DP, Kgoele JA, Gorven AJJA, Makume AJJA,
Chili AJJA

CASE / FILE NUMBER

906/2023

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 906/2023

In the matter between:

MACNEIL PLASTICS (PTY) LTD

APPELLANT

and

THEODOR WILHELM VAN DEN HEEVER N O FIRST RESPONDENT

JAYANT DAJI PEMA N O

SECOND RESPONDENT

MONIQUE STANDER N O

THIRD RESPONDENT

RONNIE DENNISON AGENCIES (PTY) LTD FOURTH RESPONDENT

t/a WATER AFRICA SYSTEMS (PTY) LTD

(IN LIQUIDATION)

Neutral citation: Macneil Plastics (Pty) Ltd v Van den Heever N O and Others (906/2023) [2024] ZASCA 181 (20 December 2024)

Coram: ZONDI DP and KGOELE JA and GORVEN, MAKUME and CHILI AJJA

Heard: 5 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down of the judgment is deemed to be 11h00 on 20 December 2024.

Summary: Liquidation – Company placed in liquidation due to inability to pay its debts – payment made by company to its creditor after the commencement of liquidation void under s 341(2) of the Companies Act 61 of 1973 and cannot be validated by court: An order placing a company in business rescue whilst in liquidation does not terminate liquidation proceedings under s 131(6)(b) of the Companies Act 71 of 2008 but merely suspends those proceedings – liquidation order remains extant and liquidation proceedings reinstated when the business rescue proceedings are brought to an end in terms of s 132(2)(a) of the Companies Act 71 of 2008.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mogale AJ with Molopa-Sethosa J and Sethusa-Shongwe AJ concurring, sitting as a full court):

The appeal is dismissed with costs.

Zondi DP (Kgoele JA and Gorven, Makume and Chili AJJA concurring):

- [1] The issue in this appeal is whether the void payments which were made by the fourth respondent, Ronnie Dennison Agencies (Pty) Ltd t/a Water Africa Systems (Pty) Ltd (in liquidation) (the Company) to the appellant, Macneil Plastics (Pty) Ltd (Macneil Plastics) after the commencement of liquidation proceedings were validated by the subsequent order placing the Company in business rescue in terms of s 131(6) of the Companies Act 71 of 2008 (the new Companies Act). It is common cause that Macneil Plastics was one of the Company's creditors and that the payments in question were void in terms of s 341(2) of the Companies Act 61 of 1973 (the old Companies Act) as they were made after the commencement of the liquidation of the Company.
- [2] The Gauteng Division of the High Court, Pretoria (the high court) held that the subsequent placing of the Company in liquidation in business rescue did not validate the void payments and that while the Company was under business rescue the liquidation order remained unaffected. These findings were upheld on appeal by the full court of the same Division. The appeal is with special leave granted by this Court. The findings of the full court are challenged by Macneil Plastics in its grounds of appeal.

- [3] The facts which gave rise to this appeal are briefly the following. On 7 February 2014, DPI Plastics (Pty) Ltd, the Company's creditor, issued an application for the winding-up of the Company out of the high court on the basis that it was unable to pay its creditors. On 28 October 2015, the high court (Hughes J) granted the application placing the Company under final winding-up. The first, second and third respondents were appointed by the Master of the High Court as joint liquidators of the Company.
- [4] On 2 November 2015 (being a date after it had been finally liquidated) the Company paid a total amount of R407 010.30 to Macneil Plastics. On 11 January 2019, the liquidators brought an application in the high court in which they challenged the lawfulness of the payments in question. Briefly, the liquidators sought an order declaring the relevant payments void in terms of s 341(2) of the old Companies Act[1] and ordering Macneil Plastics to repay the amounts concerned to the liquidators together with interest thereon. The repayment was sought on the basis that the relevant payments were made to Macneil Plastics after the commencement of the winding-up of the Company within the meaning of s 348 of the old Companies Act[2] and thus while it was finally wound-up.
- [5] On 9 December 2015, and subsequent to the winding-up order and the making of the impugned payments, the high court (Tuchten J) granted an order suspending the liquidation proceedings of the Company and placing it under business rescue in terms of s 131 of the new Companies Act. Tuchten J's order reads as follows:
- '2. The winding up (liquidation proceedings) of Water Africa Systems (Proprietary) Limited (in liquidation) ('the company') [Ronnie Dennison Agencies (Pty) Ltd] commenced in terms of the order issued by this Honourable Court under case no. 10136/2014 on 28 October 2015 be and is hereby suspended.
3. The company be and is hereby placed under supervision and business rescue in terms of section 131(1) of the Companies Act, 2008 ('the Act').
4. Niell Michael Hobbs be and is hereby appointed as the interim business rescue practitioner in respect of the company in terms of section 131(5) of the Act.
5. The applicants, the business rescue practitioner of the company and all affected persons as contemplated in section 128(1) of the Act are granted leave to apply to this Honourable Court (after having notified affected persons of the intention to do so in the prescribed manner) on the same papers, amplified to the extent necessary, for an order to end the business rescue proceedings and for an order in terms of section 354 of the Companies Act, 1973 to set aside the winding up of the company, alternatively, for an order to discontinue the business rescue proceedings in respect of the company and reinstate the final winding up of the company, alternatively, for other relief as may be appropriate.'
- [6] On 12 April 2016, Potterill J set aside the order of Tuchten J suspending the liquidation proceedings and reinstated the final winding-up of the Company. Potterill J's order reads as follows:

‘2. Setting aside the Court Order that began the Business Rescue Proceedings in respect of Water Africa Systems (Pty) Limited (“the Company”) in terms of Section 131 (6) of the Companies Act No 71 of 2008 (“the Act”);

3. Declaring that the Business Rescue Proceedings have ended by virtue of the provisions of Section 132 (2) of the Act in that:

3.1 An order has been made setting aside order that began the Business Rescue Proceedings; and/or

3.2 A Business Plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated in section 153; and/or

3.3 The practitioner has filed with the Commission a notice of the termination of business rescue proceedings;

4. Re-instating the final winding up of the Company.’

[7] The application for the repayment of the void payments served before Mngqibisa-Thusi J. She found that the payments were void in terms of s 341(2) of the old Companies Act as the Company made them after the commencement of its winding-up. In fact, when the Company made the payments in question to Macneil Plastics, a final liquidation order had already been granted. The learned Judge found that the effect of the liquidation order was to place the Company and its assets under the control of the Master of the High Court pending the appointment of liquidators. Based on this finding, she concluded that she did not have a discretion to validate the impugned payments. She accordingly ordered Macneil Plastics to repay the monies it received from the Company to the liquidators. As already alluded to, on appeal the full

court confirmed Mngqibisa-Thusi J’s findings and dismissed the appeal with costs.

[8] In argument before us, although Macneil Plastics accepted that ordinarily the payments made by the Company after its winding-up due to its inability to pay its debts are void, it contended that the subsequent placing of the Company under business rescue proceedings superseded or replaced the liquidation proceedings and nullified the voidness of the payments. The thrust of Macneil Plastics’ argument was that the liquidation process and the business rescue process cannot co-exist. It submitted that the placing of a company under business rescue not only terminates the pre-existing liquidation proceedings, but also extinguishes the concomitant concursus creditorum that is established when the company is placed under winding-up. Consequently, the payments were not void and Macneil Plastics is excused from repaying the monies in question.

[9] Macneil Plastics’ argument must be rejected for three reasons. First, the payments in question were made after the commencement of the Company’s liquidation. It is not in dispute that the Company was wound up on 28 October 2015 and that it was unable to pay its debts on that date and thereafter. The Company’s inability to pay its debts, therefore, existed

when it was wound up and when the payments in question were made. The payments that were made by the Company on 2 November 2015 therefore constituted a disposition of its property after the commencement of its winding up within the meaning of s 341(2) of the old Companies Act and those payments cannot be validated.

- [10] Validating such payments would undermine the concursus creditorum that is established by the liquidation of a company. Once the concursus creditorum is established nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the creditors. The creditors

must be paid in the order of their preference. No transaction can thereafter be entered into regarding estate matters by a single

creditor to the prejudice of the general body of creditors. The claim of each creditor must be dealt with as it existed at the date when the concursus creditorum was formed.[3] Dispositions made subsequent to the grant of a provisional or final order of winding-up are void and cannot be validated in terms of s 341(2) of the old Companies Act. This was authoritatively decided by this Court in *Pride Milling*. [4]

- [11] Petse AP in *Pride Milling* explained that to validate such payments would render nugatory the operative part of s 341(2), in terms of which dispositions made by a company being wound up are void, and would also have the effect of undermining the essence of the concursus creditorum and indeed the substratum of insolvency law.[5] He stated that this would further mean that the recipient 'would be left to enjoy the benefits of its claim being settled in full, while other creditors would have to be content with whatever residue might still be available'. [6]

- [12] Second, Macneil Plastics' argument that the order placing the Company under business rescue supersedes or replaces the liquidation order is inconsistent with the provisions of s 131(6)(b) of the new Companies Act. This section provides 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-

...

- (b) the business rescue proceedings end, if the court makes the order applied for.'

- [13] In *GCC Engineering v Maroos*, [7] a business rescue practitioner obtained a provisional winding-up order after the failure of the business rescue proceedings. A second business rescue application was thereafter instituted. This Court thus dealt with the period after the winding-up order and before a (new) business rescue order was made.

- [14] This Court, in interpreting the provisions of s 131(6) found that an 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.[8] It is the process of winding-up and not the legal consequences of a winding-up order that is suspended. The winding-up order is still in place. [9] The 'legal consequences' include the principle that payments made after the granting of the winding-up order are void. That applies equally to the present matter.

- [15] At the time the payments to Macneil Plastics were made, they were void as they were made after the winding-up of the Company. Business rescue is dealt with in Chapter 6 of the new Companies Act. There is no provision in that chapter which provides that a void payment is somehow validated once a company in liquidation is placed in business rescue. A subsequent placing of the Company in business rescue does not reverse the voidness of the dispositions.
- [16] Third, the interpretation contended for by counsel for Macneil Plastics would require that a provision be read into s 131(6) which would provide that placing a company in business rescue would automatically set aside a prior existing liquidation order *ex tunc*. Statutory interpretation is a unitary exercise which requires a court to ascertain the meaning of a provision, having regard to the language used, the context and the purpose of the provision. [10] The inevitable point of departure is the language of the provision itself.[11] The section uses the word 'suspend' – not 'set aside' or 'terminate'. 'Suspend' is defined in the Concise Oxford English Dictionary as 'to halt temporarily'. The wording of the statute can simply not accommodate Macneil Plastics' interpretation.
- [17] Additionally, Macneil Plastics' argument runs counter to the orders of Tuchten J and Potterill J. Those orders made explicit the position in the section that only a suspension rather than a supersession takes place when a liquidated company is placed in business rescue. The order made by Tuchten J authorised a future application to 'set aside' the winding-up or to 'reinstate' the final winding-up of the Company. It was therefore clearly contemplated that the liquidation order was still extant, and that the order placing the Company in business rescue did not supersede the winding-up order – the winding-up order either had to be 'set aside' or 'reinstated' in future.
- [18] Similarly, the order made by Potterill J (which was foreshadowed by Tuchten J's order) expressly provided in paragraph 5: '...reinstat[ing] the final winding up of the company'. It is clear from this analysis that the construction of s 131(6) contended for by Macneil Plastics cannot be supported. It would lead to absurdity so glaring that it could never have been contemplated by the legislature.[12]

[19] In the result the appeal is dismissed with costs.

D H ZONDI

JUDGE OF APPEAL

Appearances

For the appellant: A R Newton SC and S C Pitcher

Instructed by: C

& A Friedlander Attorneys, Centurion

Symington De Kok, Bloemfontein

For the respondents: P van der Berg SC

Instructed by: Van

Veijeren Inc

c/o Friedland Hart Solomon & Nicholson Attorneys, Pretoria

Pieter Skein Attorneys, Bloemfontein

[1] Section 341(2) of the Old Companies Act reads: ‘Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding up, shall be void unless the Court otherwise orders.’

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‘Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding up, shall be void unless the Court otherwise orders.’

[2] Section 348 of the Old Companies Act reads: ‘A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.’

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‘A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.’

[3] Walker v Syfret N O 1911 AD 141 at 160 and 166.

[4] Pride Milling Company (Pty) Ltd v Bekker N O and Another [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA) (Pride Milling) paras 17 to 20.

[5] Pride Milling fn 4 para 19, with reference to Walker v Syfret N O.

[6] Pride Milling fn 4 para 20.

[7] GCC Engineering (Pty) Ltd and Others v Maroos and Others

[2018] ZASCA 178; 2019

(2) SA 379 (SCA) (GCC Engineering).

[8] Section 131(6) reads: '(6) 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.' (Own emphasis.)

[8] Section 131(6) reads:

'(6) 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.' (Own emphasis.)

[9] GCC Engineering fn 7 paras 17 to 19.

[10] Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others

[2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[11] Natal Joint Municipal Pension Fund v Endumeni Municipality

[2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[12] Hanekom v Builders Market Klerksdorp (Pty) Ltd and Others

[2006] ZASCA 2; 2007 (3) SA 95 (SCA) para 7.

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Prepared on 10 October 2026 · Esheria