

SOUTH AFRICA / JUDGMENT

Modisakeng v Bapho Ba Mogale Investments NPC and Others (M579/2023) [2023] ZANWHC 227 (14 December 2023) [2023] ZANWHC 227

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

M579/2023

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Source record

IN THE HIGH COURT HIGH
COURT OF SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NO: M579/2023
Reportable: NO

Circulate to Judges:

NO
Circulate to

Magistrates:

NO
Circulate to Regional
Magistrates: NO
In

the matter between:

MPHO
COLIN SYDNEY MODISAKENG
Applicant
and
BAPHO BA MOGALE
INVESTMENTS NPC
(IN
LIQUIDATION)
First
Respondent
CLIFFORD THABANG
MAREDI
Second
Respondent
DIMAKATSO ARNOLD

MICHAEL
MOHASOA
N.O.
Third
Respondent
MASTER OF THE HIGH
COURT
Fourth Respondent
COMPANIES AND
INTELLECTUAL PROPERTY
COMMISSION
Fifth Respondent
SOUTH AFRICAN REVENUE
SERVICE
Sixth Respondent
PERSEVCON CONTRACTORS
(PROPRIETY)
LTD
Seventh Respondent

Coram:

Petersen J

Heard:

23 November 2023
Supplementary
Heads filed: 30 November 2023

The
judgment was handed down electronically by circulation to the
applicants' representative via email. The date and time
for hand-down is deemed to be 14 December 2023 at 10h00AM.

ORDER

(i)

The winding-up
of Bapo Ba Mogale Investments NPC (in
liquidation) be and is hereby set aside.

(ii)

No order as to costs.

JUDGMENT

PETERSEN J

Introduction

- [1] This application came before me on the unopposed motion roll of 23 November 2023. The applicant seeks an order setting aside the winding-up of the first respondent, Bapo Ba Mogale Investments NPC (in liquidation) pursuant to s354(1) of the Companies Act 61 of 1973 (as amended) – the Companies Act. I reserved judgment in the matter and subsequently allowed the filing of heads of arguments (further submissions) by Counsel.

[2] The application was served on the first, second, third, fifth and seventh respondents by the respective Sheriffs of the High Court between 23 October 2023 and 17 November 2023. The application was served on the Master of the High Court (fourth

respondent) and the South African Revenue Service (sixth respondent) by hand on 18 October 2023. No notices of opposition were filed, save for correspondence directed to the attorneys of record of the applicant by the duly appointed liquidators, to abide by the decision of the court.

The issue of locus standi of the applicant

[3] Bapo Ba Mogale Investments NPC (in liquidation), before its winding up had a single shareholder, the Bapo Ba Mogale Traditional Community, which was represented by the elected Bapo Ba Mogale I Traditional Council ('the Council') as member and shareholder of the first respondent. The applicant asserts locus standi to bring the application on the basis of his appointment by the Premier of North West Provincial Government ('the Premier') on 15 February 2023, effective retrospectively to 6 February 2023. The appointment of the applicant stems from the suspension of the Council by the Premier.

[4] In the letter of appointment of the applicant scribed by the Premier, the Premier relies on the Traditional and Khoi-San Leadership Act 3 of 2019 to make the appointment of the applicant. In particular, the Premier records in relevant part, the following:

"2. Section 22(2) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019) enjoins me to monitor traditional councils in the province to ensure the effective and efficient performance of their statutory, financial and customary obligations. It has since come to my attention that the Bapo Ba Mogale I Traditional Council is failing to fulfil its statutory, financial and customary obligations.

3. As a result, I have taken a decision to invoke section 22(4)(b) of Act No. 3 of 2019. You are hereby appointed to assist the

Administrator of Bapo Ba Mogale I Traditional Council to assume responsibility for all statutory, financial and customary obligations

of the Bapo Ba Mogale I Traditional Council. Your attention is also drawn to section 20 of Act No. 3 of 2019, which spells out the functions of a traditional council.

4. As such, you shall perform or exercise any power, authority or function conferred or imposed upon the Bapo Ba Mogale I Traditional

Council and same shall be deemed to have been performed by such traditional council for a period of six months subject to renewal

before expiry thereof."

[5] In *Mogale and Others v Speaker of the National Assembly and Others* 2023 (9) BCLR 1099 (CC), the Constitutional Court made the following order:

“1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Traditional and Khoi-San Leadership Act 3 of 2019 (Act).

2. The Act was, as a consequence, adopted in a manner that is inconsistent with the Constitution and is therefore declared invalid.
3. The order declaring the Act invalid is suspended for a period of 24 months to enable Parliament to re-enact the statute in a manner 9 that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution...”

[6] The Constitutional Court appreciated that:

“An immediate order of invalidity would withdraw the recognition granted to Khoi-San communities and traditional leaders and restore the TLGFA [the Framework Act]. Causing immense disruption, as the TLGFA hugely differs from the TKLA [Khoisan Act] (for example in the manner in which traditional councils are constituted and recognized and the powers and responsibilities that they have). Some steps have already been taken to implement the TKLA. Suspension will allow Parliament, at its discretion, to hold a new legislative process to pass the TKLA, a modified version of it, or an entirely new bill. This allows the new amended provisions (created following the appropriate public participation process) to come into force after the completion of the legislative process.”

[7] The appointment of the applicant by the Premier in terms of the Traditional and Khoi-San Act, notwithstanding the order of the Constitutional Court is valid.

Background

- [8] Bapo Ba Mogale Investments NPC (in liquidation) was finally wound up by order of this Honourable Court (Judge Djaje (as she then was)) on 28 May 2020. The second and third respondents were appointed as the joint liquidators of Bapo Ba Mogale Investments NPC (in liquidation) by the Master of this Court.
- [9] The final winding up of Bapo Ba Mogale Investments NPC (in liquidation) under case number M479/2018 was predicated on the following uncontentious facts. Persevcon Contractors (Pty) Ltd sought to acquire an interest in Royal Bapo Holdings (Pty) Ltd (Royal Bapo Holdings) through a share acquisition transaction in February
2016. Persevcon Contractors (Pty) Ltd offered Bapo Ba Mogale Investments NPC (in liquidation) R20 million in consideration of such purchase, with an amount of R14 million to be paid by November 2016.
- [10] Bapo Ba Mogale Investments NPC (in liquidation), however, cancelled the agreement during November 2016 as it was unable to transfer the shares at issue to Persevcon Contractors (Pty) Ltd. Bapo Ba Mogale Investments NPC (in liquidation), however, informed Persevcon Contractors (Pty) Ltd that it would refund to it the R14 million received from it.

- [11] Persevcon Contractors (Pty) Ltd contested the validity of the cancellation and caused its attorneys to engage Bapo Ba Mogale Investments NPC (in liquidation). A settlement was consequently reached in terms of which Bapo Ba Mogale Investments NPC (in liquidation) would pay Persevcon Contractors (Pty) Ltd an amount of the amount of R14 million plus R5 million interest.

The winding up of Bapo Ba Mogale Investments NPC (in liquidation)

- [12] Bapo Ba Mogale Investments NPC (in liquidation) reneged on the agreement resulting in Persevcon Contractors (Pty) Ltd causing a letter of demand being forwarded to Bapo Ba Mogale Investments NPC (in liquidation) pursuant to section 345(1)(a) of the Companies Act. The demand for the R19million was not satisfied by Bapo Ba Mogale Investments NPC (in liquidation). This resulted in the application

for winding up of Bapo Ba Mogale Investments NPC (in liquidation). Bapo Ba Mogale Investments NPC (in liquidation) had no defence to the relief sought for its winding up.

- [13] The joint liquidators established that Bapo Ba Mogale Investments NPC (in liquidation) were indebted to the following persons and/or entities who had proved claims. Persevcon Contractors (Pty) Ltd in an amount of R19 million which was reduced to R 14 million; Dimakatso Sylvia Kutu, Mashudu Tshipuliso, E Stuurman and Sigwill Collins Ncube amounts of R247 334.00, R340 750.00, R113 750.00 and R170 000.00 respectively, for outstanding salary payments and severance pay; VBS Mutual Bank Limited (in liquidation) an amount of R5 215 014.37 for monies lent and advanced; and SARS an amount R6 841 750.43 for arrear PAYE, UIF and SDL. The proved claims have all been settled in full from the proceeds of the liquidation of Bapo Ba Mogale Investments NPC (in liquidation).
- [14] In terms of the third and final liquidation and distribution account, once the proven claims are settled, the winding up of Bapo Ba Mogale Investments NPC (in liquidation), an amount of R6 562 504.06 is left, which is payable to its shareholder, being the community. Once the settlement amount due to Persevcon Contractors (Pty) Ltd has been paid from the surplus, the balance of any remaining amount will be remitted to the applicant as Administrator of the Bapo Ba Mogale I Traditional Council.

Bapo Ba Mogale Investments NPC (in liquidation) financial interests

- [15] The applicant asserts that investigations by the joint liquidators to which he has been privy revealed that Bapo Ba Mogale Investments NPC (in liquidation) is the holding company of valuable subsidiaries that are all dividend yielding entities. These dividends in fact allowed the joint liquidators to settle the proven claims of the creditors. Further, that certain pre-existing vacancies on the board of Bapo Ba Mogale Investments NPC (in liquidation) before its winding up, contributed materially to the financial distress in which it found itself.
- [16] Bapo Ba Mogale Investments NPC (in liquidation) has the following financial interests. It owns shares in Royal Bapo Holdings (Pty) Ltd, who in turn owns all the issued shares in Bapo Freight and Logistics (Pty) Ltd (in liquidation); 100% of the issued share capital in Bapo

Ba Mogale Mining Supplies (Pty) Ltd; and half of the issued share capital in Bapo Trans (Pty) Ltd. Royal Bapo Investment Holdings (Pty) Ltd another wholly owned subsidiary of Bapo Ba Mogale Investments NPC (in liquidation) owns all the issued shares in Bapo Petroleum (Pty) Ltd; 100% of the issued share capital in Bapo Ba Mogale Media and Entertainment (Pty) Ltd; and all of the issued shares in Bapo Platinum Resources (Pty) Ltd; 100% of the issued shares in Bapo Property (Pty) Ltd; the issued shares in Bapo Agriculture (Pty) Ltd; all of the issued shares in Business Venture Investments (Pty) Ltd and 30% of the issued shares in Mothosi Holdings (Pty) Ltd.

- [17] The applicant undertakes to ensure that, if the winding up of Bapo Ba Mogale Investments NPC (in liquidation) is set aside, that he would ensure that its Board is properly constituted and that the pre-existing vacancies, which includes the Chief Executive Officer; Non-executive Chairman of the Board and a Lonmin nominee, are filled.

The benefit of setting aside the winding up of Bapo Ba Mogale Investments NPC (in liquidation)

- [18] Bapo Ba Mogale Investments NPC (in liquidation) is a non-profit organization registered for the benefit of the community. If the setting aside of the winding up is granted by order of this Court, the community will be entitled to the dividends from the dividend yielding entities in which Bapo Ba Mogale Investments NPC (in liquidation) has financial interests. These dividends can then be utilized for the upliftment and benefit of the community.

The law

- [19] In *The Commissioner for the South African Revenue Service v Nyhonyha and Others* (1150/2021) [2023] ZASCA 69 (18 May 2023), the Supreme Court of Appeal decisively dealt with section 354 of the Companies Act as follows:

”[15] By virtue of Item 9 of Schedule 5 to the Companies Act 71 of 2008, s 354 of the repealed Companies Act 61 of 1973 remains in force until a date to be determined. Section 354 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 the Court may deem fit.
- (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.’

...

True discretion?

- [18] A true discretion is one which provides a court with a range of permissible options. Well-known examples are costs orders and awards of damages. See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* [1992] ZASCA 149; 1992 (4) SA 791 (A) (Perskor) at 800E and *Trencon* paras 84-85. This was articulated as follows in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 113: ‘Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range.’
- [19] It is clear that the expression ‘wide decision-making powers’ in this passage refers to the multitude of permissible options that characterise a true discretion. This must not be confused with a wide or loosediscretion which means ‘no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision’. See *Knox D’Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 AD at 361I, quoted with approval in *Trencon* para 86.
- [21] In *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 180H, this court said that the language of s 354 ‘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 court proceeded (at 180I - 181D) to state stringent requirements for an order on the former basis. Although the court referred to a discretion and discretionary power in this regard, it did not consider whether it was a true discretion or not.
- [22] I agree with the authors of Henochsberg on the Companies Act 61 of 1973 5 ed at 748 that where, as is the case here, the setting

aside of a winding-up is sought on the basis of subsequent events, the test is whether the facts show that the continuance of the

winding-up would be unnecessary or undesirable. In *Ex parte Strip Mining (Pty) Ltd: In re Natal Coal Exploration Co Ltd (In liquidation) (Kangra Group (Pty) Ltd and Another intervening)* 1999

- (1) SA 1086 (SCA) at 1091I, this court stated that the expression ‘proof to the satisfaction of the Court’ refers to ‘the

normal standard of proof of the facts which are to lead the Court to hold that the winding-up “ought” to be set aside’.

Thus, the test for setting aside a winding-up under s 354 on the basis of subsequent events, is whether the applicant has proved

facts that show that it is unnecessary or undesirable for the winding-up to continue. This does not involve a choice between permissible alternatives. The test is either satisfied or it is not.”

(emphasis added)

Discussion

[20] The fact that Bapo Ba Mogale Investments NPC (in liquidation) was factually and legally insolvent when it was finally wound up on 28 May 2020 is common cause. All the proven claims have been settled during the winding up of Bapo Ba Mogale Investments NPC (in liquidation). This was made possible by the dividends falling to the benefit of Bapo Ba Mogale Investments NPC (in liquidation) as result of its financial interests and in particular its shareholding in viable subsidiaries. A surplus exists for the benefit of the true beneficiaries, the community.

[21] This Court is vested with a discretion to Bapo Ba Mogale Investments NPC (in liquidation) to set aside a winding-up order, specifically on the basis that it may be set aside by reason of subsequent events following its winding up. The subsequent events set out in the facts in support of the application are such that it is unnecessary for the winding-up to continue.

[22] I am accordingly satisfied that my discretion can be exercised in favour of the relief sought.

Order

[23] In the result, the following order is made:

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

FOR THE APPLICANTS': ADV CJ ZWIEGELAAR Instructed by: M.E Tlou Attorneys Inc. No 43, Cnr Baden Powell & Visser Street Golf View MAHIKENG

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