

SOUTH AFRICA / JUDGMENT

Wylie N.O v Megaplan Konstruksie CC (75172/2013) [2015] ZAGPPHC 649 (31 August 2015)

[2015] ZAGPPHC 649

COURT

North Gauteng High Court, Pretoria

BEFORE

M W Msimeki

CASE / FILE NUMBER

75172/2013

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IN

THE GAUTENG DIVISION, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE

NO: 75172/2013

In

the matter between:

BEVAN

MERVYN WYLIE

N.O

APPLICANT

And

MEGAPLAN

KONSTRUKSIE

CC

RESPONDENT

JUDGMENT

MSIMEKI J:

[1] On 19 August 2014 this court granted an order that:

“1. The respondent is placed in provisional liquidation.

2. any and all interested parties are called upon to present reasons on 13 October 2014 at 10:00 why the provisional order should not be made final and why the applicant’s legal costs should not be regarded as administration costs in the respondent’s liquidation excluding the costs occasioned by the opposition to the application which should be paid by Petrus Johannes Steenkamp on an attorney and client scale including the costs occasioned by the employment of two counsel.
3. this order be published in the Beeld newspaper and the Government Gazette
4. the order be served at the respondent’s registered address
5. notice of this order be given to all known creditors.

[2] On 13 October 2014 Mr Schoeman, Ms Van Der Walt, Mr Van Der Merwe, and Ms Singh, respectively, represented the applicant, the

respondent; Mr P J Steenkamp (Steenkamp) and Absa Bank.

[3] Mr Van der Merwe informed the court that Steenkamp is a member of the respondent (in liquidation) with 50% interest. Steenkamp, according to Mr Van der Merwe, under case number 75455/14 has applied to the court for an order placing the respondent under supervision and commencing business rescue proceedings.

[4] Mr Van der Merwe submitted that they were not involved in the disputes. A final or interim order to them made no difference. Mr Schoeman, according to him, held a wrong view namely that the court could make a final liquidation order where business rescue

proceedings had been initiated by Steenkamp.

[5] Mr Schoeman submitted that Steenkamp is the deponent to the affidavit resisting the liquidation of the respondent. Absa Bank is not opposing the liquidation application.

[6] Mr Schoeman informed the court that the business rescue application had not yet been served on the interested parties. Mr Van der Merwe submitted that although the court is at liberty to grant a final order, Mr Schoeman’s submission that the court, in this matter, ought to do so was without merit. For the reasons that I shall give hereunder, I do not agree with Mr Van der Merwe’s submission.

- [7] Mr Van der Walt, for the respondent, submitted that the provisional order had not been complied with in that it had not been served at the registered office of the respondent. The submission appears to be incorrect.
- [8] Ms Marlette Vermeulen's affidavit (running from page 321 to page 324 of the papers) evinces how and the extent to which she complied with the provisional order. The order was published in the Government Gazette on 3 October 2014. Such publication is annexure "MV2". The order was advertised in the Beeld newspaper of 3 October 2014: see annexure "MV3" to her affidavit. On 22 September 2014 the order was served on the Receiver of Revenue and the Master of the High Court. This appears from "MV4" annexed to her affidavit. It is clear from Annexure "MV5" to her affidavit that the order was also served on the respondent's attorneys JP Kriel & Co. The sheriff served the order at the respondent's registered address on 25 September 2014 – see annexure "MV6" to the affidavit of Ms Vermeulen. The sheriff could not serve the order on the employees as none was found by the sheriff – see annexure "MV7". Annexure "MV8" shows that the order was served on the known creditors of the respondent.
- [9] The other issue raised on behalf of the respondent was that as soon as business rescue proceedings are initiated the liquidation

proceedings are suspended. In the main, the submission on behalf of the respondent was that the court ought not to grant a final order of liquidation in this matter.

THE LAW

- [10] The issue has been the subject of debate in a number of matters. The courts, as a result, have been interpreting the provisions of section 131 (6) of the Companies Act No. 71 of 2008 (the Act). This is the section which directly deals with the issue.

- [11] Section 131 (6) of the Act provides

"(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 adjourned upon the application; or
- (b) the business rescue proceedings end, if the court makes the order applied for."

- [12] The issue, in the main, is whether this court is precluded from granting a final winding-up order if regard is had to the suspension

of "liquidation proceedings" referred to in the section. Boruchowitz J in Absa Bank Ltd V Makuna Farm CC 2014 (3) SA 86 (GLD), Johannesburg, was faced with the same issue.

- [13] I am in agreement with the court's interpretation of section 131 (6) of the Act which is that "liquidation proceedings"

in the section are not a reference to the substantive application proceedings taken by a creditor to obtain a winding-up order but a reference to the application proceedings to obtain a winding-up order. This, according to Boruchowitz J, means that the suspension

envisaged in the section applies to the grant of a final winding-up order.

[14] At 87 [7] the court said:

“[7] The express wording of the section makes it plain that the stay contemplated applies to ‘liquidation proceedings’ that ‘have already been commenced by or against the company at the time an application is made in terms of subsection (1)’. Winding-up proceedings only commence, albeit with retrospective effect in terms of section 348 of the 1973 Act, once a winding-up order is granted (See Vermeulen and Another V CC Bauermeister (Edms) Bpk and Others 1982 (4) SA 159 (T) at 162A-B). In my view, the foregoing is an indication that the words ‘liquidation proceedings’ in section 131 (6) refer to the proceedings that follows the grant of a winding-up order and not to the application to obtain a winding-up order. See also in this regard Absa Bank Ltd v Summer Lodge (Pty) Ltd 2013 (5) SA 444 (GNP), where a similar view is expressed by Makgoba J.”

[15] At 87 [8] the court further said:

“[8] The launch of business rescue proceedings does not alter the legal status of the company in liquidation but merely stays the implementation of the winding-up order. The manifest purpose of the section 131 (6) suspension is to delay implementation of the winding-up order pending the outcome of the business rescue application, but the company remains under winding-up, whether finally or provisionally.”

[16] Van der Byl AJ in Absa Bank Ltd v Summer Lodge (Pty) Ltd (GNP) Case No: 63188/2012 at [19] said:

“it is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of a business rescue application in terms of section 131 (6) but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company can proceed carrying on business. The company remains to be finally or provisionally

liquidated, as the case may be, until such time as the business rescue proceedings have been finalized”.

[17] Boruchwitz J, in Absa Bank Ltd v Makuna Farm CC (supra) at 88 [9] finally said:

“[9] for these reasons I am of the view that it would be permissible for this court to grant a final winding-up order and to do so would not be inconsistent with the object and purpose of 131 (6) of the Act.”

I agree with the view.

- [18] The business rescue proceedings in this matter had not been served on the interested parties when the matter was argued. Even if the business rescue proceedings had been initiated that would not alter the position and status of the respondent. It would still be permissible for the court to grant the final winding-up order.
- [19] The applicant, having complied with the provisional order and all other requirements in this matter, is entitled to the relief that he seeks.
- [20] I, in the result, make the following order:
1. The provisional order is confirmed.
 2. The respondent is hereby placed under final winding-up.
 3. The costs of application will be costs in the liquidation.

M.W MSIMEKI

JUDGE OF THE GAUTENG DIVISION

PRETORIA

COUNSEL FOR THE APPLICANT:

ADV F TERBLANCHE SC & J VORSTER

INSTRUCTED BY:

STRYDOM & BREDENKAMP INC.

COUNSEL FOR THE RESPONDENT:

ADV A VAN DER WALT

INSTRUCTED BY:

J P KRIEL & KIE

DATE OF HEARING:

26 NOVEMBER 2014

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