IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 39490/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

4/08/2016 .....

4/8/2016

In the matter between:

EMANUEL MULDER	Applicant
and	
DEON MARIUS BOTHA N.O.	First Respondent
MALESELA RUFUS RAMONETHA N.O.	Second Respondent
MENETTE BOERDERYE (PTY) LTD	Third Respondent
THEUNIS HELLMUTH	Fourth Respondent
DANIELA HELLMUTH	Fifth Respondent
ALBERTUS CAREL VAN ZYK	Sixth Respondent
PHILLIP MARTINUS SNYMAN	Seventh Respondent
NICOLAS PETRUS MAREE	Eight Respondent
ASC DU PREEZ	Ninth Respondent
SUIDWES AGRICULTURAL (PTY) LTD	Tenth Respondent
CLEAR CREEK TRADING (PTY) LTD	Eleventh Respondent
MACK'S PETROLEUM AGENCIES (PTY) LTD	Twelfth Respondent
MASTER OF THE HIGH COURT	Thirteenth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourteenth Respondent

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JUDGMENT

VAN DER WESTHUIZEN, A J

1. The applicant launched an application in terms whereof he seeks that the third respondent be placed under business rescue in terms of the provisions of section 131 of the Companies Act, 71 of 2008 (the current Companies Act) and under the supervision of a business rescue practitioner or, in the alternative, that the winding-up order in respect of the third respondent be set aside in terms of section 354(1) of the Companies Act, 61 of 1973 (the repealed Companies Act).

2. The third respondent was finally wound-up on 17 August 2015. The applicant is the sole director and shareholder of the third respondent.

3. The first and second respondents are the appointed liquidators of the third respondent.

4. Fourth to twelfth respondents are various creditors of the third respondent and who had proven claims against the third respondent.

5. The thirteenth respondent is the Master of the High Court and the fourteenth respondent is the Companies and Intellectual Property Commission.

6. The fourth, fifth, sixth, seventh and eight respondents oppose the application. I shall refer to them as the opposing respondents. First and second respondents have indicated that they abide by the decision of the court.

7. The opposing respondents enrolled this application on the urgent roll. The reason for such enrolment being that the first and second respondents in their capacity as appointed liquidators of the third respondent had received an offer to purchase some of the immovable property of which the third respondent was the owner, and the date for acceptance thereof was eminent. The said offer flows from the auction held during May 2016.

8. After hearing argument on the application, I granted an order dismissing the application with costs and indicated that I would deliver my reasons therefor in due course. These are my reasons.

9. Mr Swart, who appeared together with Mr Els on behalf of applicant, limited his argument to the relief sought in the alternative, i.e. for an order setting aside the final winding-up order. He however did not abandon the main relief sought, that of placing the third respondent under business rescue proceedings.

10. Certain of the repealed Companies Act's provisions and in particular those relating to liquidation of a company remain operative in terms of the provisions of the current Companies Act The applicant seeks in terms of the provisions of section 354(1) of the repealed Companies Act, that the final winding-up order of the third respondent be set aside. That section provides as follows.

> *"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."*

11. The basis of the application for the setting aside of the final winding-up order of the third respondent relates to alleged subsequent circumstances arising which allegedly warrants the setting aside of the final winding-up order. The subsequent circumstances relate to an offer to purchase the farming properties of the third respondent for an amount of R13 700 000.00 received from PGL Boerdery (Pty) Ltd (PGL).

12. The applicant suggests that the amount of R13 700 000.00 is sufficient to defray all the third respondents' indebtedness, the applicant alleging that the claims proved against the third respondent's estate amount to R11 100 362.20 and the administration costs amount to R1 971 920.50. Hence the amount of R13 700 000.00 would be adequate provision for the payment of the creditors' claims.

13. It is further submitted on behalf of the applicant that on any basis the value of the third respondent's assets exceeds its liabilities by far. The opposing respondents dispute this submission.

14. Mr Swart primarily relied upon the decision in *Klass v Contract Interiors*[1] in support of the application for setting aside the final winding-up of the third respondent. He also relied on the Supreme Court of Appeal decision in Ward *et al* v Smit *et al*: *In re Gurr v Zambia Airways Corporation Limited.*[2]

15. Levenberg, AJ, in *Klass, supra,* summarised the principles applying in terms of which the court is to exercise its discretion as follows:

> *"[65] 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 s 354 of the Companies Act:*
>
> *[65.1] 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.*
>
> *[65.2] The court should ordinarily not set aside a winding-up where creditors or the liquidators remain*

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[1] 2010(5) SA 40 (WLD) paragraph [46] – [65]
[2] 1998(3) SA 175 (SCA) at 180H

> *unpaid or inadequate provision has been made for the payment of their claims.*
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> *[65.3] 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.*
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> *[65.4] 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'.*

16. Mr Swart submitted that paragraph [65.3] of the judgment of *Klass, supra,* is to be read in the context of paragraph [65.2]. Thus, Mr Swart submitted that the phrase "or adequate provision has been made for the payment of their claims" is to be read into paragraph [65.3] of the said judgment.

17. The principle enunciated in paragraph [65.2], quoted above, obliges the court not to set aside a final winding-up order where the creditors or the liquidators remain unpaid or inadequate provision for payment of their claims has been made.

18. Paragraph [65.3] quoted above, sets the principle contrary to that of paragraph [65.2]. The principle of quoted paragraph [65.3] relates to where the claims of the liquidator and all the creditors have been satisfied, i.e. have been paid, and in that regard, the court should have regard to the wishes of the members.

19. In the respective contexts of quoted paragraphs [65.2] and [65.3], different and distinct principles are enunciated. The one provides for

where the claims of all creditors and liquidators have been paid, whereas the other provides for where the claims of all the creditors and liquidators have not been paid, but adequate provision has been made.

20. To adhere to Mr Swart's submission, would require imputing a requirement applicable in one principle to be tacitly included in a different and distinct principle. If that submission is correct, Levenberg, AJ, would have so stipulated. It follows that Mr Swart's submission cannot be upheld.

21. In *Ward, supra,* the Supreme Court of Appeal confirmed that the provisions of section 354 of the repealed Companies Act is wide enough to afford the Court a discretion to either set a final winding-up order on the basis that it should not have been granted in the first place, or on the basis that it falls to be set aside by reason of subsequent events.

22. *In casu,* no case has been made for setting aside the final winding-up order of the third respondent on the basis that it should never have been granted. The dispute between the parties relate to the second situation.

23. The critical question is whether the offer received from PGL qualifies as a subsequent circumstance that would provide adequate provision in respect of all the creditors' and the liquidators' claims against the third respondent.

24. In this regard the applicant submitted that:

(a) a written agreement has been signed by PGL and the applicant;
(b) a guarantee has been furnished by ABSA Bank, the only condition being transfer of the property to the purchaser;

(c) payment of an amount of R1 000 000.00 had been made into the applicant's attorney of record that is available to pay the creditors of the third respondent as well as the liquidation costs.

25. It was submitted on behalf of the applicant that an amount of R14 700 000.00 is available in respect of the claims of the creditors and the liquidators of the third respondent. It was further submitted that in terms of *Klass, supra,* adequate provision has accordinlgy been made for payment of creditors' claims and liquidation costs.

26. In respect of the guarantee provided by ABSA that relates to the offer by PGL, it is clear that it is not an irrevocable guarantee and ABSA can withdraw there from at any time and for any reason. It is further conditional upon the cancellation of existing registered mortgage bonds in respect of the various properties and the registration of mortgage bonds on those properties in favour of ABSA.

27. A draft order was provided on behalf of the applicant, should I exercise my discretion in respect of the provisions of section 354(1) in favour of the applicant. The said draft order provides that the order setting aside the final winding-up order of the third respondent shall lapse in the event that the transaction relating to the offer by PGL is cancelled or certain stipulated creditors are not paid within four months of the granting of the order setting aside the final winding-up order.

28. Mr Swart was at a loss to explain how an order setting aside the final winding-up of the third respondent can lapse in the event that the purchase of the relevant properties by PGL is cancelled or the stipulated creditors are not paid. The order setting aside the final winding-up of the third respondent is unconditional. Once granted, it cannot be undone, unless set aside by a court of appeal.

29. It was conceded on behalf of the applicant that the applicant had given the creditors and the liquidators the run around in the past. The latest event being an attempt by the applicant to obtain an order to postpone an auction during May 2016 in respect of the third respondent's immovable properties.

30. When regard is had to the terms of the proffered guarantee by ABSA, and the terms of the proposed draft order, the adequacy of the provision for the creditors' and liquidators' claims against the third respondent becomes questionable. The dispute between the parties relating to the amounts in respect of creditors' claims and the costs of liquidation is a further factor to be considered when exercising a discretion to set aside the final winding-up order of the third respondent.

31. Mr Terblanche, who appeared together with Mr Wessels on behalf of the opposing respondents, submitted that the application for business rescue was solely brought to frustrate the liquidation of the third respondent. He submitted further that there was no merit in the application for business rescue proceedings and that there has been no compliance with the requirements of section 131(2)(a) of the current Companies Act. In that regard, it was submitted that not all the third respondent's known creditors were notified of the application for business rescue proceedings to commence.

32. In particular it was submitted that the Landbank is a creditor of the third respondent that has not been notified of the application for the commencement of business rescue proceedings. Mr Terblanche submitted that this is fatal to the application for commencement of business rescue proceedings.[3]

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[3] *Golden Dividend v ABSA Bank (569/2015)* [2016] ZSCA 78 (30 May 2016)

33. It was further submitted that the applicant had undertaken to make payment of an amount of R6 000 000.00 into the trust account of the applicant's attorney, but failed to do so and now only mentions the payment of an amount of R1 000 000.00 into the applicant's trust account. The failure to make the payment of R6 000 000.00 is not explained by the applicant. Mr Terblanche submitted that this is but one of many instances where the applicant has reneged on undertakings given by him in the past and with reference to the winding-up proceedings.

34. A further factor that is to be considered when exercising a discretion in respect of the application for either the commencement of business rescue proceedings or the setting aside of the final winding-up order of the third respondent is the uncontested fact that the third respondent had not conducted any business for the past three years nor has it planted any crops for the past two years. Furthermore, it is not in possession of any farming equipment or funding to continue the third respondent's farming activities.

35. It was further pointed out by Mr Terblanche that apart from the known creditors, the third respondent is indebted to the local municipality in respect of the third respondent's property taxes in an amount of R176 000.00. The applicant does not deny that statement. The local municipality was not joined in the present application as an affected party.

36. Mr Terblanche further submitted that the true reason for the application was an attempt to preserve the various property of the third respondent for the children of the applicant. That this submission is correct appears from the option granted to a third party by PGL in a separate agreement accessory to the aforesaid purchase offer by PGL. The applicant being the driving force behind that third party.

37. Subsequent to the auction of the properties of third respondent during May 2016, the applicant through his attorneys consented to the properties being sold. However, subsequent to that, this application was launched. After the filing of the answering affidavit in this application, the applicant entered into the said agreement with PGL for an amount far less than the amount raised by the auction. The applicant does not explain this discrepancy.

38. These subsequent circumstances (offer by PGL) relied upon by the applicant arose after the launch of these proceedings and after the opposing affidavits were received. This is a further factor to be considered when the discretion is to be exercised in terms of section 354(1) of the repealed Companies Act.

39. Mr Terblanche further submitted that the applicant has not proven that he is a member of the third respondent, the challenge being made in the answering affidavit, and for that reason, it was submitted that the applicant has no *locus standi* to bring this application. There was no response to this submission on behalf of the applicant.

40. In my view there has been no compliance with the requirements in terms of section 131 of the current Companies Act. In the absence of any business being conducted for the past three years and the non-possession of farming equipment by the third respondent together with the absence of the necessary funds to conduct any farming activities, the applicant has not proven that the commencement of business rescue proceedings would be to the advantage of the third respondent or its creditors.

41. Form the foregoing, and with reference to the application for the setting aside of the final winding-up order of the third respondent, the applicant has equally failed to prove subsequent circumstances that would warrant the setting aside of the final winding-up order.

42. It follows that the principles enunciated in *Klass, supra,* which are relied upon by the applicant find no application in the present matter.

43. It then follows that the applicant is not entitled to an order that the third respondent be placed in business rescue under the supervision of a business rescue practitioner, or that the final winding-up order of the third respondent be set aside.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicants:	B H Swart SC A P J Els
Instructed by:	Couzyn Hertzog & Horak
On behalf of Respondents:	F H Terblanche SC A J Wessels
Instructed by:	Strydom & Bredenkamp