

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Murray and Others NNO v African Global Holdings (Pty) Ltd and Others [2019] ZASCA 152

The SCA today upheld an appeal by the provisional liquidators of the African Global Holdings (formerly Bosasa) group of companies against the decision of the Gauteng Division of the High Court, Johannesburg, setting aside the resolutions under which those companies had been placed in voluntary winding-up. Those resolutions had been passed in the light of the fallout from evidence given at the Zondo Commission of Enquiry into State Capture and concerned the relationships between the group and certain high profile political figures.

The consequence of that evidence is that both of the banks with which the Group held accounts and banking facilities indicated that they would withdraw those facilities and close the accounts. No other banks were prepared to provide banking facilities. The board of directors of African Global Holdings (Holdings) recognised that the Group could not continue to function on this basis. An approach to a business rescue practitioner proved fruitless, as the practitioner indicated that it would not be possible to secure banking facilities for the companies. They were then advised to place all the companies under voluntary winding-up, which they did.

After the appointment of the provisional liquidators Holdings was advised that the resolutions placing the companies under voluntary winding-up were invalid because they had been taken in terms of the Companies Act 61 of 1973, instead of the provisions of the Companies Act 71 of 2008. The reason for claiming that the 2008 Act applied was a claim that the companies were solvent at the time the resolutions were taken. An application was brought to the Gauteng Division of the High Court, Johannesburg as a matter of extreme urgency and nine days later an order was made invalidating the resolutions and setting aside the liquidators' appointments. The liquidators were ordered personally to pay the costs. The SCA rejected a challenge to the validity of the appointment of the provisional liquidators by the Deputy Master of the High Court, Pretoria. It held that the Master in Pretoria had jurisdiction over the whole of Gauteng and the Master's jurisdiction was not excluded merely because there was a Master in Johannesburg and the companies had their registered offices within the area of jurisdiction of the Master in Johannesburg, The validity of the resolutions depended on whether the companies were insolvent at the time they were taken. The SCA held that whether they were solvent depended on their commercial solvency, that is, whether they had liquid assets from which they were able to pay their current liabilities, including contingent and prospective liabilities, as and when they fell due and continue to trade normally. According to the Chairman of Holdings once the bank facilities were cut off they would not be able to receive payment under their contracts with various State Departments and organs of state, and would be unable to pay their staff or other liabilities. The result was that they were commercially insolvent when the resolutions were taken and the companies were properly placed under voluntary winding-up.

Accordingly the appeal had to succeed. The SCA criticised the manner in which the case was conducted in the high court, in regard to urgency and the failure to consider the contents of a report filed by the liquidators at the request of the Master in regard to issues pertaining to the solvency of the companies. Finally it held that there was no warrant for the court making an order that the liquidators personally pay the costs of the application.