Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: 4653/2015

In the matter between:

GARY WALTER VAN DER MERWE	First Applicant
CANDICE JEAN VAN DER MERWE	Second Applicant
THE TRUSTEES FOR THE TIME BEING OF THE EAGLES TRUST	Third Applicant
BANK ON ASSETS GLOBAL (PTY) LTD	Fourth Applicant
HELIBASE SWAZILAND (PTY) LTD	Fifth Applicant

and

ZONNEKUS MANSION (PTY) LTD (in liquidation)	First Respondent
THE LIQUIDATORS OF ZONNEKUS MANSION (PTY) LTD (in liquidation)	Second Respondent
THE STANDARD BANK OF SOUTH AFRICA LTD	Third Respondent
ABSA BANK LTD	Fourth Respondent
BANK ON ASSETS HOLDINGS (PTY) LTD	Fifth Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN	Sixth Respondent

REVENUE SERVICE

THE COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION Seventh Respondent

Court: Ferreira AJ
Date of hearing: 28 May 2015
Date of judgment: 10 June 2015

JUDGMENT

FERREIRA AJ

1. This is an application in terms of Uniform Rule 6(5)(d) to decide a point of law and related relief. The Third and Sixth Respondents both filed notices in terms of Uniform Rule 6(5)(d)(i),[1] wherein they seek the adjudication of the following point of law ("the point of law"): **Whether it is competent to commence business rescue proceedings in terms of Section 131(1) of the Companies Act, 71 of 2008 ("the Companies Act") when a company is in final liquidation.**

2. The point of law to be decided together with the further relief, emanates from a business rescue application ("the BRA") launched by the First to Fifth Applicants (hereinafter "the Applicants") on 13 April 2015 in respect of Zonnekus Mansions (Pty) Ltd (in liquidation) ("Zonnekus"). The Third to Sixth Respondents contend that a detailed response in

[1] **"(d) Any person opposing the grant of an order sought in the notice of motion shall - (iii) if he or she intends to raise any question of law only he or she shall deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question."**

respect of the BRA will be costly and time consuming, given the fact that the BRA is complex and comprises of over 500 pages, this reasoning makes practical sense.

3. The Third Respondent, as a cautionary measure, brought an interlocutory application to have the point of law adjudicated urgently. The questions of urgency and the procedure followed, by bringing an interlocutory application in respect of the point of law, cannot in the circumstances be criticised. The sole purpose, which is to the benefit of all the parties, was to have the point of law adjudicated soonest and to avoid delay and unnecessary costs. The Sixth Respondent clearly aligned itself with this approach.

4. Although there has been some reluctance on the part of the Applicants, it is apparent that the adjudication of the point of law, and if required the BRA, is to be dealt with urgently.

5. On 22 April 2015 the learned Gassner AJ ordered that the adjudication of the point of law be heard on the semi-urgent roll on 28 May 2015, with the parties to file their respective heads of argument on specific dates. The parties have complied with this order. The Applicants were represented by Mr P Tredoux and the Third Respondent by Mr G Woodland SC and the Sixth Respondent by Mr J G A Snyman SC. Detailed heads of argument were presented by the Applicants, Third and Sixth Respondents, I thank them for this.

6. It is understood from the papers, that the First, Second, Fourth and Seventh Respondents abide the decision of this Court, them having not opposed the relief sought by the Third Respondent in the interlocutory application. They also did not indicate their stance in respect of the point of law, to be decided.

7. The core difference between the Applicants and the Third and Sixth Respondents in respect of the point of law lay in the fact that a number of judgments relied[2] upon by the Applicants all from the different divisions of the Gauteng High Court ruled that a business rescue application may be brought even after a final winding-up order has been granted. Conversely[3] there was one judgment from the Gauteng High Court, held at Pretoria, which does not follow this line of reasoning, and so did the judgment of the Honourable learned Mr Justice Rogers in this division.[4]

8. On 28 May 2015, I was thus tasked with deciding the point of law, ancillary relief sought by the Third to Sixth Respondents[5] emanating from the debate in Court, and if the point of law was found in favour of the Third to Sixth Respondents, what happens to the BRA. In this

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[2] Van Staden v Angel Ozone Products CC (in liquidation) and others 2013(4) SA 630 (GNP); Absa Bank Ltd v Summer Lodge (Pty) Ltd 2014(3) SA 90 (GP); Absa Bank Ltd v Summer Lodge (Pty) Ltd 2013(5) SA 444 (GNP); Absa Bank Ltd v Makuna Farm CC 2014(3) SA 86 (GJ)

[3] Richter v Bloempro CC and Others 2014(6) SA 38 (GP) by the learned Mr Justice Bam

[4] R J C Molyneux & Another v M I Patel & Others (14618/2014) [2014] ZAWCHC 191 (27 November 2014)

[5] The Third to Sixth Respondents are affected persons as defined in the Companies Act.

regard it was submitted by those Respondents that the BRA ought to be dismissed and the question of costs which included the costs of 22 April 2015, when Gassner AJ made the order regulating the conduct of this matter, ought to be paid by the Applicants. The Applicants on the other hand contended that the point of law ought to be decided against the Third and Sixth Respondents, and in which event, they are not to be given an opportunity to oppose the BRA. In such event it was also contended that the Third and the Sixth Respondents were to pay the costs of the interlocutory application and the adjudication of the point of law, jointly and severally, payment by the one, to absolve the other.

9. The Applicants in furtherance of the above submissions submitted that the Third and the Sixth Respondents are not entitled to have, as they put it, a second chance by opposing the business rescue application and filing answering affidavits. The reasoning, in a nutshell, is that the Third and Sixth Respondents were required to file their answering affidavits in order to oppose the BRA and cannot do so if they should lose the point of law. In this regard the Applicants contended that they would present full legal argument at the hearing of the matter.[6] At the hearing Mr Tredoux contended mildly that the Third to Sixth Respondents have lost the opportunity to file answering affidavits, and should be denied this opportunity. I do not agree with him, the Third and Sixth Respondents in the circumstances followed a perfectly reasoned and logical stance, therefore they should be entitled to file

[6] Record, p 34, para 68

answering affidavits, and have their opposition to the BRA adjudicated by this Court, if the point of law should go against them.

10. On 27 May 2015, late in the afternoon, the unreported judgment of the learned Mr Justice Rogers ("Rogers J") herein referred to as the **Molyneux** judgment, whilst doing my research prior to the hearing of this matter, came to my attention.[7] None of the parties had referred to this judgment. I transmitted copies thereof to the respective counsel, in order to make them alive to this judgment. The **Molyneux** judgment, in my view, disposed of the point of law in the Third to Sixth Respondents' favour. Bearing in mind the principle of *stare decisis*, I at that juncture was effectively bound by that judgment. On 28 May 2015, I however did reserve judgment to consider all the arguments, and to write a reasoned judgment, knowing that whatever I decided would be the subject of an appeal.

11. Miraculously on 1 June 2015, I read the SCA judgment in **Richter**[8] on Saflii ("the **Richter** SCA judgment"), it having been published in the course of that day, the aforesaid judgment, because of the principle of *stare decicis*, clearly decided the law point in the Applicants' favour. I accordingly, in view of the **Richter** SCA judgment, invited counsel to provide further submissions if they so wished. On 4 and 5 June 2015, I received the Applicants' and Sixth and Seventh Respondents'

[7] Sub nom R J C Molyneux & Another v M I Patel & Others (14618/2014) [2014] ZAWCHC 191 27 November 2014.
[8] Richter v Absa Bank Ltd (20181/2014) [2015] ZASCA 100 (1 June 2015)

submissions, dealing with the **Richter** SCA judgment.

12. In the Applicants' initial heads of argument they did not make anything of the Third and Sixth Respondents' contentions that in **Richter v Bloempro CC and Others**[9] the learned Mr Justice Bam ("Bam J") considered the question: **"Whether it is in law permissible, or possible, to grant business rescue procedure after a final liquidation order was granted."** This question was considered by Bam J with reference to Section 131 of the Companies Act, 71 of 2008 ("the Companies Act"), and specifically the words **"… may apply … at any time for an order placing the company under supervision and commencing business rescue proceedings"**, Section 128 of the Companies Act the definition of **"business rescue"** and **"financially distressed"** and the wording of Section 132 of the Companies Act dealing with the duration of business rescue proceedings and more specifically Section 132(2) in relation to when business rescue proceedings end. Bam J concluded that the legislature intended to provide for business rescue proceedings only prior to the granting of a final liquidation order.[10] Reaching this conclusion Bam J made mention of the fact that he differed from the judgment of the learned Makgoba J in **Absa Bank Ltd v Summer Lodge**.[11]

13. It thus follows that there were dissenting judgments in the diffident

[9] 2014(6) SA 38 GP
[10] See the last sentence of para 17 at 42 F - G and the reasons provided thereafter in para 18 at 42 G to 43 J.
[11] 2013(5) SA 444 (GNP) at para 18, 448 A - C

divisions of the Gauteng High Court regarding the point of law, prior to the **Richter** SCA judgment. In this Court, Rogers J in the **Molyneux** judgment[12] doubted that **Absa Bank Ltd v Summer Lodge** and **Absa Bank v Makuna Farm** were correctly decided.

14. In ***Ex parte* Minister of Safety & Security: In re S v Walters**[13] the learned Justice Kriegler, held with regard to the doctrine of *stare decicis*[14] that:

> **"This statement of principle and the warning it contains are in point in the present case. According to the hierarchy of Courts in chapter 8 of the Constitution, the SCA clearly ranks above the High Courts. It is the highest Court of Appeal except in constitutional matters. Neither the fact that under the interim Constitution the SCA had no constitutional jurisdiction nor that under the (final) Constitution it does not enjoy ultimate jurisdiction in constitutional matters, warrants the finding that its decisions on constitutional matters are not binding on High Courts. It does not matter, as Cloete J correctly observed in 'Bookworks', that the Constitution enjoys all Courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the bill of**

[12] Para 28 and 29
[13] 2002(4) SA 613 at 644 D - E
[14] 644 D - J; 645 A - H; 646 A - F

rights. In doing so, Courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals."

15. The cases in support of the approach in the **Richter** SCA judgment are, **Van Staden**, **Absa Bank Ltd v Summer Lodge (Pty) Ltd** per the learned Mr Acting Justice Van der Bijl ("Van der Bijl AJ"), **Absa Bank Ltd v Summer Lodge (Pty) Ltd** per the learned Mr Justice Makgoba ("Makgoba J") and finally **Absa Bank Ltd v Makuna Farm CC** per the learned Mr Justice Boruchowitz ("Boruchowitz J") [15].Cases which hold the contrary views are **Molyneux** per Rogers J and **Richter** in the Court *a quo*, per Bam J.[16] It is noted that in the **Richter** SCA judgment, the SCA did not refer to the **Molyneux** case, nor the judgments of Van der Bijl AJ or Boruchowitz J.

16. The reasoning in the **Richter** SCA judgment is found in paragraphs 10, 17 and in particular paragraph 17. The SCA observed that there is no sensible justification for drawing the proverbial line in the sand between pre- and post- final liquidation in circumstances where the prospects of success of business rescue exist, as the legislature did not do so and to restrict business rescue to those cases in which a final winding-up order had not been granted could be inimical to the Act.

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[15] Refer to footnote 2 for the case references

[16] *Vide* De Jure 47 Vol 2 2014, p 329: in this article the judgment of Bam J is considered to be correct. The article's heading is:

17. I am bound by the **Richter** SCA judgment, even though I respectfully differ therewith, given the reasoning in the judgments of Bam J and Rogers J referred to *supra*. The Third and Sixth Respondents contended that the Court hearing the BRA ought to adjudicate the issue of the costs of the interlocutory application and the hearing thereof, in my view the Applicants are successful given the **Richter** SCA judgment, and they are thus entitled to their costs.[17] It would be wrong to leave the exercise of that discretion to another Court, when I in fact decided the point of law and matters related to the interlocutory application. The general rule is that the successful litigant is entitled to costs, I do not see any reason why I should deviate from this.

18. I propose the following order:

18.1 It is competent to commence business rescue proceedings in terms of Section 131(1) of the Companies Act, 71 of 2008, when a company is in final liquidation.

18.2 That the Third and Sixth Respondents be granted 15 days to file their answering affidavits, if any, and the Applicants 10 days to file their answering affidavit, if any.

18.3 That the parties file heads of argument in accordance with the practice directives of this Court or, as agreed by them.

[17] Cilliers The Law of Costs: 2-08

18.4 That this matter be postponed to the semi-urgent roll to the earliest date upon which the parties are able to agree, alternatively that such date be determined by the Judge President of this Court.

18.5 That the Third and Sixth Respondents pay the costs of the interlocutory application and the costs of deciding the point of law, which shall include the costs of 22 April 2015, jointly and severally, payment by the one to absolve the other.[18]

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FERREIRA, AJ

[18] The general rule is that costs follow the event. Vassen v Cape Town Council 1918 CPD 360