

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

Case no: 61215/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

26 JANUARY 2024

DATE

SIGNATURE

In the matter between:

THELIZTA DU TOIT
DON JAMES DOUGLAS MCINTOSH N.O.
CHARLENE MCINTOSH N.O.
RIAN CLOETE N.O.

(In their capacities as the trustees of the Duggie Don Trust,
IT2864/95)

LEONIE GEERKENS N.O.

(In her capacity as executrix in the estate late Marc Geerkens)

and

DAWID MAARTENS N.O.

(Cited as BRP of Roderick Trade 9 (Pty) Ltd in business rescue)

RODERICK TRADE 9 (PTY) LTD (in business rescue)

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

First Applicant
Second Applicant
Third Applicant
Fourth Applicant

Fifth Applicant

First Respondent

Second Respondent

Third Respondent

J U D G M E N T

MAKHOB A, J

- [1] The application before this court is for the final winding-up of the second respondent. On 7 February 2023, the second respondent consented to a provisional winding up order. The application is opposed by the second respondent. The respondent is represented by Mr Reader.
- [2] The first applicant was an employee of the second respondent. Her claim relates to the unpaid remuneration for services she rendered to the second respondent.
- [3] The second, third and fourth applicants are trustees of the Dougie Don Trust. The trust has a claim of R8 904 978. 00 against the second respondent.
- [4] The fifth applicant is the executrix of the estate of the late Marc Georkens. The estate has a claim against the second respondent in the amount of R83 755.32. The claim is based on the court order which was granted on the 8 May 2020.
- [5] Mr Robert Bruce Reader is the sole director and shareholder member of the second respondent. The Business Rescue Practitioner (first respondent) has filed a notice terminating the business rescue. The first respondent is therefore no longer an active role player in these proceedings.
- [6] The applicants submit that the second respondent is in a state of insolvency for the following reasons.

6.1 The second respondent is not in a financial position to pay the applicants who are creditors of the second respondent.

6.2 The second respondent cannot pay its liabilities as and when they fall due in the ordinary course of its business.

6.3 The second respondent initiated the business rescue due to its inability to pay its debts.

[7] It is submitted on behalf of the applicants that concurrent creditors are entirely dependent upon the effectiveness of a liquidation and steps taken by the liquidator to investigate the affairs of the company.

[8] On prescription it is further submitted on behalf of the applicants that the running of prescription was interrupted as well as delayed by the business rescue on 15 May 2020.

[9] The second respondent submit that the fourth applicant does have a claim against the second. In fact the main instigator behind the liquidation application is Don Mcintosh who is the person that is controlling the trust.

[10] The second respondent argues that the business rescue does not interrupt prescription and that the first applicant's claim has prescribed.

[11] The fourth applicant's claim has been paid save for costs. The outstanding costs is in dispute and ought to be taxed first.

[12] The issue in this matter is whether the second respondent is able to meet current demands on it and can remain buoyant.¹ The applicants must show that the second respondent is insolvent and liable to be wound-up.²

¹ Absa Bank Ltd v Rhebokskloof (Pty) Ltd and others, 1993 (4) SA 436 (C).

² Johnson v Hirotec (Pty) Ltd, 2006 (4) SA 930 (SCA).

[13] In my view it is clear that the second respondent is unable to pay the debts. I say this because the second respondent agreed to the provisional winding up.

[14] I am persuaded to accept the views expressed by the applicant's counsel that the running of prescription was delayed when the second respondent entered into business rescue. This is in line with the case law relied upon by the applicants' counsel.

[15] Again in my view, the running of prescription was interrupted when the second respondent consented to granting of a provisional winding-up against it.

[16] In addition an attempt to settle the matter in my view also interrupted prescription.

[17] I am satisfied that the applicants are creditors of the second respondent and cannot obtain payment of their debts owed to them by the second respondent. This court is satisfied that all the affidavits in this matter have been properly attested to.

[18] I make the following order:

18.1 The application for the final winding-up of the second respondent is granted.

18.2 Cost of this application is to be cost in the winding – up of the second respondent.

MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 14 NOVEMBER 2023

JUDGMENT HANDED DOWN ON: 26 JANUARY 2024

Appearances:

For the Applicants: Adv MP van der Merwe SC (instructed by) Couzyn, Hertzog & Horak ATTORNEYS

For the Second Respondent and Intervening Party: Adv U van Niekerk (instructed by) JI van Niekerk Incorporated.