



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

Reportable

Case no: D4697/2023

In the matter between:

PIERRE DE VILLIERS BERRANGÉ N.O

FIRST APPLICANTS

KURT ROBERT KNOOP N.O.

SUNÉ SMIT N.O.

SIDDHARTHA SINGH N.O.

In their capacities as joint provisional liquidators
of Misty Blue Investments (Pty) Ltd (in provisional
liquidation)

EUGENE NEL N.O.

SECOND APPLICANTS

JOHNINE WINSOME ELSIE MADDOCKS N.O.

IGNATIUS CLEMENT MIKATEKO SHIRLELE N.O.

RIKESH SEWGOOLAM N.O.

In their capacities as joint provisional liquidators
of Personify Investments (Pty) Ltd (in provisional
liquidation)

TARRYN VALERIE ODELL N.O.

THIRD APPLICANTS

MANDLA PROFESSOR MADLALA N.O.

NUMDUMISO SENZOSENKOSI SIBIYA N.O.

LOUISA SIBIYA N.O.

(In their capacities as joint provisional liquidators
of Huntrex 302 (Pty) Ltd (in provisional liquidation)

and

THE MASTER OF THE HIGH COURT FIRST INTERESTED PARTY
PIETERMARITZBURG

VEJANDRAN SHUNMUGAM PILLAY SECOND INTERESTED PARTY

JENNY PILLAY THIRD INTERESTED PARTY

INVESTEC BANK LIMITED FOURTH INTERESTED PARTY

Coram: M E Nkosi J

Heard: 03 August 2023

Delivered: 17 August 2023

ORDER

1. The applicants are authorised under s 386(5), read with section 386(4)(a) of the 1973 Companies Act and Item 9 of Schedule 5 of the 2008 Companies Act to:

1.1 institute this application and to prosecute it to finality;

1.2 appoint attorneys and counsel for the purpose of bringing the aforesaid application as contemplated in section 386(4) of the 1973 Companies Act, and to pay the costs and disbursements incurred in the appointment of such attorneys and counsel.

2. The powers of the provisional liquidators are extended to permit them to sell the movable and immovable property of the respective companies by private treaty or public auction, and to give transfer of ownership thereof, as contemplated in s 386(5), as read with s 386(4)(h) of the 1973 Companies Act, subject to the approval of the Master of the High Court, Pietermaritzburg, first being obtained (in writing) authorising the provisional liquidators to proceed with any such sale/s:

2.1 Misty Blue Investments (Pty) Ltd (in provisional liquidation):

2.1.1 Erf 1410 Durban North, in extent 1,694 square metres, held in terms of Title Deed No. T41746/2013, situate at 106 Kenneth Kaunda Road Durban North;

2.1.2 the Remainder of Erf 1413 Durban North, in extent 966 square metres, held in terms of Title Deed No. T2433/2015, situate at 104 Kenneth Kaunda Road Durban North;

2.1.3 104 units in Sectional Title Scheme “Urban Park”, Scheme No. SS163/2013, situate on Portion 14 of Erf 2544, Umhlanga Rocks;

2.1.4 Section 160 in the Sectional Title Scheme “Urban Park”, more fully described in paragraph 2.1.3.

2.1.5 The real right extend the Sectional Title Scheme “Central Park”, Scheme No. SS116/2017 held under Certificate of Real Right of Extension SK 1624/2017S.

2.2 Personify Investments (Pty) Ltd (in provisional liquidation):

2.2.1 the Farm Shay no. 17185, in extent 8,056 square metres, held in terms of Title Deed No. T15321/2014, situate at 40 Mahatma Gandhi (Point) Road, Durban.

2.3 Huntrex 302 (Pty) Ltd:

2.3.1 the moveable property owned by the company.

3. That the applicants be authorised to approach this court on these papers, duly supplemented, to obtain further powers in relation to the administration of the respective companies in liquidation.

4. The second and third interested parties are ordered to pay the costs of the application, including the costs of the two counsel where employed, jointly and severally, the one paying the other to be absolved.

JUDGMENT

M E Nkosi J

Introduction

[1] The applicants are the joint provisional liquidators of Misty Blue Investments (Pty) Ltd (“Misty Blue”), Personify Investments (Pty) Ltd (“Personify”) and Huntrex 302 (Pty) Ltd (“Huntrex”) (all in provisional liquidation), respectively. They were appointed by the Master of the High Court, Pietermaritzburg, who is cited as the first interested party in these proceedings, on 21 July 2021. They are seeking leave from this court to launch this application in terms of s 386(5), read with s 386(4)(a) of the Companies Act, 61 of 1973 (“the 1973 Act”), and in terms of s 386(5) read with s 386(4)(h) to sell, by private treaty or public auction, a restricted number of immovable properties owned by Misty Blue and Personify, as well as the movable property owned by Huntrex, and to give transfer of ownership thereof. The application is opposed by the second and third interested parties, who are the co-directors and shareholders of Personify and Huntrex, while the second applicant is the sole shareholder and director of Misty Blue.

Factual background

[2] The factual background to the matter, briefly stated, is that Misty Blue, Personify and Huntrex are all interrelated companies. Misty Blue and Personify are property owning and development companies, while Huntrex does active trading in the form of leasing immovable properties from Misty Blue and Personify and conducting trading operations in the hospitality industry, apart from some commercial properties in The Square, and a property development component in the development known as Urban Park. Investec Bank Limited, which is cited as the fourth interested party in these proceedings, is the major creditor of all three

companies and, as a secured creditor, has perfected notarial bonds in respect of movable assets owned by Huntrex.

[3] On 12 July 2019, Investec had launched winding-up applications against all three companies in this court. The said applications were adjourned from time to time, first, following a resolution adopted by the directors to commence business rescue proceedings and, on other occasions, following settlement agreements concluded between Investec and the companies' directors to restructure the debts. On 7 August 2020, the directors, who are also shareholders of the three companies, launched applications to place the three companies under business rescue. This resulted in the winding-up applications being suspended in terms of s 133 of the Companies Act, 71 of 2008 ("the 2008 Act"), pending the outcome of the business rescue applications.

[4] The business rescue applications and the winding-up applications were heard jointly by Ploos van Amstel J, who delivered his judgment on 29 June 2021 dismissing the business rescue applications in respect of all three companies. He also granted the provisional winding-up orders against them in the hands of the Master of the High Court, Pietermaritzburg, who is cited as the first interested party in these proceedings. The three companies applied for leave to appeal against the dismissal of their business rescue applications, but their application was refused by Ploos van Amstel J on 17 August 2021. They then applied for leave to appeal to the Supreme Court of Appeal (SCA), but their application was dismissed by that court on 5 November 2021. They followed up with a reconsideration application to the SCA, which was dismissed by the President of that court on 23 February 2022. The dismissal of their business rescue application by the Constitutional Court (on 21

October 2022) finally sounded the death knell for their bid to be placed under business rescue.

[5] What remained was for this court to consider the applications for the final winding-up of the three companies, which were adjourned to 23 February 2023, with the provisional winding-up orders extended to that date. However, on 20 February 2023, which was a mere two days before the return date, a certain Vardraj Munsamy Chetty had brought a fresh business rescue application in respect of the three companies using the long form notice of motion. That application was set down for hearing on 30 May 2023, which resulted in the hearing of the liquidation applications not proceeding as scheduled on 23 February 2023. Believing that Chetty's intention was to derail the liquidation proceedings, in collusion with the second interested party, the applicants decided to bring this application requesting that they be given power by this court to elicit offers for consideration and to dispose of immovable properties which they contend are over-burdening the estates of the three companies (in provisional liquidation) in avoidable costs.

The relevant provisions of the 1973 Act

[6] Of particular relevance for the purposes of this application are the provisions of s 386 of the 1973 Act, the relevant portions of which are the following:

‘(3) The liquidator of a company –

- (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387...

shall have the powers mentioned in subsection (4).

(4) the powers referred to in subsection (3) are –

...

- (h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;

...

(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding-up the affairs of the company and distributing its assets.’

[7] Of further relevance for the purposes of this application are the provisions of s (1) of the 1973 Act, in which the term “liquidator”, in relation to a company, is defined as meaning ‘the person appointed under Chapter XIV as liquidator of such company, and includes any co-liquidator and any provisional liquidator so appointed’. However, when it comes to the application of s 386 of the 1973 Act to a provisional liquidator, one must have regard to the terms of the provisional liquidator’s appointment to ascertain whether they have been restricted by the Master in terms of subsection (6) of that section.¹ In the present case, there is nothing to suggest that the applicant’s powers have been restricted.

Directions to sell a restricted number of properties owned by the three companies (in provisional liquidation)

[8] It is admitted by the applicants in their founding affidavit (deposed to by the first applicant) that the function of the provisional liquidators generally is to take control of the company and its assets and the preservation thereof pending the appointment of a liquidator to attend to its winding-up. However, they contend that it is absolutely necessary for the winding-up of the three companies herein; that their

¹ Henochsberg on the Companies Act, 71 of 2008, commentary on s 386 of the 1973 Companies Act, Vol 2 APPI 1–184.

assets be sold as soon as possible in order to halt the ‘massive erosion’ of value and possible returns to creditors from debilitating holding costs funded to a large extent by Investec, the secured creditor. Some of the properties owned by the three companies are excluded from the relief sought by the applicants in this application because they are fraught with complexities, such as the units in certain developments which have been purchased and paid for but were never transferred to the purchasers thereof.

[9] It was also conceded by Mr *Stokes*, who appeared with Mr *van Rooyen* on behalf of the applicants, that as provisional liquidators, the applicants do not have the powers as set out in s 386(4) of the 1973 Act, unless with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under s 387 of the 1973 Act.² He also accepted that the primary function of a provisional liquidator is to take physical control and to manage the administration of the property and affairs of the company. The powers of a provisional liquidator do not include the power to liquidate the assets of the company, unless they are extended by the Master and the court to include the power to do so.³ See *Ex Parte Provisional Liquidators, Pharmacy Holdings*.⁴

[10] As correctly pointed out by Mr *Stokes*, it is implicit in s 386(5) of the 1973 Act that the court has an unfettered discretion to grant leave to a provisional liquidator to sell assets of a company (in provisional liquidation) if the court considers such sale to be necessary for winding-up the affairs of the company and distributing its assets. Ordinarily, it is only in exceptional circumstances where the

² Section 386(3)(a) of the 1973 Act.

³ *Massyn v De Villiers NO and others* [2021] 3 ALL SA 578 (WCC) para 31.

⁴ 1962 (2) SA 12 (W)

court would be prepared to grant leave to a provisional liquidator to sell the assets of a company (in provisional liquidation).⁵ In *Ex Parte Kloppe NO: In Re Sogervim SA (Pty) Ltd (In liquidation)*⁶, the court stated that exceptional circumstances may vary from case to case and found that no exceptional circumstances existed in that case.

[11] In the present case, the exceptional circumstances which are contended by Mr Stokes to exist and to justify this court exercising its discretion in favour of granting the relief sought by the applicants are, *inter alia*, that: (a) the winding-up proceedings in respect of the three companies have been pending since July 2019 (four years); (b) apart from very limited activity, the companies have not traded since the imposition of the Covid-19 restrictions in March 2020; (c) Investec has perfected notarial bonds in respect of movable assets owned by Huntrex and is a secured creditor in this regard; (d) since commencement of the winding-up proceedings and conclusion of the various breached settlement agreements the thrust of attempts to settle the three companies' indebtedness to Investec has been by way of unsuccessful attempts at selling the bulk of the three companies' assets; (e) notwithstanding a rental income of R475 000 per month in respect of the three companies' properties, the companies' estates are incurring expenses of approximately R1.9 million per month, a vast portion of which are not being paid and are incurring interest; (f) the preservation of the respective estates has accrued unpaid levies, rates and interest of R52 million calculated as at 23 February 2023; (g) the Municipality has threatened to disconnect all services to the companies' properties for non-payment, and; (h) the estates of the three companies have run out of money to fund preservation expenses.

⁵ *Ex parte: Ottlie Anton Noordman NO v Knipe* 2014 JDR 1815 (FB) para 10.

⁶ 1971 (3) SA 791 (T)

[12] In response, it was argued by Mr *Harpur*, who appeared with Ms *Deodath* on behalf of the second and third interested parties, that the applicants' application fails to disclose a cause of action and is excipiable on the following grounds: (a) In terms of s 387 of the 1973 Act the applicants are only entitled to apply to this court for directions to sell the properties concerned 'where the Master has refused to give directions...'; (b) the Master has not refused to give directions, but the applicants had deliberately elected to by-pass the Master and approach this court directly because they considered 'such a step to be futile since the companies are in provisional liquidation and would simply be an invitation to further protracted litigation' ; (c) as the Master's refusal to authorise the proposed sales is a necessary pre-condition, the applicants' failure to fulfil such condition discloses no valid cause of action and the application should be dismissed for that reason.

[13] According to my interpretation of the provisions of s 387 of the 1973 Act, subsection (3) of that section provides for two scenarios where the liquidator may be entitled to apply to the court for directions. The first scenario is where the Master has refused to give directions, while the second scenario is in regard to any other particular matter arising under the winding-up. If my interpretation is correct, then the relief sought by the applicants in this application will obviously fall within the scope of the second scenario. If, on the other hand, my interpretation is wrong, the relief sought by the applicants in this application will still fall within the scope of s 386 (5), which is the catch-all provision covering anything which the court may consider necessary for winding-up the affairs of the company and distributing its assets. In other words, the applicants always had a right of resort to the court for the

relief they are seeking, and the court has an unrestricted discretion to grant such relief if it considers it necessary for the winding-up of the companies.⁷

[14] Therefore, in conclusion, I find that exceptional circumstances are present and that the applicants have made out a case for the relief they are seeking in this application.

Order

[15] I accordingly grant an order in the following terms:

1. The applicants are authorised under s 386(5), read with section 386(4)(a) of the 1973 Companies Act and Item 9 of Schedule 5 of the 2008 Companies Act to:

1.1 institute this application and to prosecute it to finality;

1.2 appoint attorneys and counsel for the purpose of bringing the aforesaid application as contemplated in section 386(4) of the 1973 Companies Act, and to pay the costs and disbursements incurred in the appointment of such attorneys and counsel.

2. The powers of the provisional liquidators are extended to permit them to sell the movable and immovable property of the respective companies by private treaty or public auction, and to give transfer of ownership thereof, as contemplated in

⁷ Henochsberg on the Companies Act, Vol 2 Appx1 – 198 4th par; *Ex parte Contemporary Refrigerator (Pty) Ltd* 1966 (2) SA 227 (D) at 229.

s 386(5), as read with s 386(4)(h) of the 1973 Companies Act, subject to the approval of the Master of the High Court, Pietermaritzburg, first being obtained (in writing) authorising the provisional liquidators to proceed with any such sale/s:

2.1 Misty Blue Investments (Pty) Ltd (in provisional liquidation):

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2.1.5 The real right extend the Sectional Title Scheme “Central Park”, Scheme No. SS116/2017 held under Certificate of Real Right of Extension SK 1624/2017S.

2.2 Personify Investments (Pty) Ltd (in provisional liquidation):

2.2.1 the Farm Shay no. 17185, in extent 8,056 square metres,

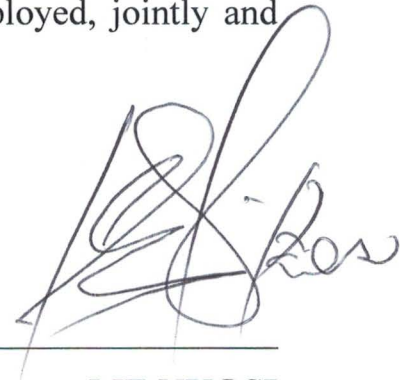
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40 Mahatma Gandhi (Point) Road, Durban.

2.3 Huntrex 302 (Pty) Ltd:

2.3.1 the moveable property owned by the company.

3. That the applicants be authorised to approach this court on these papers, duly supplemented, to obtain further powers in relation to the administration of the respective companies in liquidation.

4. The second and third interested parties are ordered to pay the costs of the application, including the costs of the two counsel where employed, jointly and severally, the one paying the other to be absolved.

A handwritten signature in black ink, appearing to be 'ME NKOSI', written over a horizontal line.

ME NKOSI
JUDGE

Appearances

For the applicant: Mr Stokes SC & Mr R M van Rooyen
Instructed by: Johnston & Partners, Umhlanga Rocks, Durban.
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For the respondents: Mr G D Harpur SC & Ms D Deodath
Instructed by: T Giyapersad Incorporated, Umhlanga Ridge, Durban.
Ref: T Giyapersad
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Email: tashya@tgiyapersad.co.za

Date of Hearing: 03 August 2023

Date of Judgment: 17 August 2023