# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

Case No: 555/08

In the matter between :

RONBEL 108 (PTY) LTD — Appellant
(Reg No 2003/026780/07)

and

SUBLIME INVESTMENTS (PTY) LTD — Respondent
(In liquidation)
(Represented by its Liquidator S L Anticevich NO)

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| Neutral citation: | *Ronbel v Sublime* (555/08) [2009] ZASCA 103 (18 September 2009) |
| Coram: | STREICHER, NUGENT, VAN HEERDEN JJA, HURT and GRIESEL AJJA |
| Heard: | 3 SEPTEMBER 2009 |
| Delivered: | 18 SEPTEMBER 2009 |
| Summary: | Section 359(2) of Companies Act 61 of 1973 – no notice to liquidator of intention to continue legal proceedings – proceedings considered to be abandoned – court's discretion to otherwise direct – long delay in bringing application. |

## ORDER

On appeal from: High Court, Johannesburg (Bruinders AJ sitting as court of first instance).

The appeal is dismissed with costs.

## JUDGMENT

STREICHER JA (NUGENT, VAN HEERDEN JJA, HURT and GRIESEL AJJA concurring)

[1] Upon registration of a special resolution by a company that it be wound up voluntarily all civil proceedings against the company are suspended until the appointment of a liquidator.[1] A person who intends to continue with such proceedings must, within four weeks after such appointment, give three weeks' notice of his intention to continue the proceedings, to the liquidator, before doing so.[2] If notice is not so given the proceedings are considered to have been abandoned unless the court otherwise directs.[3] The appellant's application for such a directive in respect of an action instituted by Absa Bank Limited, which thereafter ceded its claim to the appellant, was dismissed by the High Court,

[1] Section 359(1) of the Companies Act 61 of 1973 provides:
'(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –
(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
(b) . . ..'

[2] Section 359(2)(a) provides:
'(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same . . . shall within four weeks after the appointment of the liquidator give the liquidator not less that three weeks' notice in writing before continuing or commencing the proceedings.'

[3] Section 359(2)(b) provides:
'(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

Johannesburg, per TJ Bruinders AJ, and this is an appeal against his judgment. The appeal is with the leave of the court below.

[2] Absa instituted action against Sublime Investments (Pty) Ltd, formerly known as Capitol Hill Investments (Pty) Ltd. The matter was set down for trial on 30 April 2003 but shortly before the trial was due to commence, Sublime, by special resolution, resolved that it be voluntarily wound up and such winding-up commenced upon the registration of the resolution.[4] As a result, in terms of s 359(1)(a) of the Companies Act 61 of 1973, the action was suspended pending the appointment of a liquidator. Section 1 provides that unless the context otherwise indicates 'liquidator' includes a duly appointed provisional liquidator. But in *Strydom NO v MGN Construction (Pty) Ltd & another: In re Haljen (Pty) Ltd (in liquidation)* 1983 (1) SA 799 (D) at 806B-807H Booysen J held, correctly in my view, that in the case of s 359 the context indeed indicates otherwise and that, in terms of the section, proceedings are suspended pending the appointment of a final liquidator. The correctness of this decision was not challenged by either of the parties.

[3] A Mr Anticevich was appointed as provisional liquidator and subsequently, on 1 July 2004, as final liquidator. During the period approximately July to August 2003 Mr Loubser, in his capacity as an employee of Absa, made enquiries about the assets of Sublime and was informed by Anticevich:

(a) The company was the owner of an immovable property with improvements on it, namely a fuel filling station;

(b) The property was subject to a long term lease in favour of Zenex Oil (Pty) Ltd;

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[4] Section 352(1) provides:
'A voluntary winding-up of a company shall commence at the time of the registration in terms of section 200 of the special resolution authorising the winding-up.'

(c) All the future rent had been paid in advance, prior to the liquidation, so that the company would at least for a substantial period of time not receive any income in the form of rent;

(d) The lease was registered and was for a period of 20 years of which 11 years remained;

(e) The only future income of the company would be a contribution by the lessee to the rates and taxes payable on the property;

(f) A notarial bond was registered in favour of Zenex to secure its rights and upon a sale of the property Zenex had a right of first refusal; and

(g) Apart from the property, small outstanding debts appeared to be the only other assets.

[4] According to the statement of affairs in terms of s 363 required of the directors of Sublime, dated 9 April 2003, the liabilities of the company were reflected as R2 720 651. The assets were reflected as R120 030 comprising the immovable property at a value of R90 000 and outstanding book debts of R30 030. Save for an additional liability of R5 940 in respect of arrear salaries these were also the assets and liabilities according to the final liquidator's report dated 12 July 2004.

[5] No claims were proved at the first meeting of creditors arranged for 19 May 2004. Absa decided to refrain from submitting and proving a claim, principally because, if it did submit a claim, it, in the light of the information at its disposal, could become liable for a contribution towards the administration costs. However, towards the middle of 2004 the appellant expressed an interest in acquiring Absa's claims and entered into negotiations with Absa regarding the acquisition of its claims. Towards the end of October 2005 they reached agreement that –

(a) Absa would cede to the appellant all of its rights, title and interest in and to the claims held by Absa against the company.

(b) In consideration for the cession the appellant would pay Absa an amount of R250 000.

(c) A claim would be prepared in the name of Absa and submitted for proof.

[6] Pursuant to the agreement Absa's claims were ceded to the appellant on 31 October 2005 and at a meeting of creditors held on 24 May 2006 the appellant submitted Absa's claims supported by affidavits deposed to by Loubser on behalf of Absa for proof. The claims were opposed by Mr van Zyl, the company's director, and member on the grounds that they had been ceded to the appellant before they were submitted for proof, that the claims were in terms of s 359(2)(b) considered to be abandoned; that the claims had become prescribed and that the quantum of the claims could not be established by a certificate of indebtedness.

[7] As set out above, s 359(2) provides as follows:

'(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same . . . shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

It is common cause that Absa had not given the liquidators notice in terms of s 359(2)(a) of an intention to continue the proceedings. Consequently the proceedings (not the claims) must be considered to have been abandoned unless a court otherwise directs.

[8] As a result of the opposition to the Absa claims the appellant launched the application which is the subject matter of this appeal, in terms of which it applied to be substituted for Absa in the action instituted by

Absa and for a direction in terms of s 359(2)(b) that the proceedings should not be considered to have been abandoned.

[9] The court below found that the deliberate decision by Absa not to notify the liquidator that it intended to proceed with the action constituted evidence that the action had been abandoned and held that the appellant, in the circumstances, had failed to provide a satisfactory explanation for not having notified the liquidator of its intention to continue with the proceedings within the time period prescribed in terms of s 359(2)(b).

[10] The appellant referred to the fact that the allegation in its founding affidavit that the liquidator had not been prejudiced by Absa's failure to give the required notice is not disputed by the respondent and submitted that, in the circumstances, the court below should have exercised its discretion in its favour. In this regard the appellant referred to *Baskin v Levey & others NNO* 1967 (3) SA 121 (W) at 123F-124A where Boshoff J, referring to s 118 of the Companies Act 46 of 1926, the predecessor of s 359 said:

'The purpose of this section is to prevent a newly-appointed liquidator from being embarrassed by an action before he has had an opportunity of considering the matter, and to prevent costs being incurred by the institution of proceedings between the time when the winding-up order has been made and the liquidator has been appointed; *Randfontein Extension Ltd v South Randfontein Mines Ltd and Others* 1936 WLD 1 at p 3. If no such notice has been given to a liquidator, proceedings are to be considered abandoned to bring about finality so that the liquidator may be in a position to report to the creditors of his company as accurately as possible on the state of and the claims against the company. It would, therefore, seem that a liquidator would, generally speaking, be entitled to oppose an application for the purging of a default if he can show that he had been prejudiced by the default or that the excuse advanced by the applicant is not *bona fide* and reasonable or, if it is necessary, to insist on terms on which an applicant should be allowed either to continue or to commence proceedings.'

[11] Section 118 of the Companies Act 46 of 1926 provided that in default of a notice of intention to continue proceedings suspended by a winding-up, 'the proceedings shall be considered to be abandoned unless the Court finds that there was a reasonable excuse for the default'. Having omitted the requirement of a reasonable excuse in s 359(2)(b) it is clear, in my view, that the legislature intended to give a court an unfettered discretion to decide whether or not to direct that proceedings should not be considered to be abandoned. In exercising this discretion a court should naturally have regard to the interests of all interested parties being the creditors, liquidator and members.[5]

[12] In *Umbogintwini Land & Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd & another* 1987 (4) SA 894 (A) Viljoen JA said in respect of s 359(2)(b):[6]

'The provision was designed, in my view, to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interests of the general body of creditors, the nature and validity of the claim or contemplated claim and how to deal with it – whether, for instance, to dispute or settle or acknowledge it.'

[13] Although no prejudice is alleged by the appellant the liquidator had, contrary to the interests of the general body of creditors of the appellant, not been given an opportunity immediately after his appointment to consider and assess the nature and validity of Absa's claim against the appellant. The reason why the liquidator had not been afforded that opportunity is that Absa decided not to proceed with the proceedings and not to prove a claim against Sublime for fear of being held liable for a contribution. When Absa took that decision information as to the assets and liabilities of Sublime was available and known to Absa. Only about two years after the time for giving notice of intention to continue with the

[5] See P M Meskin *Henochsberg on the Companies Act* Vol 1 5 ed (2008) p 761.
[6] At 910H-I.

proceedings had expired, was an attempt made by the appellant, not Absa, to prove the claims. The application for a directive followed more than six months later.

[14] Absa took a deliberate decision not to proceed with the action and there is no allegation that it changed that decision for as long as it had an interest in the claim against Sublime, ie up to the date of the cession of that claim 16 months after the appointment of a final liquidator. Absa does not deny having had knowledge of the provisions of s 359(2)(b) and must be assumed to have had such knowledge. These facts justify the inference that Absa in fact abandoned the action. The appellant submitted that the fact that Absa entered into negotiations with the appellant indicated that it had not abandoned the action. In my view the negotiations may be an indication that Absa had not abandoned its claims, not that Absa had not abandoned the action. If Absa had not abandoned the action it would have considered it prudent to give notice in terms of s 359(2)(a). But even if Absa had not in fact abandoned the action there is no reason why the court below should have exercised its discretion in favour of an applicant (the appellant) who wishes to proceed with an action which the plaintiff in that action (Absa) had decided not to proceed with some two and a half years previously.

[15] The appeal should therefore be dismissed. But it should be added that the court below said in its judgment that there was further evidence that 'the claim' had been abandoned. Whether or not the claim had been abandoned was not an issue in the case and the court below probably meant to say that there was further evidence that the action had been abandoned.

[16] For these reasons the appeal is dismissed with costs.

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P E STREICHER
JUDGE OF APPEAL

Appearances:

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| For Appellant: | M P van der Merwe |
| | Instructed by<br>Bieldermans Inc, Johannesburg<br>Schoeman Maree Inc, Bloemfontein |
| For Respondent: | M Smit |
| | Instructed by<br>Melamed & Hurwitz Inc, Johannesburg<br>Rosendorff Reitz Barry, Bloemfontein |