THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 412/2018

In the matter between:

PETRUS JACOBUS MARYN VAN STADEN NO	**FIRST APPELLANT**
DIMAKATSO ARNOLD MICHAEL MOHASOA NO	**SECOND APPELLANT**
MARI HAYWOOD NO	**THIRD APPELLANT**

and

PRO-WIZ GROUP (PTY) LTD	**RESPONDENT**

Neutral citation: *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (412/2018) [2019] ZASCA 7 (8 March 2019)

Coram: WALLIS, MAKGOKA and SCHIPPERS JJA and MOKGOHLOA and ROGERS AJJA

Heard: 28 February 2019

Delivered: 8 March 2019

Summary: Business rescue application – close corporation in liquidation – liquidators cited as respondents – entitled to oppose application – service on corporation to be effected on liquidators – s 131(6) of Companies Act 71 of 2008 not disentitling the liquidators from opposing the application – proceedings brought in order to prevent interrogation under s 418 of Companies Act 61 of 1973 and delay winding up – such an abuse of process justifying a punitive order for costs

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokose AJ, sitting as court of first instance) it is ordered that:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is set aside and replaced by the following order:

'The applicant is ordered to pay the costs of the first, second and third respondents on the scale as between attorney and client.'

JUDGMENT

Wallis JA (Makgoka and Schippers JJA and Mokgohola and Rogers AJJA concurring)

[1] In February 2015 Oljaco CC (Oljaco), was placed in provisional liquidation pursuant to an application instituted in April 2014. The order was made final in May 2015. The three appellants, Messrs Van Staden and Mohasoa and Ms Haywood, were appointed as its liquidators.[1] On 12 April 2016, the respondent, Pro-Wiz Group (Pty) Ltd (Pro-Wiz), represented by a director, Ms Prinsloo, brought an urgent application, citing the appellants as respondents, for Oljaco to be placed under business rescue, in terms of s 131(1) of the Companies Act 71 of 2008 (the Act).[2] The liquidators opposed the application on a number of grounds, principally that the application was an abuse of the process of

---

[1] In terms of s 66(1) of the Close Corporations Act 69 of 1984, as read with item 9 of Schedule 5 to the Companies Act 71 of 2008, the provisions of the Companies Act 61 of 1973 apply to the liquidation of a close corporation.

[2] In terms of s 66(2) of the Close Corporations Act 69 of 1984 the provisions of Chapter 6 of the Companies Act 71 of 2008 dealing with business rescue apply to close corporations.

court. They contended that it was a device to enable the sole member of Oljaco, a Mr Coenraad Smith, to avoid interrogation in an enquiry under s 418 of the old Companies Act 61 of 1973, and that Ms Prinsloo and Mr Smith were trying to strip Oljaco of assets and conceal them from creditors.

[2] Oljaco's principal creditor, the South African Revenue Service (SARS), intervened in and opposed the application, which was postponed from time to time and was due to be heard on 14 August 2017. Two days before the hearing Pro-Wiz delivered a notice of withdrawal of the application and tendered to pay SARS's costs. There was no tender to pay the liquidators' costs, so they sought an order in terms of rule 41(1)(*c*) of the Uniform Rules of Court ordering Pro-Wiz to pay their costs. Mokose AJ sitting in the Gauteng Division of the High Court, Pretoria refused that order and subsequently refused leave to appeal. This court granted leave.

[3] Although the case was disposed of in the high court on the basis that it was an application in terms of rule 41(1)(*c*), counsel initially argued before us that, as the liquidators had not accepted the notice of withdrawal, the high court was obliged to consider the case on its merits and deliver a judgment dismissing the application. While it was true that the liquidators did not formally indicate their consent to the withdrawal the only relief claimed by them in the high court was a favourable order for costs. They did not seek the dismissal of the application. In the circumstances the application was in substance an application under rule 41(1)(*c*) and counsel accepted this was the only issue in this appeal.

<u>Mootness</u>

[4] Pro-Wiz contended that the appeal was moot, relying on s 16(2)(*a*) of the Superior Courts Act 10 of 2013, which provides that:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

The argument in favour of mootness was that the order is solely concerned with a question of costs and there was no underlying legal issue that warranted the attention of the court.

[5] An appeal will have a practical effect or result when it raises a discrete legal issue of public importance, the answer to which would affect matters in the future and on which the decision of this court is required.[3] The reason that costs orders rarely do this is that they usually involve the exercise of a judicial discretion, which is not lightly interfered with on appeal. Indeed, this was the first reason given for refusing leave to appeal, relying on the minority judgment in this court in *Khumalo*.[4]

[6] That approach was incorrect, because the refusal to grant an order for costs in favour of the liquidators did not arise from the exercise of any discretion on the judge's part. Instead it was squarely based on her conclusion of law that the effect of s 131(6) of the Act was that when Pro-Wiz made an application for business rescue in relation to Oljaco that deprived the liquidators of any power to continue with the administration of the close corporation and re-vested those powers in its sole member, Mr Smith. In reaching that conclusion the judge relied on the decision of

---

[3] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2012 ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

[4] *Khumalo v Twin City Developers (Pty) Ltd* [2017] ZASCA 143 para 17.

this court in *Richter v Absa Bank*[5] and the judgment of Fabricius J in *Maroos*.[6] That did not involve the exercise of a discretion.

[7] The further reasons for refusing leave to appeal were that the judge did not think that there was any reasonable prospect of another court reaching a different conclusion to hers and that, because it involved a question of costs, it fell squarely within s 16(2)(*a*)(ii) of the Superior Courts Act. As to the first of these, she was aware that *Maroos* was under appeal to this court and that it cited (and disagreed with) views expressed in other judgments. One of these was cited in the main judgment, being a passage from the court below in *Richter*[7] that was not disapproved in the appeal judgment. The conclusion was impractical and undesirable and should have given pause for thought as to its correctness. In those circumstances it is difficult to see on what basis the judge reached the conclusion that there was no reasonable prospect of another court coming to a different conclusion. As it happened another court did, when this court overturned *Maroos*.[8]

[8] As to the third ground for refusing leave to appeal, the mere fact that the appeal will concern a question of costs does not automatically bring the matter within the ambit of s 16(2)(*a*)(ii) of the Superior Courts Act. That provision is subject to the qualification embodied in the words 'save under exceptional circumstances'. In *Naylor v Jansen*,[9] Cloete JA said that:

---

[5] *Richter v Absa Bank Ltd* [2015] ZASCA 100; 2015 (5) SA 57 (SCA).
[6] *Maroos and Others v GCC Engineering (Pty) Ltd* [2017] ZAGPPHC 297.
[7] *Jansen van Rensburg NO and Another v Cardio-Fitness Properties (Pty) Ltd and Others* [2014] ZAGPJHC 40 para 49. The *Maroos* judgement also referred to the contrary view in *Knipe and Another v Noordman NO and Others* 2015 (4) SA 338 (NC).
[8] *GCC Engineering (Pty) Ltd and Others v Maroos and Others* [2018] ZASCA 178 paras 17 and 19.
[9] *Naylor and Another v Jansen* [2006] ZASCA 94; 2017 (1) SA 16 (SCA) para 10.

> 'I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee* to express the view that a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance. I still adhere to that view ─ for if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order, simply because an appeal would be concerned only with costs; and that obviously cannot be the effect of the section.' (Footnote omitted.)

Without endorsing that approach in its entirety, where, as a result of an error of law, the court did not exercise any discretion at all in regard to an order for costs, it seems to me that this will ordinarily constitute an exceptional circumstance for the purposes of this section.

[9] If correct, the high court's view of the legal position of liquidators, when confronted with an application to place a company in liquidation under business rescue, would have had the consequence that those with perhaps the greatest knowledge of the affairs of the company would have had no *locus standi* to participate in the application for business rescue. From the time leave to appeal was refused and until the clarification provided by this court's decision that *Maroos* was wrongly decided, that was an issue of fundamental importance to all liquidators, provisional or final, and generally to those who might become involved in liquidation and business rescue proceedings. The decision by this court did not deal expressly with the issue of *locus standi* that arises in this case. In those circumstances the fact that the purpose of this appeal is to overturn a judgment on a question of costs, does not mean that it was moot and should be dismissed in terms of s 16(2)(*a*)(i) of the Superior Courts Act.

The *locus standi* of the liquidators

[10] Starting with basic principles, in terms of s 131(2)(*a*) of the Act an application for business rescue must be served on the company or close

corporation. Where it is already being wound up, whether provisionally or finally, that means that the persons on whom it must be served, as representing the company, are its liquidators. That necessarily follows from the fact that, upon the compulsory winding up of a company, its directors (read members in the case of a close corporation) are deprived of their control of the company, which is then deemed to be in the custody or control of the Master until the appointment of liquidators. Thereafter it is in the custody or control of the liquidators.[10]

[11] Pursuant to that obligation, the application to place Oljaco under business rescue cited the liquidators as respondents and was served upon them. They opposed the application and Ms Haywood filed an affidavit giving detailed grounds of opposition. In addition, SARS, which was the major creditor, being owed some R70 million, intervened in the application to oppose it. Although Ms Prinsloo, representing Pro-Wiz, filed a lengthy replying affidavit, as well as a rejoining affidavit, at no stage did she dispute the entitlement of the liquidators to oppose the application on behalf of the company.

[12] It is apparent from the provisions of s 131 that the company that is the subject of the business rescue application is entitled to oppose it. At the time the application is made in relation to a company under provisional or final winding up, its affairs will be in the hands of the liquidators. On ordinary principles it seems obvious that liquidators, whether provisional or final, faced with such an application should be entitled either to support or oppose the application depending upon their judgment as to the interests of the company and its creditors.

---

[10] *Commissioner for Customs and Excise v Millman NO* 1975 (3) SA 544 (A) at 552H.

[13] Furthermore, as a matter of principle, when a party is cited in legal proceedings they are entitled without more to participate in those proceedings. The fact that they were cited as parties gives them that right. Here the liquidators were cited and decided to resist the application. They were entitled to do so by the mere fact of their joinder as parties. It is not open to an applicant who has joined a respondent to contend thereafter that this was a misjoinder and on that footing to resist an adverse order for costs. Were that the case a party who took the point that they had been wrongly joined would not be entitled to recover their costs, when that argument succeeded. On this simple ground the liquidators were entitled to oppose the application and, as a matter of general principle, were entitled to their costs when it was withdrawn.

[14] Pro-Wiz only challenged the liquidators' *locus standi* after they had given notice of withdrawal of the application. For the reasons I have already given that was not open to them. They did so on a construction of s 131(6) of the Act that was incorrect. The appeal must therefore succeed and the liquidators must have their costs in the high court. The remaining issue is the appropriate scale of costs.

Attorney and client costs

[15] The liquidators sought a punitive order for costs of the proceedings in the high court on the grounds that the application to place Oljaco under business rescue was an abuse of process. In my view they were justified in doing so in the light of the manner in which Pro-Wiz conducted the litigation and because I agree with the submission that the application for business rescue was brought for reasons ulterior to any genuine belief that Oljaco would benefit from being placed under business rescue.

[16] The application was brought as a matter of urgency and served on 12 April 2016. This was after Oljaco had been in provisional and then final liquidation for more than a year in respect of a winding up application launched two years before. Oljaco had not been conducting any business since at least 2014. On that day an enquiry under s 418 of the Companies Act 61 of 1973 was due to proceed at which Mr Smith was to be interrogated. He did not attend the enquiry and the presiding magistrate issued an order for his arrest. Pro-Wiz is a shell company with no significant assets. The deponent on its behalf, Ms Adele Prinsloo, had a close personal relationship with Mr Smith. The application for business rescue was not accompanied by a business plan and no attempt had been made to ascertain whether SARS, as the principal creditor, would support the application.

[17] The urgency of the application was predicated on an alleged order to purchase game, which was addressed by an entity called Waterberg Game Dealers, of which Mr Smith was said to be a director, to Zoological Live Animal Suppliers CC (ZLA). No attempt was made to deal with how this 'order' arose or why, if it was an order from ZLA to Oljaco, it did not appear to emanate from ZLA and was addressed to Mr Smith rather than the liquidators. There was no explanation for Mr Smith not having drawn this allegedly lucrative business opportunity to the liquidators' attention for them to pursue. Nor was there any explanation of four similar transactions addressed to Oljaco (but not the liquidators) in three of which Ms Prinsloo was the contact person. Nor was any satisfactory explanation given for the fact that assets reflected in a notarial bond over movables were not found on inspection or delivered to

the liquidators. These were the subject of pending litigation, which would only be addressed if the business rescue failed.

[18] The liquidators legitimately addressed these points in Ms Haywood's answering affidavit. The response by Ms Prinsloo was evasive. Similarly with the allegations on behalf of SARS. It complained that in all the business rescue projections its claim was significantly understated. It pointed out that Oljaco had not traded since, at the latest, April 2014 and that there was no prospect of reviving the business. SARS made common cause with the liquidators that the application was not bona fide. It alleged that the application was brought with an ulterior purpose and said that the application for business rescue was 'speculative at best'.

[19] In a supplementary affidavit SARS went further. It accused Mr Smith of spiriting away valuable assets and identified Pro-Wiz as being in possession of many of those assets. It said that ordering business rescue would cover up assets spirited away in this fashion and that the purpose of the application was to 'erase the allegations of mismanagement' of Oljaco. The entire scheme was dependent upon Mr Smith's co-operation and there was nothing to indicate that he would co-operate with a business rescue practitioner. Finally it was suggested that the failure to provide a business rescue plan at the outset was an attempt to mislead the court to grant an order. Although Ms Prinsloo deposed to a rejoining affidavit she did not deal with any of these allegations.

[20] The application was eventually set down for hearing on 14 August 2017. A notice of withdrawal, tendering the costs of SARS but not the liquidators, was delivered on 12 August 2017. No explanation was

tendered for the withdrawal. When the liquidators asked for their costs, Pro-Wiz, for the first time, submitted that they were not entitled to oppose the application.

[21] It is apparent that Pro-Wiz could never have thought that a viable business rescue could be instituted in relation to Oljaco. Its failure to engage with the liquidators or the principal creditor on that subject prior to launching its application speaks volumes in that regard. The timing of the application suggested that its true purpose was to stultify the interrogation of Mr Smith. The failure to deal with any of the issues raised by the liquidators and SARS in this regard indicates that no response was possible. Finally, the withdrawal at the very last minute, without explanation, when confronted with the reality of having to argue the application in court, conveyed the impression of an absence of any bona fide belief in the merits of the case and a lack of intention genuinely to pursue it. I conclude that it was brought to provide a reason for avoiding Mr Smith's interrogation and with a view to delaying the liquidators in their enquiries as to the squirreling away of assets.

[22] All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure. It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose

behind a business rescue application was not to achieve either of these goals a punitive costs order is appropriate.

Result

[23] It follows that the appeal must succeed and the order of the high court altered to one in terms of which Pro-Wiz must pay the liquidators costs and do so on an attorney and client scale. The liquidators sought a similar order in regard to the costs of the appeal, but in my view that would not be appropriate. Pro-Wiz was entitled to defend a high court order on appeal and to argue, as it did that because the appeal concerned costs alone the appeal should be dismissed. If anything that view may have been strengthened by the outcome of the *Maroos* appeal.

[24] The following order is made:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is set aside and replaced by the following order:

'The applicant is ordered to pay the costs of the first, second and third respondents on the scale as between attorney and client.'

____

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellants: S J van Rensburg SC (with him H P Wessels)

Instructed by: Tintingers Inc, Pretoria

Symington & De Kok, Bloemfontein

For respondent: D van den Bogert (with him L W de Beer)

Instructed by: Vezi & De Beer Inc, Pretoria

Lovius Block Attorneys, Bloemfontein.