NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited [2021] JOL 51810 (GJ)

Some critical observations on the legal effect of a provisional winding-up order

1 Introduction

The facts and judgment in *NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited* [2021] JOL 51810 (GJ) raises some interesting questions in relation to the legal effect of a provisional winding-up order on the power and authority of the board of a company to conclude agreements on behalf of the company after such an order is made. A company is a separate juristic person from the date of its registration in terms of the Companies Act 71 of 2008 (the 2008 Companies Act) (s 19). Unless its capacity to do so is restricted in its Memorandum of Incorporation, a company has the capacity to enter into all agreements to which a juristic person can be a party (s 19 read with s 20 of the 2008 Companies Act; see also the commentary of Delport et al on s 19 in Henochsberg on the Companies Act 71 of 2008 (May 2022 – SI 28)). The power to manage the business and affairs of a company vests in the board of directors (s 66 of the 2008 Companies Act). Because a company cannot act by itself it must be represented by its board or a duly authorised agent in agreements that bind the company. Consideration will be given in this case note specifically to the legal status of agreements concluded by a company represented by its board in the time between the granting of a provisional winding-up order and prior to the appointment of a liquidator. One of the implications of the judgment in *NCA Plant Hire CC v Blackfield Group Holdings* is that the board has the authority to enter into an agreement to settle the claim of one of the company's creditors after a provisional winding-up order is granted, but prior to the appointment of a provisional liquidator. In short, the court found that because the creditor who brought the application for the provisional winding-up of the company is *dominus litis* such creditor may enter a settlement agreement, which may include a condition that the provisional liquidation order be discharged, with the company in provisional liquidation. The approach of the court, in this case, is evaluated against the general legal principles applicable, namely the power of the board to manage the business and affairs of a company, the legal effect of a provisional winding-up order, and the *concursus creditorum* which begins as from the moment of liquidation but effectively backdated to the date of the filing of the application of liquidation by the Registrar of the High Court (s 348 of the 1973 Companies Act).

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2 Case

2 1 Facts

On 20 May 2021, NCA Plant Hire CC (the applicant) successfully applied for the provisional winding-up of Blackfield Group Holdings (Pty) Limited (the respondent) with a return date of 22 November 2021 (paras 1 and 2). On the return date, the applicant argued for the placement of the respondent in final liquidation (para 2). The respondent opposed the application for its final winding-up by arguing for the dismissal thereof (para 2). The respondent's opposition was based on a written settlement agreement contained in emails exchanged between the applicant and respondent (para 3). It was contended that an offer of settlement was made by the respondent on 31 August 2021 which was accepted by the applicant on 1 September 2021 (paras 3-4). One of the terms of the settlement agreement was that the provisional liquidation order will be discharged (para 4). It was the case of the applicant that the emails exchanged on 31 August 2021 and 1 September 2021 did not constitute a settlement agreement, as the actual settlement agreement still had to be drafted and signed by both parties before it would have had any legally binding effect on the applicant and respondent (para 5). In the alternative, it was argued by the applicant that since a provisional order was made on 20 May 2021, the commencement of the *concursus creditorum* prevented the respondent from entering such a settlement agreement (para 7). Since the company was in provisional liquidation at the relevant time, only a duly appointed provisional liquidator could, according to the applicant, enter into such a settlement agreement (para 7).

2 2 Legal questions

The court in the NCA matter had to determine whether the board of a company in provisional liquidation could still represent the company by entering into valid settlement agreements on behalf of the company with a creditor who brought the application for the liquidation against the company. More specifically, it had to be decided whether the *concursus creditorum* prevented a creditor from accepting an offer of settlement made by the company after a provisional liquidation is granted and before a provisional liquidator is appointed; and whether the board a company was in fact authorised to make an offer of settlement during the same period.

2 3 Judgment and reasons

The court found that the emails exchanged on 31 August 2021 and 1 September 2021 constituted a settlement agreement between the applicant and the respondent to which effect must be given (paras 4-6). It was further accepted that such a settlement agreement could serve as a ground for the discharge of provisional liquidation (paras 4 and 6).

The court held (see para 7) that there was no justification for the application of the *concursus creditorum* on "either a factual or a legal basis" since there were no meetings of creditors and no final liquidation order yet "which is a step which can only be taken at the behest of the applicant" according to the court (para 7).

The provisional winding-up was also discharged on the basis that there was no evidence that the respondent was factually insolvent (para 9).

2 4 The court order

The court discharged the provisional winding-up order (paras 8 and 14). The court made no order as to the costs (para 13) of the application.

3 Case analysis

3 1 The legal effect of a provisional winding-up order on the powers of the board

3 1 1 The institution and defence of legal proceedings as a management power

The board of directors has the power to manage the business and affairs of a company (s 66 of the Companies Act 71 of 2008). This is an original power (*Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* 2014 3 All SA 591 (WCC); see also the commentary of Delport *et al* on s 66 in Henochsberg on the Companies Act 71 of 2008 (May 2022 - SI 28)). This power is subject to restrictions and limitations contained in the memorandum of incorporation of a company, if any (s 66(1) of the 2008 Companies Act). Instituting or defending legal proceedings on behalf of a company falls within the powers of the board to manage the business and affairs of a company, which includes the authority to conclude settlement agreements on behalf of the company.

3 1 2 The power to enter into settlement agreements on behalf of a company in provisional liquidation

To determine the authority of the board to enter into agreements on behalf of the company after a provisional liquidation order has been made, the legal effect of a liquidation order on a company and its directors must specifically be considered. When a provisional winding-up order is granted, the control and the administration of the company's property vests in the Master pending the appointment of a provisional – and/or final liquidator (s 361 of the 1973 Companies Act). A further legal consequence is that the directors "are divested of their powers" (*Attorney-General v Blumenthal* 1961 4 SA 313 (T) 318; *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) 552; *AMS Marketing Co (Pty) Ltd v Holzman* 1983 3 SA 263 (W) 268-269; *Barclays Zimbabwe Nominees (Pvt) Black* 1990 4 SA 720 (A) 726). In *AMS Marketing Co (Pty) Ltd v Holzman* (269-270) the court adopted the view that

> the liquidator enjoys dual capacity. In one sense he is a primary organ of the company in whom powers formerly residing in the directors are vested. In the other sense, his position is similar to that of a trustee of an insolvent estate, having the power to recover assets, realise them and distribute the proceeds to the person entitled thereto.

The powers of directors to manage the business and affairs of a company cease (*Terblanche v Offshore Design Co (Pty) Ltd* 2001 1 SA 824 (C) 828-829; *GCC Engineering (Pty) Ltd v Maroos* 2019 2 SA 379 (SCA) para 21; see the commentary of Kunst, Delport and Vorster (eds) on s 347 in *Henochsberg on the Companies* Act 61 of 1973; see further *Tayob v Shiva Uranium (Pty) Ltd* (336/2019) 2020 ZASCA 162 (8 December 2020) paras 22-23 where the court contrasts the legal position of the board of a company in business rescue with the legal position of the board of a company in liquidation). In *Insulations Unlimited (Pty) Ltd v Adler* 1986 4 SA 756 (W) 760-761 it was held that any acts or conduct by the board on behalf of a company, after a provisional order is granted but before a provisional liquidator is appointed, is "unauthorised and possibly illegal".

3 1 3 The right of a board member to oppose liquidation proceedings

Although the authority of the board to represent and conclude contracts on behalf of the company will cease, there are judgments which held that the board does retain a residual power to oppose the application for the final liquidation of a company (see *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 1 SA 553 (T) 558; *Ex parte G Pagan Enterprises (Pty) Ltd* 1983 3 All SA 400 (W) 399; see also the commentary of Kunst, Delport and Vorster (eds) on s 347 in *Henochsberg on the Companies Act 61 of 1973* (June 2011 – SI 33)). It is unclear whether this residual power of directors to oppose an application for the final winding-up of a company includes the authority to conclude on behalf of the company a settlement agreement with an applicant for the company's winding-up, when the company was already placed in provisional winding-up but before a provisional (or final) liquidator is appointed. In the rejection of the notion in *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 1 SA 553 (T) that the board of a company retains a residual power to oppose a final winding-up order, the court in *Venbor (Pty) Ltd v Vendaland Development Co (Pty) Ltd t/a Camp Store* 1989 2 SA 619 (V) favoured the approach adopted in *Attorney-General v Blumenthal* 1961 4 SA 313 (T). A director cannot act on behalf of the company or retain any residual powers as the directors of a company become *functus officio* when a winding-up order is made (*Venbor (Pty) Ltd v Vendaland Development Co (Pty) Ltd t/a Camp Store* 1989 2 SA 619 (V) 627). According to the court in *Venbor* (628), the directors of a company have a direct and substantial interest in an application for the winding-up of a company which makes a director eligible to join proceedings as a party in his or her personal capacity.

3 2 Some observations on the court's application of the law to the facts in *NCA Plant Hire CC*

3 2 1 The validity and enforcement of the settlement agreement

In the *NCA Plant Hire CC* case, the respondent entered into a settlement agreement after a provisional liquidation was granted (paras 3-4). The effect of this judgment is that a court does not have a discretion other than to discharge a provisional winding-up order, when the applicant and the respondent company have reached a settlement agreement on such basis (see also the commentary of Kunst, Delport and Vorster (eds) on s 347 in *Henochsberg on the Companies Act 61 of 1973* (June 2011 – SI 33). This raises questions regarding the legal consequences of a provisional winding-up order on the authority of the respondent's board which has entered a settlement agreement with the applicant. The court accepted that the applicant and the respondent were at liberty to enter into agreements with each other in settling a dispute between them (para 4). The court's reasoning was based on the fact that the applicant was *dominus litis* and because the *concursus creditorum* did not apply (para 7). It is submitted that although the applicant was *dominus litis* in the proceedings before the court, additional considerations do apply when dealing with insolvency proceedings. A winding-up order does not only affect the offices of the directors and the authority of the board, but the *concursus creditorum* also prohibits the creditors of the company from conducting themselves in any manner that will alter or prejudice the rights of other creditors of the company (*Walker v Syfret* 1911 AD 141, 160). Thus, a settlement agreement could only have been reached between the applicant and respondent, when an offer was made which was thereafter unconditionally accepted by the offeree (see *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 5 SA 192 (SCA) paras 18-19; see also Bradfield *Christie's Law of Contract in South Africa* (2022) 85-86 on the unconditional acceptance of an offer). Contrary to the finding of the court that an offer was made by the respondent, which was accepted by the applicant as the offeree, it is submitted based on the respondent's board's lack of the authority to make an offer on the respondent's behalf, there was no valid offer which the applicant could have accepted. It is furthermore submitted that the applicant's reply to the alleged offer dated 1 September 2021, as quoted in para 3 of the judgment, cannot be understood to be an unconditional acceptance of the respondent's alleged offer. The legal representative of the applicant made it clear that the settlement between the parties will be embodied in a separate agreement that will be drafted specifically for the purposes of settling the dispute. At best it may be argued that the applicant's reply and/or alternatively the draft settlement agreement would have constituted a counteroffer (see Bradfield *Christie's Law of Contract in South Africa* (2022) 67-68 on the effect of a counteroffer on an original offer). Based on the same legal principles on which the board could not have made an

offer on behalf of the respondent, the respondents did not have the authority to accept the applicant's counteroffer.

3 2 2 The application of the concursus creditorum

It is interesting to note that the court found that the *concursus creditorum* did not apply (para 7). The reason advanced by the court for this finding was that a meeting of creditors had not yet been held (para 7). Neither did the court cite any authority in support of the legal basis it relied on nor is this finding supported by legal authorities. This finding of the court runs counter to a judgment of the Supreme Court of Appeal where it was held in *Nel v The Master* 2002 3 SA 354 (SCA), that a winding-up order, whether it is provisional or final, determines the status of a company (para 6) and the creation of a *concursus creditorum* is one of the consequences of a provisional winding-up order (para 6. See also *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) 551-552 where the court pointed out there is no difference between the effects of a provisional and final winding-up order on a company). In terms of section 348 of the Companies Act 61 of 1973, the winding-up of a company is deemed to have commenced on the date an application for a winding-up order is presented to the court and therefore the *concursus creditorum* is effective from the date when the application for the winding-up order is presented to the court and is not from when a meeting of creditors has been held as found by the court in *NCA Plant Hire* (para 7). It is therefore submitted that the court's finding that there was no *concursus* prior to a meeting of creditors must be approached with caution as it does not reflect the correct legal position. The *concursus* is applicable to a company from the moment an order for the winding-up of a company is made, which includes a provisional winding-up order. Moreover, the *concursus* is deemed to apply from the date the application is "presented" to the court. A liquidator carries a legal duty to protect the *concursus creditorum* (*Commissioner of South African Revenue Services v Stand Two Nine Nought Wynberg (Pty) Ltd* 2006 4 All SA 11 (SCA) para 15). A settlement agreement concluded between a creditor and a company after the granting of a provisional liquidation order is thus subject to the *concursus creditorum*. A creditor may not obtain an unjustified advantage in terms of such a settlement agreement or violate the *concursus creditorum*. It is submitted that by upholding the settlement agreement concluded after the granting of the provisional order, the interests of the general body of creditors may have been infringed or prejudiced. It is unfortunate that the court erroneously failed to fully appreciate the effect of the settlement considering the function and purpose of the *concursus creditorum*. Any payments in terms of such an agreement may even constitute a void disposition in terms of section 341 of the Companies Act 61 of 1973. S 341(2) of the 1973 Companies Act expressly provides that when a company is unable to pay its debts, "[e]very disposition of its property (including rights of action)" is void unless the court orders otherwise. A court will exercise its discretion judicially considering the facts and circumstances of each case, before declaring such an agreement valid and enforceable (see the commentary of Kunst, Delport

and Vorster (eds) on s 341 in Henochsberg on the Companies Act 61 of 1973 (June 2011 – SI 33)).

3 2 3 Factual solvency as a defence

Although the focus of this case note is not on the grounds for the winding-up of a company, the court's apparent acceptance of factual solvency as a defence to an application for the winding-up of a company based on commercial insolvency does deserve further comment. The Companies Act 61 of 1973, in section 344(f) read with section 345, provides for the winding-up of a company when it is unable to pay its debts or is commercially insolvent (see also *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Limited* 2014 2 SA 518 (SCA) paras 17-18). A court may take the factual insolvency of a company into consideration in exercising its discretion on whether a company is able to pay its debts as it becomes due and payable, but a creditor is entitled to a winding-up order when a company is unable to pay a debt owed to the creditor, irrespective of the fact that the company may be factually solvent (*Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Limited* 2014 2 SA 518 (SCA) para 24; *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 4 SA 436 (C) 440-441). It is, therefore, submitted that the court's finding (para 9) that the respondent could not be wound-up on the basis that it was factually solvent must be approached with caution as it is not supported by legal authority.

4 Conclusion

A winding-up order — whether it is provisional or final — holds important legal consequences for a company and its directors. The first of these consequences is that the power of the board to represent the company ceases and vests in the Master and then subsequently in a provisional and/or final liquidator. Considering the facts in *NCA Plant Hire CC*, it is submitted that the board of Blackfield Group Holdings (Pty) Ltd did not have the authority to conclude a settlement agreement on behalf of the company after the provisional winding-up order was granted. Secondly, the *concursus creditorum* applies from the moment when a provisional winding-up order is made. It is unfortunate that the court in *NCA Plant Hire CC* upheld the settlement agreement based only on the fact that the applicant was *dominus litis*. As argued above, the court failed to properly consider the *concursus creditorum* in the context of this case and incorrectly implied that the *concursus creditorum* only finds application from the date when a meeting of creditors is held. The correct legal position is that when an order for the winding-up of a company is made — whether it is provisional or final — the *concursus creditorum* applies and is in terms of section 348 of the Companies Act 61 of 1973 deemed to have commenced as from the date the application for winding-up is "presented" to the court. Finally, there may be practical reasons why the board should have been able to enter into a settlement agreement in such a situation and before a final liquidation order is granted but, as stated it can't be in the reason as provided by the court.

The fact that a liquidator has not been appointed yet may have been the reason for the settlement agreement entered into by the board, but this is not a proper reason in law for the judgment handed down in the matter.

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