REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 42820 / 2023

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 13 August 2024

SIGNATURE OF JUDGE:

In the matter between:

TIMANA LOVELY Applicant

and

CONRAD ALEXANDER STARBUCK N.O. First Respondent

AMANDA KANYISA BIKANI N.O. Second Respondent

MASTER OF THE HIGH COURT Third Respondent

NEDBANK LIMITED Fourth Respondent

PREVANCE CAPITAL (PTY) LTD Sixth Respondent

MBOMBELA CROCODILE HOLIDAY RESORT AND SPA (PTY) LTD Seventh Respondent

JUDGMENT

Woodrow, AJ:

Introduction:

[1] Timana Properties (Pty) Ltd ("**Timana Properties**") was placed in final liquidation on 16 September 2019, the fourth respondent ("**Nedbank**") being the petitioning creditor.

[2] The first and second respondents were appointed as the liquidators of Timana Properties.

[3] The applicant, the sole shareholder of Timana Properties, issued the present application in May 2023 seeking an order in the following terms:

1. That TIMANA PROPERTIES (PTY) LIMITED (In Liquidation) with registration number 2013/159336/07 ("the Company") be discharged from liquidation.

2. That the First and Second Respondents, in their capacities as Joint Liquidator of Timana Properties (Pty) Ltd (in liquidation) under Master Reference Number: T2719/17, are divested of their statutory powers, and subject to the conclusion of the process envisaged in 4 and 5 below.

3. That the affairs, assets and management of the Company to re-vest in the hands of the Third Respondent (the Master of the High Court), until the finalisation of the process envisaged in 5 and 6 below.

4. That the affairs, assets and management of TIMANA PROPERTIES (PTY) LIMITED (In Liquidation) with registration number 2013/159336/07 ("the Company") be restored and re-vest in the hands of the Directors of the Company, subject to the condition in 4 and 5 below.

5. That the First and Second Respondents, in their capacities as Joint Liquidator of Timana Properties (Pty) Ltd (in liquidation) under Master Reference Number: T2719/17, submit their Final Report to the Master of the High Court, Pretoria within **30 (Thirty) days** of the date of this Court Order.

6. The effect and/or implementation of Order 4 above is to take effect from the date of acceptance and/or approval of Final Report (envisaged in 5 above) by the Master of the High Court, Pretoria.

7. That the costs of this application be costs in the liquidated estate of TIMANA PROPERTIES (PTY) LIMITED (In Liquidation) under Master Reference Number: T2719/17], alternatively, that the Applicant pay the costs of this application, apart from any costs of opposition which will be sought against the opposing party or person;

8. Granting such further and/or alternative relief as this Honourable Court may consider appropriate.

[4] The liquidators opposed the application and filed an answering affidavit. No replying affidavit or heads of argument were filed on behalf of the applicant. On the day of the hearing, counsel appeared on behalf of the applicant and indicated that he had been briefed at a late stage. A request for the matter to stand down to Thursday 8 August 2024 was declined by me for the reasons

given by me in open court. The applicant and the liquidators then proceeded to argue their respective cases.

The application:

[5] The liquidators contend that the relief sought by the applicant in her notice of motion is incompetent – they argue that the applicant seeks an order that Timana Properties "*be discharged from liquidation*"[1] but does not seek an order rescinding the liquidation order (granted in 2019). Further, the liquidators state that there is no case made out for the aforesaid or for the further relief sought.

[6] In my view, there is merit in the aforesaid opposition of the liquidators. The applicant has not made out a case for the relief that she seeks.

[7] At the hearing of the matter counsel for the applicant indicated that the applicant proceeds only in respect of prayer 1 of the notice of motion[2] and on the basis of section 354 (of the Companies Act, Act 61 of 1973 (the "**Companies Act, 1973**")). I shall return to this later in this judgment.

[8] At the hearing, I raised the issue of service of the application. Pursuant thereto, a return of service was handed up in respect of service on 5 June 2023 of the application on Nedbank. In support of service on the Master, I was referred to the stamp on the notice of motion at CaseLines 001-8. This does not prove service on the Master – the stamp is that of the Registrar of the High Court and not that of the Master. The applicant has failed to demonstrate proper service of the application.

[9] The liquidators further take the point that the applicant has failed to join all creditors and has failed to serve the application on all creditors. The

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[1] The use of the word 'discharge' is more appropriately used in circumstances where a company is in provisional liquidation in terms of a rule *nisi* operating as a provisional winding-up order - the termination of the liquidation is obtained simply by means of the 'discharge' by the court of such rule *nisi*. *In casu*, Timana Properties is in final liquidation.

[2] This was indicated in counsel's argument in reply.

application papers are wholly unhelpful in regard to identifying all creditors of Timana Properties. The applicant in its founding papers refers to two secured creditors, namely Nedbank and the sixth respondent, Prevance Capital (Pty) Ltd ("**Prevance**"). The answering papers of the liquidators are also of not much assistance in this regard, possibly due in part to the defective founding papers. There is an indication in the second and final liquidation, distribution and contribution account that the South African Receiver of Revenue ("**SARS**") is owed amounts. There are also *inter alia* various other references in the second and final liquidation, distribution and contribution account regarding various other "*payment[s] to be made*" and costs payable, none of which is dealt with by the applicant. The applicant has failed to properly address all relevant facts in the founding affidavit.

[10] Even if one is to adopt a benevolent approach and to accept that prayer 1 of the notice of motion is an ineloquently worded prayer in terms of section 354 of the Companies Act, 1973, and that the failure to properly serve the application can be overlooked, the application stands to be dismissed on a more fundamental basis, namely that the applicant has failed to make out a case for the relief that she seeks.

[11] Section 354 of the Companies Act, 1973, provides as follows:

> **354. Court may stay or set aside winding-up.—**
>
> (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
>
> (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.

[12] By virtue of Item 9 of Schedule 5 to the Companies Act, Act 71 of 2008, section 354 of the (repealed) Companies Act, 1973, remains in force until a date to be determined.

[13] These provisions accord to the Court a discretion to set aside a winding-up order on the basis (**a**) that the institution of the winding-up should not have occurred at all and (**b**) consequent upon events which have happened subsequent to such institution of the winding-up. In **Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd**,[3] the SCA held as follows:[4]

> The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events. …

[14] The application is not brought on the basis that the liquidation order should not have been granted in the first place. No case is made out for such relief.

[15] In the context of a case brought in terms of section 354 based on subsequent events, the question arises as to what is contemplated by "… *proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be … set aside …*".

[16] In **Commissioner, South African Revenue Service v Nyhonyha and Others**,[5] the SCA,[6] quite recently held:[7] (my emphasis)

> I agree with the authors of Henochsberg on the Companies Act 61 of 1973 5 ed at 748 that where, as is the case here, the setting aside of a winding-up is sought on the basis of subsequent events, **the test**

[3] 1998 (3) SA 175 (SCA)
[4] at p 180
[5] 2023 (6) SA 145 (SCA)
[6] Whilst dealing with the question whether the setting aside of a winding-up under section 354 of the Companies Act, 1973, constitutes the exercise of a discretion in the strict sense.
[7] At par [22]

is whether the facts show that the continuance of the winding-up would be unnecessary or undesirable. In Ex parte Strip Mining (Pty) Ltd: In re Natal Coal Exploration Co Ltd (In liquidation) (Kangra Group (Pty) Ltd and Another intervening) 1999 (1) SA 1086 (SCA) at 1091I, this court stated that the expression 'proof to the satisfaction of the Court' refers to 'the normal standard of proof of the facts which are to lead the Court to hold that the winding-up "ought" to be set aside'. Thus, **the test for setting aside a winding-up under s 354 on the basis of subsequent events, is whether the applicant has proved facts that show that it is unnecessary or undesirable for the winding-up to continue.** This does not involve a choice between permissible alternatives. The test is either satisfied or it is not.

[17] The *onus* is on the applicant to prove facts to show that it is unnecessary or undesirable for the winding-up to continue.

[18] The court in **Klass v Contract Interiors CC (in liquidation) and others**,[8] dealt with the discretion of the court in setting aside the proceedings for the winding-up of a close corporation. At paragraph 65, the court held as follows:

> [65] In summary, based upon the above cases, it is my opinion that the following principles apply to the exercise of the court's discretion to set aside a winding-up proceeding under s 354 of the Companies Act:
>
> [65.1] The court's discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties in interest, such as the liquidator, creditors and members.

[8] 2010 (5) SA 40 (WLD) at paras 65 – 66

[65.2] The court should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims.

[65.3] Where the claims of the liquidator and all creditors have been satisfied, the court should have regard to the wishes of the members, unless those members have bound themselves not to object to the setting-aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.

[65.4] In deciding whether or not to grant a setting-aside order, the court should, where appropriate, have regard to issues of 'commercial morality', 'the public interest' and whether the continuation of the winding-up proceedings would be a 'contrivance' or render the winding-up 'the instrument of injustice'.

[19] In the present matter, the applicant has failed to show on the facts that the continuance of the winding-up would be unnecessary or undesirable. The founding affidavit, a 13 page document, does not state very much at all. In fact, the portion of the entire founding affidavit that may conceivably deal with the merits of the matter comprises approximately 7 pages (the remainder being devoted to citation of parties, the commissioning section *et cetera*).

[20] The bald allegations of the applicant in support of the application include the following:

18. I hastily state that the Company has now been released from the major financial obligations and this, following the settlement and/or payment of various financial obligations the Company had

undertaken previously. The assets of the Company now exceed its liabilities and is solvent.

…

26. Notwithstanding the transfer of the Mpumalanga Property to Mbombela, the value of the assets of the Company exceed its liabilities and is accordingly, solvent.

27. Whether or not the Mpumalanga Property is transferred to Mbombela, there is no longer any need for the Company to be liquidated as there are no further benefits to creditors.

…

29. I hastily state that the Joint Liquidators have delayed the finalisation of the winding up of the affairs of the Company and necessitating the need to bring this application.

…

31. Accordingly, the Joint Liquidators have failed in their duties and responsibilities and have failed to act with the necessary degree of care and skill during the administration of the affairs of the Company. There is certainly, no basis for the Company to continue being in liquidation.

…

[21] Simply put, the allegations in the founding affidavit do not make out a case for the relief sought by the applicant.

[22] The applicant fails to indicate whether there are any other creditors of Timana Properties apart from the two secured creditors referred to in the founding papers (and as reflected in the second and final liquidation, distribution and contribution account), namely Nedbank and Prevance.

[23] Even in respect of Nedbank, the founding affidavit falls woefully short. The applicant states that at the time of the liquidation application,[9] a certain close corporation, namely Khukhanya Marketing CC and Timana Properties "*were indebted to Nedbank in respect of various amounts*" recorded in a settlement agreement ("**LM4**") which was made an order of court ("**LM5**"). A perusal of the settlement agreement reflects an indebtedness on the part of Timana Properties (jointly and severally with other parties to the settlement) in the following sums (plus interest and ancillary fees and costs) in respect of various agreements referred to therein:

a. the sum of **R2,683,725.00** in respect of a current account;

b. the sum of **R367,873.30** in respect of an instalment sale agreement with number 2[...];

c. the sum of **R147,137.43** in respect of an instalment sale agreement with number 2[...];

d. the sum of **R490,694.03** in respect of an instalment sale agreement with number 2[...];

e. the sum of **R446,739.99** in respect of an instalment sale agreement with number 2[...];

f. the sum of **R1,003,586.80** in respect of a mortgage bond agreement with number 1[...];

g. the sum of **R921,363.70** in respect of a mortgage bond agreement with number 1[...].

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[9] The applicant alleges that "*…. the [liquidation] application (sans annexures) is attached [to the founding affidavit] marked "**LM3**"*." However, a perusal of "**LM3**" reveals that this is in fact a copy of a sequestration application launched by Nedbank against the applicant and her husband out of this court under case number 664/20.

[24] The settlement agreement includes various further terms, including *inter alia* that should payments not be made on due dates that the full amounts shall become immediately due and payable, for costs, for consents to judgment *et cetera*. Be this as it may, the applicant in her founding affidavit confirms an indebtedness on the part of Timana Properties to Nedbank at the time of the liquidation in the sum (in respect of capital alone) in excess of R6,000,000.

[25] The applicant attaches a letter from Nedbank dated 8 October 2020 in support of the fact that the liquidators have paid the full mortgage bond account with number 1[...] ("**LM7**") to Nedbank. As set out above, the settlement agreement refers to a capital amount in this regard in the sum of R1,003,586.80. In fact, the applicant states in paragraph 30.7 of the founding affidavit that Nedbank "*… were paid only R927 107, 00 …*". There is no explanation furnished by the applicant regarding the balance of the amount that the applicant alleges was due to Nedbank – a difference of some R5 million.

[26] I am cognisant of the statement by the liquidators noting "… *that Nedbank's debt was settled.*" However, this must be read in the context of the paragraphs which are being responded to, as well as the fact that the paragraph in the answering affidavit containing the aforesaid statement is prefaced by a denial. Further, the second and final liquidation, distribution and contribution account evidence the fact that Nedbank has not been paid in full, a deficiency in the sum of R3,462,652.57 being recoded therein. The judgment of Her Ladyship Justice Teffo dated 11 November 2020 at CaseLines 005-97 further confirms that Nedbank was not settled in full.[10]

[27] In respect of Prevance Capital, the applicant relies on various agreements that she alleges were concluded including a sale agreement dated March 2021 of a property, portion 5[…] of the farm Schagen ("**Farm Schagen**") between Timana Properties (represented by the liquidators) as seller and the seventh respondent ("**Mbombela**") as purchaser, and Prevance as the

[10] For example, par [47] of the judgment: "*There is therefore, no doubt that the debt to Nedbank against Timana Properties is not paid in full. The defence raised can therefore not stand.*"

bondholder (the "**sale agreement**"), a cession agreement between Timana Properties and Prevance (the "**cession agreement**"), and a loan agreement between Prevance and Mbombela (the "**loan agreement**").

[28] There are various issues that are problematic in respect of the sale agreement attached to the founding affidavit – for example: it does not contain the signatures of all of the parties to the sale agreement, it contains suspensive conditions which the applicant does not allege were fulfilled. The loan agreement attached by the applicant to the founding papers is not signed by any of the parties to the aforesaid agreement *et cetera*.

[29] Despite the sale agreement being entered into in March 2021, the Farm Schagen has not been transferred to Mbombela to date.

[30] The cession agreement attached to the founding affidavit provides that Timana Properties is indebted to Prevance "*in an amount exceeding R9 500 000.00*". The (unsigned) loan agreement attached to the founding affidavit ("**LM10**") provides that Timana Properties is indebted to Prevance "*in an amount of R14.500.000.*" The sale agreement between Timana Properties and Mbombela provides for a purchase price of R9,500,000.00 (none of which will be received by Timana Properties, if the cession is enforced). Despite an allegation to the contrary on the part of the applicant, on the applicant's own version, Timana Properties is insolvent. The liquidators confirm also that Timana Properties is insolvent.

[31] The second and final liquidation and distribution account reflects *inter alia*:

a. an indebtedness to Nedbank in the sum of R3,462,652.57, and a deficiency in respect of Nedbank in the same amount;

b. an indebtedness to Prevance in the sum of R21,426,297.31, and a deficiency in respect of Prevance in the sum of R13,340,064.62

[32] The applicant states nothing about any assets of Timana Properties but for two immovable properties. One of the properties has been sold and transferred by the liquidators. The other, the Farm Schagen, is the subject of the sale agreement in which the Farm Schagen is to be transferred to Mbombela. The applicant makes no mention of any other assets or property of Timana Properties. In circumstances where it appears that Timana Properties is insolvent, where the liquidators of the company are still in the process of dealing with the sale of the Farm Schagen (which appears to be the only asset of Timana Properties), and where the applicant provides no facts in support of an allegation that the continuance of the winding-up would be unnecessary or undesirable, there is no case made out by the applicant in terms of section 354 of the Companies Act, 1973.

[33] In addition to the aforesaid, the applicant fails to deal at all with the position of the liquidators. No provision has been made by the applicant for the payment of the expenses of the liquidators nor for sufficiently securing payment. The argument advanced by counsel on behalf of the applicant, including that all that is left in respect of the winding up proceedings is the section 89 costs, being a fight between the liquidators and Prevance, and submissions to the effect that absent prior written authorisation of the creditors as contemplated by section 73 of the Insolvency Act,[11] the liquidators are not entitled to have incurred costs in respect of certain litigation, misses the point. These arguments do not serve to meet the *onus*

[11] Section 73(1) of the Insolvency Act provides that:

"***73. Trustee may obtain legal assistance***

(1) Subject to the provisions of this section and section 53(4), the trustee of an insolvent estate may with the prior written authorisation of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate: Provided that the trustee—

(a) if he or she is unable to obtain the prior written authorisation of the creditors due to the urgency of the matter or the number of creditors involved, may with the prior written authorisation of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate; or

(b) if it is not likely that there will be any surplus after the distribution of the estate, may at any time before the submission of his or her accounts obtain written authorisation from the creditors for any legal work performed by any attorney or counsel,

and all costs incurred by the trustee, including any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, in so far as such costs result from any steps taken by the trustee under this subsection, shall be included in the cost of the sequestration of the estate"

that the applicant bears in her application in terms of section 354 of the Companies Act, 1973. Further, this is not the case that the applicant brought in her founding affidavit. The liquidators who stand to lose control of the assets by reason of a setting aside of the winding up ought normally to be properly safeguarded in relation to their expenses. This the applicant has failed to do at all.

[34] A further factor militating against a finding that the continuation of the liquidation proceedings be set aside is that Timana Properties has been in final liquidation for almost five years now. The grant of the application sought by the applicant will likely lead to many practical difficulties, and further disputes. (*cf.* **Aubrey M Cramer Ltd v Wells NO** 1965 (4) SA 304 (W) at 305)

[35] In all the circumstances of the case, no proper case for the relief sought has been made out by the applicant. The application stands to be dismissed.

[36] Counsel for the liquidators submitted in heads of argument that I ought to grant costs on a punitive basis based on "*… the failure to make provision for the payment of all fees …*". In submissions in court, the submission was that the applicant ought to have been aware that the application had no merit when the answering affidavit was filed and for such reason the applicant ought to pay costs on an attorney and client scale (as the application was meritless). Further reliance was placed on the conduct of the applicant in the present proceedings, not filing a replying affidavit or heads of argument, and what was referred to as a lackadaisical approach in the conduct of the litigation. In my view, such facts do not go far enough to justify costs on a punitive scale.

[37] Considering *inter alia* the following factors - the complexity of the present matter and the importance of the relief sought,[12] - my view is that costs on scale B constitutes the appropriate scale.

[12] Rule 67A read with Rule 69 of the uniform rules of court.

ORDER

[38] Accordingly, I make the following order:

1. The application is dismissed with costs.
2. The applicant is directed to pay the costs of the application on scale B.

WOODROW AJ
ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 13TH day of August 2024.

Appearances

Counsel for the Applicant: N Riley
instructed by: Ndobe Incorporated

Counsel for the First and Second Respondents: SJ van Rensburg SC
instructed by: NJ De Beer Attorneys

Date of Hearing: 5 August 2024
Date of Judgment: 13 August 2024