HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 48555/2011

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 13 FEBRUARY 2025

SIGNATURE

In the matter between:

JOHANNES STEPHANUS WESSELS N.O.	First Applicant
VERA MARIA WESSELS N.O.	Second Applicant
JOHANNES STEPHANUS WESSELS	Third Applicant
JOHANNES STEPHANUS WESSELS N.O.	Fourth Applicant
SEBASTIAAN JACOBUS WESSELS N.O.	Fifth Applicant
JOSANDRA PAUW N.O.	Sixth Applicant
CHANE WESSELS N.O.	Seventh Applicant
BAREND JACOBUS DU TOIT N.O.	Eighth Applicant

and

ESTATE LATE ESIAS JOHANNES JANSE VAN RENSBURG N.O.	First Respondent

FAROUK SHARIEF N.O.	Second respondent
THE MASTER OF THE HIGH COURT, PRETORIA	Third Respondent
ABSA BANK LTD	Fourth Respondent
RAND MERCHANT BANK	Fifth Respondent
MANDLA PROFESSOR MADLALA N.O.	Sixth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Seventh Respondent
MABALINGWE SHAREBLOCK	Eighth Respondent

Summary: *The principal applicants are the trustees of trusts who are shareholders of a company in liquidation – they sought relief aimed at setting aside the final winding-up of the company – the applicants alleged that all proven creditors have been paid and that a settlement had been reached with the only remaining creditor, ABSA – however, there remained three principal aspects relating to the winding up still outstanding and in dispute – these were whether the fees of the erstwhile liquidators had been forfeited, what the extent of the current liquidator's fees were and whether another creditor's claim for levy payments due to it, constituted post-winding up expenses or not – Found: not appropriate that these winding-up related issues have to be litigated upon after the termination of a winding-up process sought in terms of section 354 of the Companies Act 61 of 1973, which remained operative by virtue of Item 9 of Schedule 5 of the Companies Act 71 of 2008 – Application dismissed with an appropriate order for costs.*

ORDER

The application is dismissed with costs, such costs to include the employment of senior counsel.

J U D G M E N T

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 13 February 2025.

DAVIS, J

Introduction

[1] Boschpoort Ondernemings (Pty) Ltd (in liquidation) (Boschpoort) has three shareholders: the Hannes Wessels Family Trust, the Mabalingwe Trust and the Willem Wessels Trust. The principal applicants are the trustees of these trusts. Johannes Stephanus Wessels (Mr Wessels) is an applicant in his personal capacity as well. Relying on a settlement agreement reached with ABSA Bank Ltd (ABSA), which the applicants allege is the only remaining unpaid creditor, they sought to have the winding-up proceedings set aside. The application was launched in terms of section 354 of the Companies Act[1]. The alternative relief for the placement of Boschpoort in business rescue, had been jetissoned.

The law relating to section 354

[2] Section 354(1) provides that a court may, at any time after the commencement of a winding-up, *"… on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be … set aside …*", make an order staying or setting aside "the proceedings".

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[1] 61 of 1973, which section is operative by virtue of Item 9 of Schedule 5 of the Companies Act 71 of 2008.

[3] A court may act as aforesaid on an application by a member of the company in liquidation and may have regard to the wishes of creditors "*… as proved to it by any sufficient evidence*"[2].

[4] What are the factors that a court must consider when granting or refusing an application for rescission of a winding-up process in terms of section 354? The answer has been given by this court as follows in *Klass v Contract Interiors CC* (*in liquidation*) and others (*Klass*)[3]:

> "*[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'.*"

[5] Insofar as Leenberg AJ in *Klass* had found that a court's discretion "*… is practically unlimited",* the Supreme Court of Appeal has held that the test for setting aside a winding-up order 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*

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[2] Section 354 (2).

[3] *Klass v Contract Interiors CC (In liquidation) and others* 2010 (5) SA 40 (W), a decision on which both parties relied (*Klass*).

alternatives [such as where a true discretion is involved]. The test is either satisfied or it is not"[4].

[6] In *Ex parte Strip Mining (Pty) Ltd*: *In re Natal Coal Exploration Company Ltd (In liquidation) (Kanga Group (Pty) Ltd intervening)*[5], the same court has held 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*".

[7] In determining whether the requisite standard of proof has been attained in motion proceedings where final relief is sought, which is the case here, the Plascon-Evans-principle[6] finds application where there are disputes of fact.

The applicants' case

[8] For present purposes it is not necessary to deal with issues of *locus standi* and joinder, which have featured in previous skirmishes between the parties[7] and it will suffice to proceed on the basis that the principal applicants, representing various trusts which are all shareholders and therefore the "members" of Boschpoort, have been entitled to launch the present application.

[9] The applicants alleged that all the creditors of Boschpoort at the time of liquidation have either been paid or would be paid and there is no need for Boschpoort to be further wound up.

[10] The applicants alleged that, when the winding-up order had been granted, Boschpoort only had two creditors, Rand Merchant Bank (or a related entity in the First Rand Group), in the amount of some R10 million and ABSA in the amount of some 34 million. Up to that time Boschpoort had conducted the business of running lodges and nature reserves at Mabalingwe, Bela Bela, Aldam and Hoedspruit.

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[4] *Commissioner, South African Revenue Service v Nhonyka and others* 2023 (6) SA 145 (SCA).
[5] 1999 (1) SA 1086 (SCA).
[6] After *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) S 623 (A) which, with reliance on *Stellenbosch Farmer's Winery Ltd v Stellenbosch Winery (Pty) Ltd* 1957 (4) Sa 234 (C), dictates that an applicant can only succeed in such circumstances if the facts stated by the respondent together with those facts stated by the applicant which have not been denied, entities the applicant to the relief sought.
[7] And which have resulted in judgments by Bokaka AJ and Retief J.

[11] The applicants alleged that, during the course of their tenure, the respective co-liquidators from time to time, have liquidated some R54 million of assets, which was more than enough to cover all Boschpoort's debts. On this proposition, all the creditors could have been paid.

[12] The accounting appeared to have not turned out as simple as this. Rand Merchant Bank (also referred to by the applicants as First Rand Bank) only received with a dividend of R2 173 505, 94. It is alleged that it has contented itself with this rather paltry repayment and did not oppose the current application, despite having been cited as the fifth respondent.

[13] In respect of ABSA (being the liquidating creditor) who had been cited as the fourth respondent, the applicants relied on a purported settlement agreement. The proposed settlement agreement, was intended to be reached between the current remaining liquidator, Mr Madlala, Mr Wessels in his capacity as director of Boschpoort, the trustees of the Hannes Wessels Family Trust, Absa and First Bank Rand Ltd t/a FNB (supposedly also being Rand Merchant Bank). The signed copy annexed to the applicants' founding affidavit, however appears to have only been signed on behalf of ABSA and by Mr Wessels, both in his personal capacity and in his capacity as trustee of his family trust, together with Mrs Vera Maria Wessels. Neither the remaining liquidator nor First Rand Bank (or the fifth respondent) has signed the agreement.

[14] The settlement agreement itself is an intricate affair. It recorded that ABSA had proven 5 claims in the winding-up process, totaling R36 765 987, 80 and that First Rand Bank (also trading as FNB) had proven two claims, totaling R10 819 263, 21.

[15] It lists as "remaining claims", those claims or costs "*to be charged against the Company, and which to be best of the knowledge of the parties are the only remaining claims against the Company*". This appears to be quite a list. It reads as follows:

"*2.6.16.1* *ABSA: A claim of R4 000 000.00 being a remaining secured claim after having received advance dividends of R33 436 245.05 on 5 proven secured claims i.o.r respectively:*

2.6.16.1.1 *an overdraft facility under account number 1[...];*

2.6.16.1.2 *a residential development loan under account umber 7[...] (paid in full);*

2.6.16.1.3 *mortgage loan agreement under account number 8[...] (paid in full);*

2.6.16.1.4 *mortgage loan agreement under account number 8[...] (paid in full); and*

2.6.16.1.5 *mortgage loan agreement under account number 8[...];*

2.6.16.2 *Mabalingwe: A claim of R3 278 222 for levies being a post liquidation administration cost;*

2.6.16.3 *Mabalingwe: A claim of R3 039 896 49.00 for levies being a concurrent claim;*

2.6.16.4 *Erstwhile Liquidators: A claim of R12 597 553.00 for liquidator's fees being a post liquidation administration costs in respect of:*

2.6.16.4.1 *Encumbered Asset Account number 1: R3 167 586.48;*

2.6.16.4.2 *Encumbered Asset Account number 2: R1 217 331.82;*

2.6.16.4.3 *Encumbered Asset Account number 3: R84 714.27;*

2.6.16.4.4 *Encumbered Asset Account number 4: R474 553.74;*

2.6.16.4.5 *Encumbered Asset Account number 5: R1 661 111.41;*

2.6.16.4.6 *Encumbered Asset Account number 6: R1 565 161.10;*

2.6.16.4.7 Encumbered Asset Account number 7: R2 299 023.07;

2.6.16.4.8 Free Residue Account R2 128 067.11".

The claims listed in paras 2.6.16.2 and 2.6.16.3 were labelled "the Mabalingwe claims".

[16] As "remaining assets" in Boschpoort, only two items are listed, namely "Cash Funds" meaning funds held by the liquidators in the estate account, estimated at R14,2 million and a costs order obtained against Mr Wessels. There is also a reference to a costs order obtained by Mr Wessels against Boschpoort. Neither of these two costs orders have been quantified.

[17] As a recordal, the settlement agreement stated that the Master has disallowed fees of the erstwhile liquidators in the amount of R1 710 000,00 on 11 September 2017 and R12 597 533.00 on 11 April 2019. In respect hereof, the agreement states that the time periods for review of these decisions had already lapsed.

[18] The agreement was made subject to the setting aside of the winding-up proceedings, for which purpose the liquidator would supply a supporting affidavit. None has been supplied.

[19] The settlement mechanism envisaged in the agreement was formulated as follows:

"*5.1.1 Absa's advanced dividends R33 436 246.05 is hereby made final;*

5.1.2 FNB's advanced dividends of R2 173 505.94 is hereby made final;

5.1.3 The Liquidator will distribute the Cash Funds by making the following payments:

5.1.3.1 An amount of R4 000 000.00 to Absa into its nominated bank account;

5.1.3.2 His fees as taxed by the Master and provided for in section 384 of the Companies Act 61 of 1973 (or

as agreed between the parties), into his nominated bank account in respect of liquidation fees;

5.1.3.3 The balance of the cash in the estate shall be transferred to Boschpoort Ondernemings (Pty) Ltd, into it nominated bank account after which the bank account will be closed".

[20] The settlement agreement further envisaged that "the following aspects remain in dispute" and that Boschpoort, Mr Wessels and the Hannes Wessels Family Trust, reserve their rights to further litigate these "aspects", namely: all the issued A class shares in a related company, Gorcum Farm Shareblock Ltd (with its principal place of business at Mabalingwe), the costs orders against Mr Wessels, the disputed liquidator's fees of R12 597 553.00, the taxation of the liquidator's attorney's fees, the "Mabalingwe claims", and "any other dispute between the Company and the initial liquidators" (the "Company" is a reference to Boschpoort).

[21] The settlement agreement also recorded an extensive set of securities whereby ABSA's claims had been secured (called the "Boschpoort securities). These included covering mortgage bonds over units in the scheme known as Mabalingwe 2 and over 3 other immovable properties not related to the Mabalingwe development. Other securities included notarial bonds, a general claim relating to 3[...] M[...] N[...] R[...] B[...] [...] shares and suretyships furnished by the Mabalingwe Trust, the Hannes Wessels Family Trust and by Mr Wessels.

[22] The crucial term of the settlement agreement relating to these securities is clause 7.2 thereof, which reads as follows: "*On payment of the settlement amount of R4 000 000.00 to Absa, Absa shall release all Boschpoort securities and sureties of any Boschpoort liabilities … on demand*".

[23] As is apparent from the judgment of Retief J, when she dealt earlier during the litigation process with the issue of non-joinder of all the shareholders of Boschpoort, the applicants have then already jettisoned the alternative relief initially sought by them, that is for Boschpoort to be placed in business rescue.

The opposition to the section 354 application

[24] As a starting point, the attorneys for the second respondent directly disputed the allegation by Mr Wessels (repeated in the settlement agreement) that the Master had disallowed the fees of the erstwhile liquidators, which had been removed and of which one had passed away, leading to the executor in his deceased estate featuring as first respondent. They also denied the allegation that these fees had been "forfeited". This denial appears to be correct and is substantiated by the Master's own comment on this issue in its affidavit delivered in respect of an unsuccessful contempt of court application launched by Mr Wessels on 21 October 2021[8]. Therein the Master stated the following: "*Wessels also deals with the percentages the liquidators are allowed to claim fees and the Wessels objection amounts to its own taxation of the liquidators' fees and as stated in my ruling, the Master will consider and tax a reasonable fee in accordance with the prescribed tariff B … the taxation of the account falls within the exclusion jurisdiction of the Master … My ruling on the objection is that the liquidators; fees will be taxed in accordance with tariff B*".

[25] It is common cause that, to date this taxation had not yet taken place.

[26] There appears to also be dispute as to the fees of the current liquidator (the sixth respondent).

[27] In respect of the eighth respondent's claims for arrear levies owed to it by Boschpoort, this has not been attacked by the applicants insofar as the actual amount thereof concerned, nor has there been any attack on the actual basis thereof, i.e. the fact that levies had been due and payable. The only attack of any substance was the applicants' contention that these levies should not form part of the costs of the administration of the winding-up process. Despite the liquidators having been running the business of Boschpoort during the winding-up process, thereby becoming liable for the payment of levies, the applicants averred that this

[8] The application was for alleged contempt of the Master of an order of Wanless AJ (as he then was) in case no 65015/2018 on 14 February 2020 whereby the Master was ordered to comply with certain obligations, not relevant to the current dispute.

claim should (at least in part) have been proven separately as a claim in the insolvent estate and, since that hasn't been done, it has become unenforceable.

[28] This court is not called upon to settle the above dispute, it is enough to note that even the applicants, in clauses 2.6.16.2, 2.6.16.3 and 5.2.1.6 of the proposed settlement agreement, acknowledged that the eighth respondent's claims would remain the subject of further litigation, should the winding-up be set aside.

[29] In respect of the claim of First Rand Bank (or Rand Merchant Bank), it is to be noted that it had not signed the settlement agreement. It has (only) by way of a letter from its attorneys, annexed to the applicants' papers, withdrawn its objection to the first liquidation and distribution account (in terms of which it was awarded a divided of R2 13 505, 94). There is no evidence of what its position was or would have been, had the first liquidation and distribution account in fact been a final account. In fact, it had expressly been stated by the then liquidators at the time (including the second respondent) that "*this is not a final plan of distribution, there being … further assets … 1 x motor vehicle, section 1 of the Sectional Title Scheme known as Mabalingwe 10 …Gorcum shares … bills of costs against Mr Hannes Wessels … dividends from Boschpoort Management (Pty) Ltd (in liquidation)*". There is also no proper explanation for the alternating identification (or citation) of this creditor as either First Rand Bank or Rand Merchant Bank.

Evaluation

[30] The applicants allege that ABSA has already received payment of the capital amount due to it and remains only an unpaid creditor in respect of the interest portion of its claim.

[31] The applicants concluded the founding affidavit delivered on their behalf in respect of the subject of payment by alleging that, once ABSA is paid R8 million in respect of its claim for interest, then, of the some R14 million in the estate account, there would be R6 million left *"… to serve as security for the sixth respondent's (i.e. the current liquidator) claim for liquidator's fees*".[9]

[9] Par 4.17 of the founding affidavit.

[32] Despite clause 5.1.3.2 of the proposed settlement agreement making provision for the payment liquidator's fees, after taxation thereof by the Master, no provision has been made for payment of the erstwhile liquidators fees, as and when taxed.

[33] The proposition of the applicants is therefore that the remaining funds in the estate account be distributed to the liquidating creditor and the current liquidator and that all other claims (including the costs order against Mr Wessels) either fall by the wayside or become the subject matter of further litigation.

[34] Apart from the questions remaining as to First Rand Bank's acquiescence to this, the settlement agreement envisages extensive and diverse litigation about claims exceeding millions of rands. One can readily foresee extensive disputes looming about *locus standi*, prescription and the interaction between these claims and how they fitted into the winding-up and taxation processes, with no immediately discernable end to the ensuing litigation. If anything, the current litigation and the numerous interlocutory and other skirmishes, resulting in voluminous papers through which the court had to wade, only serve to confirm that this would be the position.

[35] Should the relief sought by the applicants be granted, it would result therein that, despite the winding-up process being terminated, outstanding claims against (and by) Boschpoort would have to be "liquidated" or determined by way of further litigation and not by a winding-up process. Should this be tolerated by a Court? I think not.

[36] The following principle enunciated in *Klass*, referred to by both parties and quoted in par 4 above, bears repetition, namely that the court "*… should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision had been made for the payment of their claims*". I find that that is the position here.

[37] Insofar as the applicants alleged that the claims of the erstwhile liquidators and the eighth respondent are disputed, then one should add a rider to the

abovementioned principle extracted from *Klass* to the effect that winding-up proceedings should not be set aside until such time as all disputes regarding disputed claims (including the taxation of fees) have been resolved, whether by litigation, determination by the Master or otherwise.

[38] In addition to the above reasons for refusing the relief, until such time as the disputes referred to above have been resolved, a court can also not properly determine other issues relating commercial morality or public interest as referred to in *Klass*.

[39] The continuation of the current winding-up process would therefore not be "unnecessary or undesirable"[10].

Conclusion

[40] In these premises, I therefore find that the application should fail. I find no grounds to deviate from the customary order that costs should follow the event.

Order

[41] In the circumstances, the following order is made.

The application is dismissed with costs, such costs to include the employment of senior counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 1 November 2024
Judgment delivered: 13 February 2025

[10] *CSARS v Nyhonyha and* others 2023 (6) SA 145 (SCA) at [22] which, incidentally, overruled *Klass* insofar as the latter had held (in par 65.1) that the court had a "practically unlimited" discretion.

APPEARANCES:

For the Applicant:	Adv F. G Janse van Rensburg
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For the Respondent:	Adv B. H Swart SC
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