Bosasa - liquidation lessons learned

By Kylene Weyers and Stephan Venter

9 Dec 2019

The sensational revelations that were made during the Zondo Commission of Enquiry into Allegations of State Capture, by, *inter alia*, the former COO of Bosasa, namely Angelo Agrizzi, shocked the entire country. Bosasa is now known as the African Global Group (Group), the holding company of which is African Global Holdings (Holdings).

This prompted the bankers of African Global Operations (Operations) (which is a wholly owned subsidiary of Holdings and performed all the treasury functions of the Group, including receiving payment and making payment on behalf of various operating companies in the Group) to indicate that they will be withdrawing Operations' banking facilities and closing the banking accounts (which was catastrophic for its continued business operations).

After the Group failed to find another bank that would provide Operations with banking facilities, the directors of Holdings (and directors of Operations) resolved to place Operations and its subsidiaries under voluntary winding-up in terms of section 351 of the Companies Act 61 of 1973 (Old Companies Act).

However, when the provisional liquidators (who were appointed by the Master of the High Court in Pretoria) started to exercise their statutory powers, Holdings attempted to have its resolutions in terms of which Operations and its subsidiaries were placed under voluntary winding-up, declared null and void. In addition, and as a consequence of the aforementioned, Holdings attempted to have the appointment of the provisional liquidators declared null and void and of no force and effect.

A litigious battle between the provisional liquidators and Holdings culminated into the case of *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others [2019]*, before the Supreme Court of Appeal (SCA). This case was an appeal by the provisional liquidators against the decision of the Gauteng Division of the High Court, Johannesburg, setting aside the resolutions under which the companies had been placed in voluntary winding-up.

Legal questions

During the proceedings in the SCA, Holdings raised two interesting legal arguments which will be discussed hereunder, namely:

1. Holdings argued that, because the appointment of the provisional liquidators was effected by the Master in Pretoria, whilst the registered offices of all the companies were within the area of jurisdiction of the Master in Johannesburg, the appointment was invalid and as a result thereof the provisional liquidators had no *locus standi* in the court proceedings.

2. Holdings argued that Operations and all its subsidiaries were solvent companies and could therefore not be voluntarily wound up in terms of section 351 of the Old Companies Act. Instead, Operations and its subsidiaries should have been wound-up in terms of section 79 and 80 of the Companies Act 71 of 2008 (New Companies Act), which makes provision for the winding-up of solvent companies.

Jurisdiction and appointment of the provisional liquidators

Section 368 of the Old Companies Act requires the Master to appoint a provisional liquidator as soon as the special resolution for the winding-up of the company has been registered with the CIPC in terms of section 200 of the Old Companies Act. "Master", in regard to a company that is not being wound-up pursuant to a court order, is defined in section 1 of the Old Companies Act as

> *"the Master having jurisdiction in the area in which the registered office of that company is situated."*
>
> As mentioned above, Holdings contended that because the companies had their registered offices within the jurisdiction of the Master in Johannesburg, only that Master was legally entitled to appoint the provisional liquidators of the companies.

The SCA noted that the jurisdiction of the Master in Pretoria and the Master in Johannesburg overlaps. This is since the area of jurisdiction of the Master in Pretoria includes the entire area of jurisdiction of the Master in Johannesburg, in the same way that the former Transvaal Provincial Division exercised concurrent jurisdiction over the entire area of jurisdiction of the former Witwatersrand Local Division. As a result, the SCA held that it is open to parties requiring the assistance of the Master to use the office of either Master, where their areas of jurisdiction overlap. The SCA consequently held that the objection by Holdings to the appointment of the provisional liquidators by the Master in Pretoria was without merit.

Winding-up of solvent and insolvent companies and meaning of "commercial solvency"

There are two ways in which an insolvent company can be wound-up voluntarily, namely, in terms of section 350 of the Old Companies Act (Members voluntary winding-up) and section 351 of the Old Companies Act (Creditors voluntary winding-up).

Should a solvent company wish to be wound-up voluntarily, it must rely on section 79 and 80 of the New Companies Act. During the SCA proceedings, Holdings attempted to argue that the resolutions that were passed by Operations and its subsidiaries were incorrectly passed in terms of section 351 of the Old Companies Act, instead of section 79 and 80 of the New Companies Act.

The reason for this being that, according to Holdings, Operations and all its subsidiaries were solvent (Holdings however did not provide the court with any financial statements or information to support its contention). Holdings argued that, because the wrong sections of the Old Companies Act were relied upon when passing the resolutions, the resolutions were null and void and of no force and effect.

Since there is no definition of a solvent company in the New Companies Act, the SCA considered in its judgment how it should be determined whether a company is solvent or insolvent. The SCA considered the judgment in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Limited 2014* (SCA), in which case the SCA previously held that for purposes of the New Companies Act, a company will be solvent, if it is commercially solvent.

It is trite law in South Africa that a company is commercially solvent if it is able to meet current demands on its debts, as well as its day-to-day liabilities in the ordinary course of business. The test is therefore not whether the company's assets exceeds its liabilities, since a company can be commercially insolvent while being factually solvent.

The SCA further considered the following passage from LAWSA to assist it with determining whether Operations and its subsidiaries were commercially solvent:

> *"The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant."*

The SCA noted that liquid assets will include the following: cash on hand, receipts that the company can expect to receive in the ordinary course of business, overdraft or other banking facilities that can be used to pay debts when they fall due, or other assets such as shares, bonds and book debts, that can be realised quickly so as to generate cash with which it can pay debts. The SCA further stated that, when a company is unable to access any liquid assets, it is illiquid and unable to pay its debts as they fall due.

Holdings argued that the moment of the inability of the Group to pay its debts had not yet arrived when the voluntary winding-up resolutions were passed, since at that point in time the bank accounts of Operations had not yet been closed (notwithstanding that an inability to pay was imminent once Operations' banking accounts were closed).

The SCA stated that Holdings' argument regarding timing of the resolutions misconceived the nature of commercial insolvency, since commercial insolvency is not something that should be measured at a single point in time. The SCA held that the test is rather whether a company is able to meet its current liabilities, including contingent and prospective liabilities as they come due. In other words, the question is whether the company has enough liquid assets or readily realisable assets available in order to meet its liabilities as and when they fall due (in the ordinary course of business), and thereafter to be in a position to carry on normal trading. According to the SCA, a company's current financial position, as well as its financial position in the immediate future, should be considered in order to determine the commercial solvency of a company.

By applying the principles as set out above, the SCA held that the Group, including Operations and its subsidiaries, were commercially insolvent at the time that the resolutions were passed for their voluntary winding-up.

The SCA held that the companies were properly placed under voluntary winding-up and accordingly upheld the appeal by the provisional liquidators.

Conclusion

It is important for companies who are considering a voluntary winding-up to carefully determine:

a. whether the company is commercially solvent or commercially insolvent, based on the facts, by considering the company's current financial position, as well as its financial position in the immediate future (and further having regard to the fact that a company can be commercially insolvent while being factually solvent); and thereafter

b. in terms of which provisions of the Old and New Companies Acts the company should resolve to be wound up.

ABOUT THE AUTHOR

Kylene Weyers, Senior Associate and Stephan Venter, Associate in Cliffe Dekker Hofmeyr's Dispute Resolution practice