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When a séance to raise the dead is permissible... SCA makes finding on nature of discretion exercised when setting aside a winding-up order

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An order setting aside a winding up order is akin to raising the dead – especially if the winding-up is far into its progression. The further into the process, the more complex the business of resurrecting the entity becomes. Setting aside the winding up order has a myriad of consequences.

To name a few:

1. There is huge uncertainty in respect of how, when and by whom the liquidators of the hitherto insolvent (now solvent) company are to be paid their fees;
2. creditors losing their rank and claim status;
3. uncertainty arises in respect of whether agreements and schemes concluded during the winding-up continues to be binding – the status of pre-existing agreement and the intervening liquidation is also necessarily complex;
4. the status of voidable dispositions, impeachable transactions under challenge also becomes vexed.

Appreciably therefore, it is not a matter of simply coming to court to say that the creditors can now all be paid and that business is solvent (commercially or otherwise).

In the Supreme Court of Appeal (SCA) case of *The Commissioner for the South African Revenue Service v Nyhonyha and Others (1150/2021) [2023] ZASCA 69 (18 May 2023)* (*CSARS v Nyhonyha*), the SCA confirmed that when a court exercises its discretion to set aside a winding-up order on the basis that the order falls to be set aside by virtue of subsequent events, such discretion is not a *true discretion*. This is so because the outcome of this discretion is really only the outcome of a simple test of whether the continuation of the winding up would be undesirable and unnecessary.

In terms of section 354 of the Companies Act, 63 of 1973 –

> *"(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."*

According to the case of *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) (Ward) which is referenced in *CSARS v Nyhonyha*, it is stipulated that the language of section 354 is such that the court is afforded a discretion to set aside a winding-up on the basis that the winding-up order ought not to have been granted at all (an example of this would be an error in procedure); and on the basis it falls to be set aside by reason of subsequent events (an example of this would the company becoming solvent).

The court in Ward stated that a winding-up order shall only be set aside in exceptional circumstances whereupon satisfactory explanation is furnished for not having opposed the granting of a final order or appealed against the order – that for a court to exercise its discretion, no

less would be expected of an applicant who seeks to have a judgment rescinded at common law – the object of the section is not to provide for a rehearing of the merits of the original proceedings or for a court to sit in appeal as to the merits of a judgment. Any delays in progressing the winding-up and the extent of progress if the winding-up might constitute relevant considerations.

In the unreported case of *Arnold v EOH Managed Services PS (Pty) Ltd and others* (case 24877/2021), Todd noted at paragraph 42 that if those factors were present, then it would be a matter of the court's discretion whether this kind of relief should be granted.

Against that backdrop, the court in *CSARS v Nyhonyha*, stated that Ward only referred to a discretion and did not consider what the nature of the discretion was. The court proceeded to interrogate that very issue on the basis that the respondent in the appeal asserted that the discretion was a true discretion of the court a quo and that on this basis the appeal had to fail.

A true discretion of a court would involve the exercise of "*a choice between permissible alternatives*".[1] It is trite that the scope of interference on appeal with the exercise of a true discretion is limited. This is because the question on appeal would not be whether the appeal court would have reached a similar conclusion, rather whether the discretion was exercised properly. Such a true discretion exist for instance in relation to costs orders.

The court in *CSARS v Nyhonyha* interrogated the nature of the *discretion*, and in so doing, pointed to a long line of authority which makes it clear that the test for setting aside a winding-up by virtue of subsequent events occurring, is that when proof to the court's satisfaction has been presented to the effect that the continuation of the winding-up is neither necessary nor desirable then no such discretion in fact exists. Therefore, it is more of a zero sum game in that the test is either satisfied or not satisfied.

The real heart of the exercise in considering whether or not to grant relief under section 354 is whether the applicant has proved facts which show that it is unnecessary or undesirable for the winding up to continue – the converse would of course be true where it is shown that it would be desirable to maintain the status quo.

In *CSARS v Nhyonyha* the court was of the view that the court a quo came to its decision based on incorrect facts and wrong principles of law which opened the door to the consideration of the matter on appeal.

We therefore conclude that the facts and submissions before the court on application to set aside a winding up will therefore, on collective consideration, have to lead the court to arriving at a finding of desirability or otherwise which is rationally supportable, whereupon an appropriate ruling must be made.

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Footnotes

[1] Paragraph 22 of the Case



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