THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 10 May 2022

Status: Immediate

The following Summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal.

Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others (1088/2020 and 1135/2020) [2022] ZASCA 66 (10 May 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment in three appeals that were heard together: One has been referred to by all the parties as the 'auction' appeal; one as the 'business rescue' appeal; and one as the 'liquidators' and SARS' costs' appeal. The SCA upheld the auction appeal with costs, including those of two counsel, it dismissed the business rescue appeal with costs, including those of two counsel, and it upheld the liquidators' and SARS' costs appeal.

The sensational revelations made during the Zondo Commission of Enquiry into Allegations of State Capture, *inter alia* by the former COO of Bosasa, Angelo Aggrizzi, shocked the country. Bosasa is now known as Global Holdings (Pty) Ltd (Holdings). This prompted the bankers of African Global Operations (Pty) Ltd (Operations), a wholly-owned subsidiary of Holdings that performed all the treasury functions of the Bosasa Group of companies, 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 Bosasa Group had failed to find another bank that would provide Operations with banking facilities, the directors of Holdings and of Operations resolved to place Operations and its ten wholly-

owned subsidiaries (the Bosasa companies), under voluntary winding-up in terms of section 351 of the Companies Act 61 of 1973 (the 1973 Companies Act). However, when the joint provisional liquidators of the Bosasa companies (the liquidators) started to exercise their statutory powers, Holdings attempted to have the resolutions in which the Bosasa companies were placed under voluntary winding-up (the special resolutions) declared null and void and to have the appointments of the liquidators declared null and void and of no force and effect. That was the beginning of a litigious battle between Holdings and the liquidators. It did that by initiating an application as a matter of extreme urgency in the high court. On 14 March 2019 judgment was delivered, granting Holdings the relief it had sought and ordering the liquidators to pay the costs of the proceedings in their personal capacities (the Ameer AJ order). However, the high court granted the liquidators leave to appeal to the SCA against that order. Notwithstanding the pending appeal against the Ameer AJ order, Holdings and the directors of the Bosasa companies (the directors) did not accept that there had been a *concursus creditorum* in respect of any of the Bosasa companies or that the liquidators held any rights or powers as 'provisional liquidators'. They maintained that the suspension of the order as a result of the pending appeal did not resolve the disputes between them and the liquidators whether the Bosasa companies had indeed been placed into liquidation and whether the liquidators had the powers of provisional liquidators to take control of the assets and affairs of the Bosasa companies. They asserted that they (and not the liquidators) remained in control of the assets and affairs of the Bosasa companies, and they refused to relinquish their control to the liquidators. The liquidators, on the other hand, maintained that because of the appeal and through the operation of s 18 of the Superior Courts Act 10 of 2013, the Ameer AJ order setting aside the special resolutions and their appointments as provisional liquidators was suspended pending the outcome of the appeal. The Bosasa companies, according to them, remained in liquidation and under their control (the dispute). However, the liquidators, Holdings, and the directors agreed to implement a mechanism through which they could, in consultation with one another, attend to the affairs of the Bosasa companies despite the dispute between them to avoid further unnecessary skirmishes and costly litigation pending the outcome of the appeal. That mechanism included joint and mostly monthly meetings between them when they discussed matters arising in connection with the affairs of the Bosasa companies and took joint decisions in relation to the conduct of the Bosasa enterprise (the interim arrangement).

By agreement between them, the high court (Mudau J) granted an order on 14 May 2019, extending the powers of the liquidators in terms of s 386(5), read with s 388, of the 1973 Companies Act, authorising them to: (a) transact on the banking accounts of the Bosasa companies; (b) continue to conduct their businesses; (c) institute or defend legal proceedings;

and (d) reach reasonable settlements with debtors and accept payment of any such debts. Paragraphs 6 and 7 of the consent order read as follows:

'6. The powers in paragraphs 4 and 5 above shall be exercised by the Applicants in consultation with the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions and the Applicants shall at all times be obliged to give the directors in question reasonable notice of the meeting at which it is sought to consult and of the subject matter thereof.

7. This order shall lapse and be of no further force and effect immediately upon the grant of an order by the Supreme Court of Appeal that the appeal against the order granted under case number 2103/2019 has been successful. However, if the appeal is successful, then the provisions in paragraph 6 shall lapse and be of no force or effect.' (The Mudau J order.)

The liquidators, Holdings and the directors realised that six of the Bosasa companies had lost their substrata and that there was a need to dispose of their assets expeditiously. By agreement between them, the high court (Bhoola AJ) granted an order on 28 October 2019, extending the powers of the liquidators and authorising them to sell the assets of the six Bosasa companies. The consent order reads thus:

'1. The applicants' powers are extended in terms of section 386(5), read with section 388, of the Companies Act, 61 of 1973 (the Companies Act), authorising them to sell all the movable assets belonging to African Global Operations (Pty) Ltd, Global Technology Systems (Pty) Ltd, Bosasa IT (Pty) Ltd, Leading Prospect Trading 111 (Pty) Ltd, Bosasa Development Centres (Pty) Ltd, and Black Rox Security Intelligence Services (Pty) Ltd (all in liquidation), by way of public auction, public tender or private contract, as contemplated in section 386(4)(h) of the Companies Act.

2. The applicants' powers are extended in terms of section 386(5), read with section 388, of the Companies Act authorising them to sell all of the immovable properties belonging to Bosasa Properties (Pty) Ltd (in liquidation), by way of public auction, public tender or private contract, as contemplated in section 386(4)(h) of the Companies Act.

3. The assets referred to in paragraphs 1 and 2 above shall be sold in consultation with and with the consent of the board of African Global Holdings (Pty) Ltd, African Global Operations (Pty) Ltd (in liquidation) and the respective boards of its subsidiaries referred to in paragraphs 1 and 2 above.' (The Bhoola AJ order.)

Paragraph 2 of the Bhoola AJ order was subsequently varied by the insertion of the words 'and African Global Operations (Pty) Ltd (in liquidation)' after the words 'Bosasa Properties (Pty) Ltd (in liquidation)'.

On 22 November 2019, the SCA delivered its judgment, upholding the appeal against the Ameer AJ order and replacing it with an order dismissing the application with costs, including those of two counsel. The effect of the SCA's order is that the Bosasa companies remain in a creditor's voluntary winding-up. Holdings nevertheless demanded that the liquidators do not proceed with the three-day public auction of the assets of the six Bosasa companies scheduled to take place from 4 to 6 December 2019, maintaining that paragraph 3 of the Bhoola AJ order remained operative and that the liquidators still required its consent and that

of the directors to sell the assets of the six Bosasa companies, and they had not consented to the scheduled public auction. The liquidators refused to accede to Holdings' demand. On 3 December 2019, Holdings and two other companies (Holdings) caused an application for an order placing the six Bosasa companies under supervision and commencing business rescue proceedings in terms of s 131(1) of the Companies Act 71 of 2008 (the Companies Act) to be issued by the Registrar of the high court. It still demanded that the scheduled public auction be cancelled, also maintaining that the issue of the business rescue application had suspended the liquidation proceedings in terms of s 131(6) of the Companies Act, including the scheduled public auction, but the liquidators steadfastly refused to accede to the demand. During 4-6 December 2019, the liquidators caused most of the assets of the six Bosasa companies to be sold by public auction. Holdings responded by launching the auction application. Therein it sought an order against the liquidators: (a) interdicting them from selling any further assets owned by the six Bosasa companies before the final adjudication of the business rescue application and/or before the second meeting of creditors, without the written consent of Holdings; (b) a declaration that the sale of assets before the final adjudication of the business rescue application and/or before the second meeting of creditors, without the written consent of Holdings, was null and void; and (c) interdicting the liquidators from delivering the movable assets to, and causing the transfer and registration of ownership of the immovable assets into the names of, anyone who had purchased the assets of the six Bosasa companies before the final adjudication of the business rescue application and/or the second meeting of creditors, without the written consent of Holdings.

The auction and business rescue applications were argued before the high court in a consolidated hearing. In one judgment, the high court granted the relief sought in the auction application and dismissed the business rescue application. It gave the liquidators and SARS, an intervening creditor, leave to appeal its order in the auction application. It gave Holdings leave to appeal its order in the business rescue application. It also gave the liquidators and SARS leave to appeal one of the costs awards made in the business rescue application. In each case, leave was given to appeal to the SCA. The primary issues before the SCA concern: (a) the interpretation of the word 'made' in s 131(6) of the Companies Act, which section provides for the suspension of liquidation proceedings at the time a business rescue application is 'made'; and (b) the interpretation of paragraph 3 of the Bhoola AJ order.

The SCA held that a business rescue application must be issued, served by the sheriff on each joint liquidator of each of the six Bosasa companies and on the Commission in the manner provided for in rule 4(1)*(a)* of the Uniform Rules of Court, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of section 131(6) of the Companies Act in order to trigger the suspension of the liquidation proceedings. It held that on a proper conspectus of the papers it cannot be said that there had

even then been compliance, or even substantial compliance, with the service and notification prescripts of section 131(2) of the Companies Act and the Regulations. First, on 3 December 2019 the sheriff only served it on one of the joint liquidators and a candidate attorney delivered it by hand to another joint liquidator, who are both joint liquidators of each of the six Bosasa companies. The sheriff did not serve it on the many other joint liquidators. Second, it is common cause that the Bosasa Group had approximately 4 500 employees as at 12 February 2019, when the directors of Holdings and the Bosasa companies passed the special resolutions, which were filed with the Commission on 14 February 2019, when the creditors' voluntary winding-up of each of the Bosasa companies commenced. Its workforce was thereafter reduced to 50 employees as at 29 November 2019. On 3 December 2019, only 29 employees were notified by electronic means of the business rescue application. It is not stated that all the employees of the Bosasa companies have been notified of the business rescue application, nor is any explanation proffered why the full staff compliment of 50 employees was not notified. Third, it is not stated what steps, if any, were taken to identify affected persons and their addresses and to deliver the business rescue application to them in order for the high court to have considered whether all reasonable steps had been taken to identify affected persons and their addresses and to deliver the application to them. The SCA concluded that the application had not been 'made' as envisaged in s 131(6) of the 2008 Companies Act. Accordingly, the issue of the business rescue application did not suspend the liquidation proceedings. Instead of dismissing it, the high court ought to have struck the business rescue application from the roll; it was not made.

The SCA held that in departing from the general rule that costs should follow the event and that the successful party is awarded costs as between party and party, by depriving the successful liquidators of 50% of their costs of opposing the business rescue application, the high court failed to exercise its discretion judicially. It should not have deprived them of 50% of their costs.

The SCA re-affirmed the now well established test on the interpretation of court orders: The starting point is to determine the manifest purpose of the order. In interpreting the order, the court's intention is to be ascertained primarily from the language of the order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. The manifest purpose of the order is to be determined by also having regard to the relevant background facts which culminated in it being made.

The SCA held that a proper interpretative analysis leads to the inevitable conclusion that, although the Bhoola AJ order extending the powers and authorising the liquidators to sell the assets of the Bosasa companies did not expressly state that its paragraph 3 shall lapse and be of no further force and effect immediately upon the granting of an order by the SCA in the

liquidators' appeal against the Ameer AJ order, the intention of the high court in granting the Bhoola AJ order by consent between the liquidators, Holdings and the directors was to extend the powers of the liquidators by authorising them to sell the movable and immovable assets of the six Bosasa companies, but subject to consultation with and the consent of the directors pending the outcome of the appeal. The Bhoola AJ order and the high court's reasons for giving it cannot be read as a whole to ascertain its intention since it was a consent order. But, the SCA held, its manifest purpose becomes crystal clear when the order is placed in proper perspective, and the context in which it was made is considered. The SCA held that paragraph 3 of the order was at all material times intended to lapse when the Supreme Court of Appeal gave judgment in the appeal, which it did on 22 November 2019. The fundamental *raison d'être* for paragraph 6 of the Mudau J order and paragraph 3 of the Bhoola AJ order had then fallen away. Clearly, the SCA held, it could never have been the intention of the high court, as Holdings and the directors would have it, to have ordered the liquidators never to sell the assets of the six Bosasa companies without consultation with and without obtaining the consent of Holdings and the directors should the liquidators be successful in their appeal. Indeed, the SCA held, such a conclusion would be absurd. It would ignore the extended powers granted to the liquidators and the statutory prescripts applicable to the liquidation process that ultimately results in the company's demise. It concluded that the liquidators were thus clothed with the requisite power or authority to sell the assets of the six Bosasa companies by public auction at the time when the auction was held and thereafter. The auction application ought accordingly to have been dismissed.

~~~~ends~~~~
~~~~