



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

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The Commissioner for the South African Revenue Service v Nyhonyha and Others
(1150/2021) [2023] ZASCA 69 (18 May 2023)

Today, the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against a decision of the Gauteng Division of the High Court, Johannesburg (the court a quo).

The issues before the SCA were whether the setting aside of a winding-up under s 354 of the Companies Act 61 of 1973 constitutes the exercise of a discretion in the strict sense (true discretion); and whether Regiments was commercially solvent at the time of the hearing in the court a quo.

This was an appeal by the Commissioner for the South African Revenue Service (SARS) against an order setting aside the winding-up of Regiments Capital (Pty) Ltd (Regiments). On 18 November 2019, the National Director of Public Prosecutions (the NDPP) obtained a provisional restraint order (the restraint order) under the Prevention of Organised Crime Act 121 of 1998 which related, *inter alia*, to the assets of Regiments. This halted Regiments' participation in an 'unbundling' transaction in respect of shares in Capitec Bank Holdings Limited (Capitec) held by the sixth respondent. On 16 September 2020, Regiments was placed in final winding-up at the instance of an unpaid creditor.

On 26 October 2020, the restraint order was discharged. This cued the application of the respondents in the court a quo. The urgent application was brought in two parts. The first part was essentially for an order staying the winding-up of Regiments and authorising the execution of the unbundling transaction. The aim of the first part of the application was to realise funds for Regiments. The second part of the application was for an order setting aside the winding-up of Regiments.

The application came before Vally J, together with an application by SARS for leave to intervene. The court granted the first part of the application. The order authorised the implementation of the unbundling transaction under the supervision of an independent attorney. It issued a rule nisi returnable on 26 January 2021. In respect of the second part of the application, Vally J accepted that Regiments' total assets exceeded its total liabilities. Vally

J found that Regiments was 'asset rich but cash poor' and ordered the setting aside of Regiments' winding-up.

On the question of whether the court a quo exercised a true discretion, the SCA held that a true discretion is one that provides a court with a range of permissible options. It held that 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 satisfied or it is not. Therefore, it followed that the decision of the court a quo did not constitute the exercise of a true discretion.

On Regiments' solvency, the SCA held that on the evidence before the court a quo, Regiments was both factually and commercially insolvent. On these facts there was no basis for finding that the continuation of its winding-up was unnecessary or undesirable.

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