

A Targeted Outsider's Right to Challenge Local Winding-Up Proceedings *PricewaterhouseCoopers v Saad Investments Co Ltd* 2014 UKPC 35 (10 November 2014), 2014 1 WLR 4482 (PC)

AD Smith*



Author

Alastair D Smith

Affiliation

University of South Africa,
South Africa

Email smithad@unisa.ac.za

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Abstract

The problem in *PricewaterhouseCoopers v Saad Investments Co Ltd* 2014 UKPC 35 (10 November 2014), 2014 1 WLR 4482 (PC) was that the Cayman liquidators, frustrated by the unhelpfulness of the company's previous auditors in supplying documents and information to help the liquidators get to the bottom of the company's problems, then obtained a winding-up order in Bermuda, the auditors' home jurisdiction, to have them examined. The auditors appealed successfully to the Privy Council in London to have the winding-up stayed. The facts and the reasoning of this senior court are described, and then critically discussed in this case comment. The auditors were erroneously added to the statutory list of persons who may apply to the court for the stay of the winding-up proceedings. Still, the decision may be supported for the finding that, on the particular facts of the case, the auditors had standing to challenge the winding-up application because the Bermudian court of first instance had no jurisdiction under the relevant statutes and the auditors were the direct targets of the application to wind up the company and examine them. The outcome of the decision carries important implications for the development of company law in England and Bermuda, and for the corresponding company law in South Africa, where the decision is of persuasive authority.

Keywords

Cross-border insolvency; companies; list of persons who may seek a stay of a winding-up order; grounds for challenging a winding-up order.

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1 Introduction

It is possible that company outsiders who hold documents with important information may refuse to hand these over to the company's liquidators. Complications may arise in the case of international companies: the outsiders may be domiciled in another country and not be subject to the court orders or legislation of the country where the winding-up order was issued, a problem increasingly foreseeable – including in South Africa – with globalisation and companies seeking new markets. To solve this problem in *PricewaterhouseCoopers v Saad Investments Company Limited* (hereafter the *PwC* case),¹ the liquidators applied to wind up the company in a foreign country but ultimately failed. The decision of the Board of the Privy Council, although flawed in adding the auditors to the relevant statutory list of persons who may seek a stay of the winding-up order, is still to be supported for the finding that on the facts the auditors had the required standing to challenge the winding-up order, an outcome important for the development of company law in England and Bermuda, and of persuasive authority in South Africa.

In this case comment, the facts and issues are briefly stated, and the reasoning of the Board deciding the appeal from Bermuda is then summarised. Critical comments on the reasoning follow, and suggestions for dealing with the corresponding problem: the foreign liquidator applies to a South African court for a winding-up order under the legislation on companies and in the context of the law of civil procedure. A conclusion with relevant findings rounds off this case comment.

2 Facts

The Grand Court of the Cayman Islands wound up Saad Investments Company Limited (SICL), which was registered in that jurisdiction. The court-appointed liquidators found that the affairs of SICL should be investigated in several countries.

The liquidators sought information and documents about SICL from the Bermudian branch of SICL's former auditors, PricewaterhouseCoopers (PwC). Sluggishly complying with a Cayman court order to deliver their

* Alastair D Smith. BA LLB (Rhodes) PhD (Edin). Professor, Department of Mercantile Law, School of Law, University of South Africa. Email: smithad@unisa.ac.za.

¹ 2014 UKPC 35 (10 November 2014), 2014 1 WLR 4482 (PC) (hereafter the *PwC* case).

working files,² PwC delivered several documents showing heavy and unjustified redaction.³

So the Cayman liquidators applied to the Supreme Court of Bermuda for the winding up of SICL. The liquidators intended to rely on section 195 of the Bermudian *Companies Act* 1981, authorising the court to summon and examine on oath persons, such as PwC in this case, who the court considers can give information about the company's conduct, affairs or property, and requiring these persons to hand over books or papers that they have about the company.⁴

Winding up SICL, Kawaley CJ appointed the Cayman liquidators as provisional liquidators in Bermuda and summoned PwC to appear for examination and produce all their documents about SICL's affairs.⁵ PwC challenged this order in the Bermudian Court of Appeal, arguing that the chief justice lacked jurisdiction to make the winding-up order or to appoint the Cayman liquidators as Bermudian liquidators. These arguments did not convince the appeal court, and so PwC appealed to the Judicial Committee of the Privy Council.⁶ The discussion turns to the status of the Privy Council and the two issues for its decision in the *PwC* case.

3 The two issues in the Privy Council

The decision in the *PwC* case was unanimous, delivered by the highest judges of the United Kingdom on cross-border insolvency matters. The Judicial Committee also remains the apex court of appeal for, among other courts, those of

... many current and former Commonwealth countries, as well as the United Kingdom's overseas territories, crown dependencies, and military sovereign base areas.⁷

The *PwC* appeal came before Lord Neuberger PSC, Lords Mance, Clarke and Sumption JJSC, and Lord Collins. Lord Neuberger gave judgment on two issues. The first was whether the court had jurisdiction to liquidate SICL,

² *PwC* case para 5.

³ *PwC* case para 6.

⁴ Sections 195(1)-(3) of the *Companies Act* 1981.

⁵ *PwC* case para 10.

⁶ On the structure of the court system and the right of appeal in Bermuda, see Bell 2012 <http://tinyurl.com/hlfskxe> para I.

⁷ Judicial Committee of the Privy Council 2015 <http://tinyurl.com/hg3c2u3>. For a map, see Judicial Committee of the Privy Council 2015 <http://tinyurl.com/gvcfnwz>.

and the second was whether PwC might challenge the order granted under section 195 of the *Companies Act* 1981 (hereafter the section 195 order).⁸

4 The judgment of the Board

The two issues before the Board are dealt with in turn.

4.1 The first issue: jurisdiction to wind up SICL

PwC argued that the Bermudian Supreme Court lacked jurisdiction to liquidate SICL under the *Companies Act* 1981.⁹ SICL did not carry on business in Bermuda. PwC should not have been summoned under section 195 of that statute. The respondents, the liquidators, replied that the court had jurisdiction under the *Companies Act* 1981 or the *External Companies (Jurisdiction in Actions) Act* 1885. And even if the court lacked this jurisdiction, PwC could not attack the winding-up order, particularly by defending the liquidators' application for a section 195 order.

The Board held that the Bermudian Supreme Court had only statutory jurisdiction to wind up companies.¹⁰ Part XIII of the 1981 Act controlled the case. Section 161 of that statute stated how the court might wind up a company.¹¹ Definitions in section 2 of the statute were important and applied all the way through the statute unless the context required otherwise. A company was "a company to which this Act applies by virtue of section 4(1)" of the statute.¹² And an "overseas company" was

... any body corporate incorporated outside Bermuda other than a non-resident insurance undertaking.¹³

For present purposes, for companies not registered or incorporated in Bermuda, section 4(1) applied the 1981 Act to "any overseas companies so far as any provision of this Act requires it to apply".¹⁴

The Board rejected the liquidators' argument that Part XIII conferred jurisdiction on the Supreme Court of Bermuda to liquidate SICL.¹⁵ It was an overseas company. Section 161 clearly provided for jurisdiction regarding "companies" only. That wording did not govern overseas companies if the

⁸ PwC case paras 13, 23.

⁹ PwC case para 11.

¹⁰ Part XIII of the *Companies Act* 1981.

¹¹ Section 161(g) of the *Companies Act* 1981.

¹² Section 2 of the *Companies Act* 1981.

¹³ Section 2 of the *Companies Act* 1981.

¹⁴ Sections 4(1)(a)-(d) of the *Companies Act* 1981.

¹⁵ PwC case para 16.

context did not require otherwise. Part XIII did not indicate an intention that it should govern overseas companies. This interpretation by the Board was consistent with other provisions of the *Companies Act 1981*.¹⁶ It was clear that the Supreme Court of Bermuda lacked jurisdiction to liquidate SICL under the *Companies Act 1981*.

The Board considered the liquidators' alternative argument, regarding jurisdiction under the *External Companies (Jurisdiction in Actions) Act 1885*.¹⁷ Two subsections of this statute were important; they applied to companies incorporated outside Bermuda that did business there by agents or branches. These companies might be sued in the Bermudian Supreme Court on a cause of action that arose wholly or partly in Bermuda.¹⁸ In addition, these suits might be continued all the way to judgment as though the company were incorporated in Bermuda or had its principal place of business there.¹⁹

PwC put forward two arguments why this 1885 Act did not apply. Firstly, SICL did not do business in Bermuda by agents or branches, and SICL had obtained a Bermudian company's shares through a Bermudian bank. The Board held that this series of steps was not sufficient for carrying on business in Bermuda.²⁰

Secondly, held the Board,²¹ presenting a winding-up petition did not usually amount to suing SICL for a cause of action.²² Where the petition and Bermuda were linked only by the petitioner's aim to enforce a right under a Bermudian insolvency statute, a right that would arise only after the winding-up order had been granted,²³ the Board held that even if there were a cause of action, it was difficult to see how one could say that such a cause of action could arise in Bermuda. By PwC's making the argument that such a cause of action did arise in Bermuda, PwC were "pulling themselves up by their own bootstraps".²⁴ Accordingly, the Bermudian court had no statutory jurisdiction to appoint the SICL liquidators, nor could the court wind up SICL.

¹⁶ Section 4(1A)(b) of the *Companies Act 1981* Act read with s 134; see the *PwC* case paras 17-18.

¹⁷ See the 1989 revision of the *External Companies (Jurisdiction in Actions) Act 1885* (as amended).

¹⁸ Section 1(1) of the *External Companies (Jurisdiction in Actions) Act 1885*.

¹⁹ Section 1(3) of the *External Companies (Jurisdiction in Actions) Act 1885*.

²⁰ *PwC* case para 21.

²¹ *PwC* case para 22.

²² Section 1(3) of the *External Companies (Jurisdiction in Actions) Act 1885*.

²³ *PwC* case para 22.

²⁴ *PwC* case para 22.

Did it then follow, as the second issue, that PwC could escape the section 195 order? If so, why?

4.2 *The second issue: the right to challenge the section 195 order*

The liquidators mounted an argument in three steps. These steps concerned why this winding-up order was effective unless it was set aside. In addition, the argument dealt with why PwC could not attack the winding-up order and the section 195 order.

4.2.1 *The first step in the liquidators' argument*

The Board approved of the first step in the liquidators' argument.²⁵ The Bermudian Supreme Court order was granted by a court of unrestricted jurisdiction. On basic principles, its order was effective. It thus had to be regarded as effective unless set aside by the court.²⁶ The liquidation order could not be examined unless set aside or stayed.²⁷

4.2.2 *The second, complex step in the argument*

The liquidators also raised a second, complex argument. As jurisdiction was lacking, PwC could have applied to the Supreme Court of Bermuda to have the winding-up order set aside or stayed; or PwC could have applied to the Court of Appeal to have the order discharged; or, even if the winding-up continued, PwC could still have had the section 195 order set aside.²⁸

The Board confirmed that PwC could have taken the point regarding jurisdiction in the Bermudian Supreme Court. The present facts were "unusual".²⁹ The Board exercised the power to set aside the winding-up order as the Supreme Court and the Court of Appeal of Bermuda ought to have done.

The Board quoted section 184(1) of the *Companies Act 1981*. Its provisions, which are important for the present discussion, read as follows:³⁰

²⁵ PwC case para 25.

²⁶ *Isaacs v Robertson* 1985 1 AC 97 (PC) 101F per Lord Diplock (hereafter the *Isaacs* case).

²⁷ *In re Dover & Deal Railway Co* 1854 4 De GM & G 411 420; 43 ER 567 571 per Knight Bruce LJ; *In re London Marine Insurance Association* 1869 LR 8 Eq 176 193 per James V-C.

²⁸ PwC case para 26.

²⁹ PwC case para 27.

³⁰ PwC case para 28.

The [Supreme] Court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

Further, section 184(2) enables the Bermudian court to

... make such order as it considers desirable to enable the company to be as near as practicable as it was before the winding up order was made.³¹

The Board devoted most of the rest of its judgment to dealing with the liquidators' further five arguments about why PwC could not request Her Majesty to stay the Bermudian winding-up proceedings.³² These five arguments are dealt with in turn, under subheadings to make them more accessible for readers.

4.2.2.1 PwC were outsiders with limited room to manoeuvre

The first argument concerned the status of PwC as outsiders to the winding-up. In principle, such outsiders could not even raise the issue that the Supreme Court should stay the winding-up. Or, if PwC could raise this argument, they could do so only as friends of the court, and would then not have the right of appeal. So PwC could not raise this argument at this stage of the matter.³³

On this point, held the Board, PwC were not one of the persons mentioned in section 184(1) of the 1981 Act. There was also considerable authority that outsiders could not make arguments when winding-up was sought. Outsiders had no standing for a late challenge to the issue or the continuing of the winding-up order.³⁴ The Board held that outsiders would not normally be heard on whether the winding-up order ought to have been granted.³⁵ Yet this useful general rule was flexible. The *PwC* case had two significant and rare facts: the winding-up order had been challenged only as regards jurisdiction; and the outsiders were only technically outsiders to the winding-up. In general, a party subjected to a section 195 order could not query the issuing of the winding-up order at the end of the application. To make this

³¹ *PwC* case para 28.

³² *PwC* case para 29.

³³ *PwC* case paras 29, 30.

³⁴ *PwC* case para 30, giving the example of *In re Mid East Trading Ltd* 1998 BCC 726 (CA) (hereafter the *Mid East* case) 731G-733H and Evans-Lombe J's citations in the High Court.

³⁵ *PwC* case para 31.

challenge, the party subject to a section 195 order required support by one of the parties mentioned in section 184(1) of the 1981 Act. By contrast, though, if the lack of jurisdiction could well be questioned on the court papers, this point needed to be dealt with properly. And if this lack of jurisdiction were proved, then the interests of justice would need to be considered,³⁶ an outcome that had been suggested by Chadwick LJ in a previous decision.³⁷

PwC were not mere outsiders but were the only immediate targets of the intended winding-up and the section 195 order. Consequently, PwC had standing for their challenge regarding jurisdiction for the winding-up when they challenged the section 195 order.³⁸ In the *PwC* case, the liquidators had relied on the just and equitable ground for the winding up of SICL so as to seek a section 195 order. When they attacked the section 195 order, PwC had standing sufficient to query the existence of jurisdiction by the court to make the winding-up order.³⁹ An outsider to the winding-up might appropriately make representations when the winding-up petition was heard,⁴⁰ yet PwC were not in court at that stage, and received no special notice of the petition, except as members of the public who had seen the advertisement of the winding-up proceedings. And PwC had challenged those proceedings once "they reasonably could have done so".⁴¹

The Board then mentioned that the winding-up could be stayed by the court if the stay were applied for by some itemised people, such as the liquidator. Auditors such as PwC were not listed. PwC were absent from the court at that point, but the liquidators were present, as the Bermudian Supreme Court's appointees and officers of that court. On the wording of section 184(1) the Bermudian Supreme Court ought to have been satisfied that clearly there was no jurisdiction to grant the winding-up order. Then, if a stay or setting aside were considered possible, the court "could and should have effectively required" the liquidators to seek the stay of the winding-up.⁴² The court should have allowed the liquidators to be heard, and then "could and should simply" have stayed the winding-up.

³⁶ *PwC* case para 32.

³⁷ *Mid East* case 747A-B.

³⁸ *PwC* case para 33.

³⁹ *PwC* case para 33.

⁴⁰ *In re Bradford Navigation Company* 1870 LR 5 Ch App 600 603 per James LJ (hereafter the *Bradford* case).

⁴¹ *PwC* case para 33.

⁴² *PwC* case para 34.

The liquidators continued: even if PwC had the right to query the lack of jurisdiction, PwC had no standing to appeal against the Supreme Court's refusal to set aside the winding-up order, because PwC were outsiders to the liquidation proceedings. PwC could query jurisdiction only as friends of the court and thus not on appeal. That ruling had been made in *In re Bradford Navigation Company* (hereafter the *Bradford* case).

The Board distinguished the circumstances of the *Bradford* case from those of the *PwC* case.⁴³ In the *Bradford* case the applicant was not affected by the winding-up order, nor did the applicant challenge the jurisdiction to grant the order as PwC were doing. And James LJ in the *Bradford* case had refused the application "in very general terms". These were not relevant to the present circumstances, said Lord Neuberger in the *PwC* case. James LJ had held that it would be

... extending litigation beyond all possible limits if every person who may have a right with respect to property which belongs to the company could come here and say that the winding up will interfere with his rights.⁴⁴

In the *PwC* case the Board was cautious in hearing representations from a party other than the parties mentioned in section 184(1) of the 1981 Act as a person who opposed the granting of the liquidation order. Yet the Board could

... see no reason why, in appropriate circumstances, a person who will be directly affected by a winding up order should not have the right to be added as a party to the proceedings.⁴⁵

The Board emphasised that this step would rarely take place. "Exceptionality", held the Board, "is not a very useful guide".⁴⁶ Usually, the mere fact that interests would be affected by the winding-up would not warrant hearing a party. In the *PwC* case, by contrast, jurisdiction had been challenged, and the liquidators had brought the winding-up petition only to obtain relief against PwC.⁴⁷ Interfering with PwC's rights would be a breach of natural justice if PwC were not allowed, formally as parties and not merely informally as friends of the court, to challenge the granting of the order. These facts were exceptional, and PwC were entitled to be added as parties.

⁴³ *PwC* case para 35.

⁴⁴ *Bradford* case 603; *PwC* case para 35.

⁴⁵ *PwC* case para 36.

⁴⁶ *PwC* case para 36.

⁴⁷ *PwC* case para 37.

With the benefit of hindsight, in these unusual circumstances PwC ought to have been notified and allowed to make representations regarding the court order.⁴⁸ If PwC were entitled to be added as parties, they had not been notified. So, unless there were good reasons to the contrary, PwC should have had the right to query jurisdiction before the Supreme Court of Bermuda and also further on appeal. PwC would have had the right to challenge the issue of the order had they been parties to the petition.⁴⁹

4.2.2.2 The winding-up order was unchallengeable during the winding-up

The second argument made by the liquidators was as follows. The winding-up order could not be challenged during the liquidation proceedings themselves.⁵⁰ The Board considered this argument flawed.⁵¹ At best, the invalidity of the proceedings could be challenged only if the proceedings themselves were set aside.⁵² As long as the winding-up order continued, the section 195 order could not be challenged on the ground that the basic winding-up order had been issued without jurisdiction. Such a ruling followed from the principle in *Isaacs v Robertson*⁵³ and the fact that otherwise the winding-up order would then be applied inconsistently.

However, the Board held that this was not what PwC were arguing.⁵⁴ A stay meant that the winding-up order would have no effect in general. The liquidators' counsel had also argued incorrectly that the associated challenge to the winding-up order should be prohibited. PwC were arguing not only that the winding-up should not have been granted,⁵⁵ but also that the court should stay the winding-up generally under section 184(1).

The liquidators raised an argument on a principle of procedure. During the winding-up proceedings it could not be argued that the winding-up order had been made without jurisdiction.⁵⁶ The Board rejected this reasoning by the liquidators. Such a principle, it was held, would be unwarranted and unjust. Chadwick LJ's judgment in a previous case had been relied on to support the liquidators' reasoning. The Board overruled it as support for this

⁴⁸ PwC case para 38.

⁴⁹ PwC case para 39.

⁵⁰ PwC case paras 29, 40.

⁵¹ PwC case para 40.

⁵² *Mid East* case 746F-H.

⁵³ *Isaacs* case 101F.

⁵⁴ PwC case para 41.

⁵⁵ To use Jessel MR's words (*In re Arthur Average Association* 1875 LR 10 Ch App 542 545).

⁵⁶ PwC case para 42.

contention. In any event, it was held, Chadwick LJ's judgment would not apply to the *PwC* case.⁵⁷

4.2.2.3 PwC had not sought a stay in the Bermudian courts

The third argument made by the liquidators was as follows. PwC had not applied for a stay in terms of section 184 in the Supreme Court and the Court of Appeal of Bermuda.⁵⁸ The Board acknowledged this contention. Still, PwC had squarely raised the lack of jurisdiction to make the winding-up order, and had argued that this lack of jurisdiction justified reversing the winding-up order on appeal. The outcome amounted to a permanent stay. The opportunity of obtaining an order under section 184 had been argued before the Board, and the liquidators had been allowed to discuss it. In the absence of unfairness to the liquidators, Her Majesty, exercising the powers of the court *a quo*, should stay the winding-up.⁵⁹

4.2.2.4 The refusal of a stay was justifiable on the facts

The fourth argument made by the liquidators was as follows. On these facts there were "good reasons for not granting a stay".⁶⁰ The Board disagreed with this contention. Often the court would be convinced that it was too late to stay the winding-up order even though jurisdiction was clearly lacking. The winding-up might have been so advanced that matters could not be restored or reorganised properly. Rights might also have been created or altered for third parties. As a result, it would be "unjust to stay the winding up (or more unjust to stay than not to stay)".⁶¹

That, however, was not the position in the *PwC* case. No one had acted irrevocably under the winding-up order. The liquidators could only have acted against PwC or gained control of the Bermudian shares. What is significant is that the Board held that the

... pursuit of PwC cannot possibly be invoked to justify a contention that it is now too late to stay the winding up.⁶²

⁵⁷ See the comments in the *Mid East* case 747A-B.

⁵⁸ *PwC* case paras 29, 43.

⁵⁹ *PwC* case para 43.

⁶⁰ *PwC* case paras 29, 44.

⁶¹ *PwC* case para 44.

⁶² *PwC* case para 44.

4.2.2.5 The dispute about the stay should be remitted to Bermuda

The fifth and final argument made by the liquidators was as follows. The dispute about the stay ought to have been remitted to the Supreme Court of Bermuda.⁶³ Again, the Board disagreed with this contention. To recap: obviously, there had been no jurisdiction to grant the winding-up order. The court thus could stay the winding-up on these facts. There was "no good reason" not to do so.⁶⁴ And if the winding-up were not stayed, this result would be "thoroughly unjust" to PwC, the sole direct target of the order, who were attacking the validity of the order for the first time.⁶⁵

The Board considered the position if section 184 had not applied to this matter.⁶⁶ For the reasons given above, the Bermudian Court of Appeal would still have had jurisdiction to take the required steps, which were as follows. The court should have added PwC as parties to the winding-up proceedings; allowed their late appeal against the issue of the winding-up order; approved PwC's reasoning that the jurisdiction for the winding-up had been lacking; and set the winding-up order aside.⁶⁷ PwC had made this argument in the Bermudian Court of Appeal. The Board reiterated that the technical outsider to the winding-up was not the company, the liquidator, the Official Receiver, a contributory or a creditor. The Board emphasised how rarely such an outsider could successfully apply to bring such an appeal, especially if time had run out, but the *PwC* case had several special features. The application related to jurisdiction, the liquidators had not acted irrevocably, and the applicants were the only targets of the winding-up and had not delayed in dealing with the problem.⁶⁸ There was only one proper outcome: the court should allow PwC's application and set the winding-up order aside.⁶⁹ The Board also terminated the section 195 order.⁷⁰

⁶³ *PwC* case paras 29, 45.

⁶⁴ *PwC* case para 45.

⁶⁵ *PwC* case para 45.

⁶⁶ *PwC* case para 46.

⁶⁷ *PwC* case para 46.

⁶⁸ *PwC* case para 46.

⁶⁹ *PwC* case para 46.

⁷⁰ *PwC* case paras 24, 47.

4.2.3 *PwC's argument in reserve*

The Board then discussed the argument that PwC would have raised if their preceding arguments had failed.⁷¹ This contention was that the section 195 order had to be rescinded even if the winding-up survived.

Usually, so the Board held, this argument would be dismissed if the third party could not convince the court to set that order aside,⁷² for the winding-up order should be applied consistently. Yet, if this argument had been made in the *PwC* case, the Board "would have acceded to it",⁷³ because the Supreme Court of Bermuda ought to have exercised its discretion and set aside the section 195 order. "This is only justifiable", held the Board, "because of the very limited purpose and effect of the winding up order made by the Supreme Court",⁷⁴ the winding-up order having been granted so that the respondents could obtain the section 195 relief against PwC.

The Board concluded that, if "it should not have been granted"⁷⁵ and PwC were not allowed to attack the winding-up order, then a serious breach of PwC's rights and of natural justice would occur if PwC could not argue that

... there had been no jurisdiction to make that order as a reason for denying the respondents the relief under section 195.⁷⁶

This result would have a restricted effect, as the "inability to pursue" the section 195 application would not prejudice the Bermudian winding-up. It might harm the Cayman winding-up, but that was not relevant to the *PwC* case.

5 Comments

The issues in the *PwC* case mainly concerned the lack of jurisdiction in this cross-border insolvency matter. Similarly, a difference in South African law is clear in the contrast between the facts of two cross-border cases that went to the Supreme Court of Appeal. In *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd*,⁷⁷ the court of first instance, the Witwatersrand Local Division, had jurisdiction, for the corporation was an external company

⁷¹ *PwC* case para 47.

⁷² *PwC* case paras 25, 40.

⁷³ *PwC* case para 48.

⁷⁴ *PwC* case para 48.

⁷⁵ *PwC* case para 48.

⁷⁶ *PwC* case para 48.

⁷⁷ 1998 3 SA 175 (SCA) 178A-C (hereafter the *Ward* case).

under the definition in section 1 of the *Companies Act* 61 of 1973, and in terms of section 322 of that statute, it had also registered with the registrar of companies. *Ward's* case may be contrasted with *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste Intervening*.⁷⁸ *Moolman* was decided under the apartheid system, when the homelands, such as the Transkei, were regarded as falling outside South Africa. In *Moolman* the company was registered in the Transkei and had no established place of business in South Africa, and so it did not meet the definition of an "external company" in section 1 of the 1973 Act. The South African courts thus did not have jurisdiction to wind it up under that statute. As a result, the Transkei liquidator could not apply the machinery of that Act, such as an examination by a commissioner under section 418, to carry out his duties.

The Board in the *PwC* case found that the Supreme Court of Bermuda had no jurisdiction to wind up SICL under either of the Bermudian statutes considered. For the sake of comparison with South African law, a corresponding finding by a local court is considered. This finding would be that the relevant entity did not qualify as an external company under the *Companies Act* 1973, so the South African court would lack jurisdiction to wind up the company under that statute.

What happens if, even though the court lacks jurisdiction under the *Companies Act* 1973 to grant a winding-up order against the auditors, the South African court does grant a winding-up order so that the liquidators may examine the auditors under section 417 of that Act? It is submitted that this winding-up order would be regarded as legally effective in South African law unless set aside by a subsequent court order.⁷⁹ Usually, a final judgment

⁷⁸ 1990 1 SA 954 (A) 959D-E.

⁷⁹ See Van Loggerenberg and Bertelsmann Erasmus: *Superior Court Practice* OS, 2015, D1-576 n8, citing cases such as *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) 242C-244A; *Jacobs v Baumann* 2009 5 SA 432 (SCA) 439G-H; and *Minister of Home Affairs v Somali Association of South Africa* 2015 3 SA 545 (SCA) 570F-H. Van Loggerenberg and Bertelsmann Erasmus: *Superior Court Practice* continues (OS, 2015, D1-576 n8): "A judgment given where the court has no jurisdiction is a nullity and does not require to be set aside. It could simply be ignored. However, in the event of the parties disagreeing as to the status of an impugned judgment, the court should be approached for a rescission of the judgment. See, in this regard, the notes to s 21 of the Superior Courts Act 10 of 2013 s v 'Lack of jurisdiction' in Volume 1, Part A2". As to such a judgment's being a nullity, see cases such as *S v Absalom* 1989 3 SA 154 (A) 164E-G (hereafter the *Absalom* case); *Vidavsky v Body Corporate Sunhill Villas* 2005 5 SA 200 (SCA) 207C-F (hereafter the *Vidavsky* case); and *Campbell v Botha* 2009 1 SA 238 (SCA) 243I-244A (hereafter the *Campbell* case). For the principle that the judgment need not be set aside, see the *Vidavsky* case 207C and the *Campbell* case 244A. For the principle that the judgment may simply be ignored, see the *Absalom* case 164F and the *Campbell* case 244A. For

and/or order stands because the court that has issued the judgment or order has discharged its duties. It is *functus officio*.⁸⁰ Further, a winding-up order continues unless an application is instituted that the court which granted the order should set it aside as irregular, or unless an appeal is brought so as to have the order set aside by an appeal court.⁸¹ The unusual facts in circumstances like those of the *PwC* case would be the lack of jurisdiction and the chief purpose to target outsiders, the debtor's previous auditors, under section 417 of the 1973 Act. (And the context, as in the *PwC* case, would be that the controllers of the company had removed property of the company to a foreign country. This country would be neither the country of the original winding-up nor South Africa.⁸²) The applicant would have to furnish a copy of the winding-up application to specified persons.⁸³ The list does not include the auditors,⁸⁴ so the auditors would not be entitled to receive such a copy. Still, notice of the winding-up would be published in the *Government Gazette*.⁸⁵

The Board dealt with *PwC*'s challenge by relying on section 184(1) of the Bermudian *Companies Act*. Its provisions are similar in some respects to those of section 354 of the *Companies Act* 1973 in South African law. The Board acknowledged the considerable authority that the auditors were not mentioned among the persons listed in section 184(1). The auditors do not seem to have obtained the consent of any of those listed persons to bring the application under section 184(1). It has been submitted that only a few persons have standing to apply under section 354 of the *Companies Act*

present purposes, it is assumed that the parties disagree over the status of the impugned winding-up order. The liquidators are determined to pursue the auditors, and the auditors maintain that, in these circumstances, the South African court has no jurisdiction to grant the winding-up order because the company does not qualify as an external company under the *Companies Act* 61 of 1973.

⁸⁰ *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173- 176 178 186-187 192; *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 502; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 4 SA 298 (A) 306F-G; Cilliers, Loots and Nel *Herbstein and Van Winsen* 926 n89; Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* para D1-561 n1; Harms *Civil Procedure* para B42.2 n1.

⁸¹ See Blackman *et al Commentary* RS 2, 2005 ch 14, 190 n1331 referring to the *Mid East* case and the *Isaacs* case.

⁸² See the subsequent explanation by Chief Justice Smellie of the Cayman Islands in Smellie 2015 <http://tinyurl.com/zh3d68z> 24 n35.

⁸³ Section 346(4A) of the *Companies Act* 61 of 1973.

⁸⁴ Blackman *et al Commentary* RS 8, 2011 ch 14, 172-174; Kunst, Delport and Vorster *Henochsberg* 724(3)-724(4).

⁸⁵ Section 356(1) of the *Companies Act* 61 of 1973; Blackman *et al Commentary* RS 3, 2006 ch 14, 227-228; Kunst, Delport and Vorster *Henochsberg* 751-753.

1973 for the stay or setting aside of the winding-up order in South African law. These persons are

... exclusively the liquidator of the company (including its provisional liquidator), a creditor or a member of the company.⁸⁶

The applicant's standing must also be proved.⁸⁷ It is conceivable that, in the comparable situation under discussion, SICL owed the auditors unpaid debts. This fact would have made the auditors creditors of SICL. It would thus have provided them with the standing required by section 354 of the 1973 Act. But the judgment of the Board in the *PwC* case does not express this idea. It cannot therefore form part of the reasoning in the comparable circumstances considered from a South African point of view. None the less, a significant feature of the judgment in the *PwC* case is the ruling by the Board regarding the liquidators. The liquidators should have raised the possible lack of jurisdiction. The auditors were not before the court. The liquidators could have applied to have the winding-up order stayed. Similarly, the liquidators could act in terms of the South African section 354, for they are listed in that section.

Section 184(1) of the Bermudian 1981 Act contains a finite list. It mentions the persons who may apply to stay the winding-up. The Board still decided the case in terms of section 184(1). In doing so, the Board added further persons – the auditors – who could apply for the stay of the winding-up. These persons were not listed by the Parliament of Bermuda when it passed the *Companies Act* 1981.

The liquidators brought cognate proceedings against PwC in *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* (hereafter the *Singularis* case).⁸⁸ In the *Singularis* case, the liquidators sought the recognition of their status as liquidators appointed by the Cayman court. They also sought the assistance of the Bermudian court at common law. Lord Collins was clear that legislating by courts should be only interstitial.⁸⁹

⁸⁶ See Kunst, Delpont and Vorster *Henochsberg* 747.

⁸⁷ *Ex parte Strip Mining (Pty) Ltd: In re Natal Coal Exploration Co Ltd (in Liq)* 1999 1 SA 1086 (SCA) 1090A.

⁸⁸ 2014 UKPC 36 (10 November 2014), 2015 2 WLR 971 (hereafter the *Singularis* case).

⁸⁹ See the *Singularis* case paras 65-69, referring to *Kleinwort Benson Ltd v Lincoln City Council* 1999 2 AC 349 378 per Lord Goff of Chieveley; *Southern Pacific Co v Jensen* 244 US 205 221 (1917) per Holmes J; Cardozo *Nature of the Judicial Process* 103, 113; Posner *How Judges Think* 86; and Bingham *Business of Judging* 32.

Nor should statutes be applied "as if" they did apply when clearly they did not apply.⁹⁰ Lord Collins concluded that such reasoning was

... not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature.⁹¹

It is therefore surprising to find that, although the facts of the *PwC* case were unusual, the Board added persons – the auditors – to the list in section 184(1), for in doing so, the Board extended the scope of the section beyond that set by the Parliament of Bermuda. It is doubtful whether this activity could be described as interstitial legislating by the Board. The two appeals – in the *PwC* case and the *Singularis* case – were both heard by the Privy Council in April 2014 and judgment was given in November 2014. The Board criticised legislating from the bench in the *Singularis* appeal, yet it remains a puzzle that the warnings of the Board were not borne in mind by the same judges when they gave judgment in the *PwC* appeal.

The Board in the *PwC* case held that the winding-up application under the *Companies Act* 1981 could have been challenged when it was heard in Bermuda. This would have been the best time for the auditors to oppose such an application because the court lacked jurisdiction to wind up the company.

(By way of comparison, consider the requirements of section 354 of the *Companies Act* 1973 in South Africa. The applicant is arguing that the winding-up order should never have been granted. He is required to prove that there are special circumstances for setting aside the order. He also has to explain satisfactorily why the granting of the winding-up order was not opposed or appealed, or why the application for relief was delayed.⁹²)

It is assumed that the liquidators seeking the local winding-up order under the legislation on companies have not notified the auditors. The auditors should challenge the winding-up as soon as they can reasonably do so after seeing the advertisement of the proceedings. The liquidators would object to the jurisdiction of the South African court as a preliminary point of law.⁹³ This step by way of an exception would presuppose that the auditors or their legal advisers keep up to date with the contents of the *Government Gazette*

⁹⁰ *Singularis* case paras 78-83.

⁹¹ *Singularis* case para 83.

⁹² Kunst, Delpont and Vorster *Henocheberg* 748, citing the *Ward* case 180; and see *Aubrey M Cramer Ltd v Wells* 1965 4 SA 304 (W) 305; *Herbst v Hessels* 1978 2 SA 105 (T) 108-109 and cases there cited. Also see Blackman *et al Commentary* RS 8, 2011 ch 14, 224-1-224-2 nn1571-1573.

⁹³ Compare Cilliers, Loots and Nel *Herbstein and Van Winsen* 93.

as relevant to them concerning a particular debtor whom they have audited, and that they are conscious of the possible implications, for them, of such a notice of a winding-up order. The significant feature of the present circumstances would be that the foreign liquidators' reason for bringing the local winding-up application would be to obtain the order to examine the auditors under relevant South African legislation. It was held in the *PwC* case that, in such narrow circumstances, it would be a breach of natural justice not to notify the auditors and allow them to make representations regarding the court order. This important reason – the foreign liquidators' pursuit of the previous auditors of the company – may not be clear from the notification of the winding-up proceedings in the *Government Gazette*. It is possible that this reason is not stated as the express purpose of the proceedings. Context still matters. The problem may be recapped. The auditors have been required by the courts of a foreign country to provide the liquidators with information and documents. The auditors have complied with that foreign court order tardily and incompletely in that country. The liquidators have therefore applied for a winding-up in the home jurisdiction (such as South Africa) of the relevant registered branch of the auditors. It is submitted that it is a fair inference by this branch that the foreign liquidators' chief purpose in bringing this application is to engage the machinery of the local legislation on companies. The liquidators are pursuing these auditors for information and documents with respect to the debtor whom they have audited. It is also submitted that if the *ex parte* application brought by the foreign liquidators for the winding up of the company in South Africa does claim relief against the auditors in the form of an order for their examination under section 417 of the *Companies Act*, then this application is required to be "addressed" to those auditors but it does not need to be served on them.⁹⁴ And it is submitted that, as the auditors would be interested parties who would be prejudiced by this application for winding-up, they should be joined in this application.⁹⁵ At this stage, it may be advisable for the auditors to seize the nettle. They should oppose the application on the point of law that the final winding-up order should not be granted because the court lacks jurisdiction under the *Companies Act* 1973 to wind up the company.⁹⁶

⁹⁴ Compare Cilliers, Loots and Nel *Herbstein and Van Winsen* 421 n9.

⁹⁵ See *Ex parte Body Corporate of Caroline Court* 2001 4 SA 1230 (SCA), referred to by Cilliers, Loots and Nel *Herbstein and Van Winsen* 422; see also Rule 6(2) of the *Uniform Rules of Court*.

⁹⁶ Cilliers, Loots and Nel *Herbstein and Van Winsen* 456.

The liquidators as the applicants for the winding-up order would bear the burden of proving that the court had jurisdiction to hear their application.⁹⁷ In addition, the liquidators would have a duty of dealing fairly and disinterestedly with everyone interested in the liquidation.⁹⁸ They would have a duty not to conceal or suppress knowledge that they had acquired during their investigation, which was material to ascertaining the true position. This duty would be owed to the court, among others. Further, it is submitted that, in South African law, counsel would owe a duty to bring to the attention of the court a feature – the existence or lack of jurisdiction – that might be adverse to their case and important to the decision of the case.⁹⁹ If the clear lack of jurisdiction were to be dealt with at this early stage in terms of the duties resting upon the applicant foreign provisional liquidators and their legal representatives, then the local winding-up order would probably not be granted, because an essential element of the liquidators' application would be missing. It would follow that the order for the examination of the auditors under section 417 of the *Companies Act* 1973 would probably not be granted either.

It is submitted that if one accepts that the auditors may successfully challenge the issuing of the winding-up order, then the further reasoning of the Board as to the right of the auditors to challenge the consequent issuing of the section 195 order may form a useful ground of comparison for the auditors who seek to challenge the issuing of the corresponding order against them under section 417 of the South African *Companies Act* 1973, so the auditors would be directly affected by the winding-up order. They would not merely be friends of the court. It would be a breach of natural justice if the auditors were not heard by the court. The auditors could challenge the winding-up order during the liquidation proceedings themselves. No procedural principle would prevent them from doing so. The auditors should challenge the winding-up order as soon as is reasonably possible. They would not wish to be met with the reasoning by the liquidators or the court that it was too late to stay or set aside the winding-up order.¹⁰⁰

⁹⁷ The founding affidavit attached to the notice of motion must, among other things, state facts that establish the jurisdiction of the court (Harms *Civil Procedure* para B6.23 n2, applying the law regarding summonses to applications, with reference to *Kikillus v Susan* 1955 2 SA 137 (W); *Marais v Munro & Co Ltd* 1957 4 SA 53 (EDL); *Natalse Landboukoöps Bpk v Fick* 1982 4 SA 287 (N). As Cilliers, Loots and Nel *Herbstein and Van Winsen* 438 point out with respect to the contents of the supporting affidavit, "If the court is not satisfied on the facts stated in the application that it has jurisdiction, it will not entertain the proceedings".

⁹⁸ See Cilliers and Luiz 1995 *THRHR* 606 regarding the English position.

⁹⁹ See *Toto v Special Investigating Unit* 2001 1 SA 673 (E) 683A-E; *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 5 SA 311 (GNP) para 43.

¹⁰⁰ See the text accompanying fn 61 above.

By acting promptly the auditors would not encounter the obstacle that the liquidators had acted irrevocably.

A further line of reasoning is considered for the sake of argument. The following considerable assumptions are made: the South African court has decided that it has jurisdiction to hear the matter; the auditors are not in court; and a final winding-up order has been granted. It is submitted that the auditors in their capacity as auditors are not in the finite list of persons in the South African section 354, so the better view would be for the auditors in a situation like the one in the *PwC* case to proceed to have the winding-up order set aside on a basis other than that of section 354. Instead, the auditors in the present circumstances could apply to have the winding-up order set aside because of error concerning the existence of jurisdiction. The auditors would argue that the winding-up order was erroneously sought and erroneously granted in the absence of the auditors, who were the only targets of the winding-up and thus the parties affected by the winding-up order.¹⁰¹ A judgment may be rescinded because the court mistakenly believed that the defendant did know about the hearing although in fact this was not so.¹⁰² If the auditors did not, in fact, know about the hearing of the winding-up application, then that might be a ground for setting aside the winding-up order.

The principle is that the court's discretion is usually exercised in favour of the applicant who, through no fault of his own, was not allowed to oppose the order granted against him and who, once he finds out about this order, acts quickly to have the state of affairs corrected.¹⁰³

To prove their standing, the auditors in circumstances like those in the *PwC* case would show that they were directly and substantially interested in the outcome of the winding-up application sufficiently to be entitled to have

¹⁰¹ Rule 42(1) of the *Uniform Rules of Court*.

¹⁰² See Cilliers, Loots and Nel *Herbstein and Van Winsen* 931-932 n125, citing *De Sousa v Kerr* 1978 3 SA 635 (W); *Topol v L S Group Management Services (Pty) Ltd* 1988 1 SA 639 (W); *Nyingwa v Moolman* 1993 2 SA 508 (Tk) 510E-F (hereafter the *Nyingwa* case); also see *Grantully (Pvt) Ltd v UDC Ltd* 2000 JOL 6396 (ZS) 5; *Weelson v Waterlinx Pool and Spa (Pty) Ltd* 2013 JDR 0669 (GSJ) paras 5-6 (hereafter the *Weelson* case); and *Moosa v Siddi-Akoo* 2014 JDR 1674 (GP) para 5 (hereafter the *Moosa* case).

¹⁰³ See Cilliers, Loots and Nel *Herbstein and Van Winsen* 930 n114, citing *Theron v United Democratic Front (Western Cape Region)* 1984 2 SA 532 (C) 536; the *Nyingwa* case 510-511 512; *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 1 SA 697 (T) 703; also see *Brits v Nedbank Ltd* 2010 JDR 0495 (GNP) para 3; the *Weelson* case paras 5-6; and the *Moosa* case para 5.

opposed the original application for the winding-up order.¹⁰⁴ The auditors would argue that their interest concerned a basic requirement of the matter – the court's jurisdiction to hear the application for winding-up under the *Companies Act 1973*. This choice of approach to dealing with the matter would also help the auditors to bypass the further issue of whether they ought to have been cited as parties by the foreign liquidators. If the attempt by the auditors to have the winding-up order set aside were to be dismissed by the court, this step would afford them a ground for approaching the appeal court. The auditors would then argue that in these circumstances there had been a failure of natural justice by the court of first instance, which had failed to hear the other side before rendering a final decision on whether to grant the winding-up order.

On a more abstract level, the combination of some of the relevant principles reveals a lurking danger. The order of a high court stands because the court is *functus officio*. The order is thus effective until it is examined and set aside by the high court itself or by the court of appeal. But a high court order that has been granted without the necessary jurisdiction may be ignored. Yet a party who applies for such an order to be set aside must show that there was no fault by that party and that, having found out that the order had been granted, that party acted promptly to have the position corrected. Often, too, the court may conclude that it is too late to stay the winding-up order even though jurisdiction was clearly lacking. The winding-up may be so far advanced that matters cannot be restored or reorganised properly. Rights may also have been created for third parties. Consequently, in the words of Lord Neuberger, it would be "unjust to stay the winding up (or more unjust to stay than not to stay)".¹⁰⁵ If all these principles are read together, then it appears that the party who knows that the court does lack jurisdiction, or who considers that the court may possibly have lacked jurisdiction, but who chooses to ignore the resultant court order does so at his peril, for he may later find that the court decides that he is too late to stay the winding-up order. The court may hold that matters cannot be corrected and third parties' rights have been created or altered, so that staying the winding-up would be unfair. One inference is to be drawn. Once the targeted person suspects that the winding-up is flawed because the court lacked jurisdiction to grant it, he should promptly act. He should have the winding-up order stayed or set aside so that he cannot be blamed for leaving the position uncorrected.

¹⁰⁴ See Cilliers, Loots and Nel *Herbstein and Van Winsen* 944 n207, citing *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 4 SA 409 (C) 415; *Standard General Insurance Co Ltd v Gutman* 1981 2 SA 426 (C) 433B-436D.

¹⁰⁵ *PwC* case para 44.

6 Conclusion

The *PwC* case revealed a problem of cross-border insolvency law. The liquidators were frustrated at the slow, unsatisfactory furnishing of documents and information by the previous auditors in the Cayman Islands, so they obtained a winding-up order in Bermuda solely to have the auditors examined in their home jurisdiction. The auditors successfully appealed to the Privy Council. The court unanimously held that, in these particular circumstances, the auditors ought to have been added as parties to the winding-up. It had been a failure of natural justice by the court of first instance not to hear them. Both the winding-up order and the order for the examination of the auditors were stayed.

This case comment regarding the *PwC* case described the reasoning of the Board in reaching its decision. It was submitted that the decision showed that the relevant statutory provisions entitled the liquidators but not the auditors to apply for the stay of the proceedings. The circumstances were unusual. The jurisdiction of the court was queried and the auditors were the only target of the winding-up application under the legislation on companies. Still, the Board added the auditors to the statutory list of persons who could apply for the stay of the proceedings. It was submitted that the Board thus legislated in a manner which it disapproved of in the *Singularis* case. It was submitted that instead the auditors could apply for the stay or setting aside of the winding-up order on the grounds of error as to the existence of jurisdiction to hear the winding-up application if such a dispute were to arise in South African law. In addition, it was explained that the auditors, although they would be outsiders to the winding-up, would still be able to take the initiative at an earlier stage. They should act promptly and argue a preliminary point of law. Jurisdiction would be lacking under the *Companies Act* 1973, and the auditors would be the direct target of the section 417 order. By means of this argument, the liquidators could oppose the granting of the final winding-up order.

The reasoning of the Board can be criticised for the unwarranted addition of the auditors to the relevant statutory list of those persons who may apply to have the winding-up order stayed. However, the reasoning may still be supported for the ruling that at an earlier stage the auditors, as a target of the winding-up application, should have been notified of the proceedings, that they had standing, and that they were entitled to oppose the making of the final order, because the court lacked jurisdiction under the legislation on companies. If this conclusion is accepted, then the entitlement of the

auditors as outsiders to challenge the winding-up is confirmed. The relevant principle of company law is thus expanded.

The decision of the Board has implications for the theory and practice of company law. The Board did acknowledge the considerable authority that, in general, parties whose interests are affected by a winding-up do not have standing to oppose the granting of the winding-up application, yet on the narrow basis of the facts in the *PwC* case, such standing may be found to exist where jurisdiction is lacking and the challenger is the direct target of the intended winding-up. This decision by the Board is of persuasive authority in South African law. It will be interesting to see whether it will be referred to with approval by the courts in South Africa.

This case comment has focused on the decision by the Board in the *PwC* case. The decision sets a new direction for the development of company law in England and Bermuda. It is possible that aspects of the reasoning by the Board may be adopted in the development of the corresponding law of South Africa. These advances should be welcomed.

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List of Abbreviations

PwC

PricewaterhouseCoopers

SICL

Saad Investments Company Limited

THRHR

Tydskrif vir Hedendaagse Romeins-Hollandse Reg