

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

CASE NO: 67866/2009

In the matters between:

3/9/2010

OCHSE et uxors

Applicants

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE. YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
03/10/10 DATE	<i>li. Stubb</i> SIGNATURE

JACQUES and OTHERS

Respondents

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CASE NO: 42873/10

GLASS and NAIDU

Applicants

and

VAN ZUYDAM and others

Respondents

JUDGMENT

1 These two urgent matters were argued together before me. They relate to an enquiry convened under s 417(1) of the Companies Act, 61 of 1973 by the Master. The cases were argued together before me on 3 September 2010. The urgency lies in the fact that the enquiry is due to resume on 7 September 2010. The respective sets of applicants, who were separately represented, ask that the enquiries be stayed until certain litigation has been completed. In the case of the Ochse applicants, the request is that the enquiry be adjourned until after the return day of the provisional winding up order which was granted by Van der Bijl AJ in this court on 23 August 2010 in relation to Forlife Holdings (Pty) Ltd. Applicants Glass and Naidu ask that the enquiry be postponed, at least in relation to their evidence, until the completion of an application for their provisional sequestration before Bertelsmann J, in which the learned judge is presently hearing oral evidence at his direction on a number of defined issues.

2 The applicants locate the jurisdiction they ask me to exercise in s 354 of the Companies Act, which confers a general discretion on the court to stay proceedings "in relation to the winding-up". I do not think this provision is applicable to the present cases, for reasons I shall give below.

3 Glass and Naidu were executives in Centurus (Pty) Limited. They dealt with Forlife. Centurus used Forlife to procure contractors to provide services to Centurus. Forlife in its turn used several subcontractors to render the services. In February 2009, Centurus called Glass and thereafter Naidu to a series of meetings at which they were accused of having defrauded Centurus of many millions of rands by submitting invoices to Centurus which were not for Centurus' account and then causing Centurus to make payment in terms of these invoices to Forlife.

4 My attention was directed, as a representative example, to one of the invoices on which Centurus relies, VAT invoice no 461 dated 1 August 2007 in which Centurus is asked to make payment of R85 999,77 plus VAT of R12 039, 97 for "Parktown North House: Phase 2 Deposit as per attached schedule". This debt was not a debt of Centurus but of Glass. The invoice was directed to the attention of Naidu and required a cheque made out to Forlife. The VAT paid by Centurus could never legitimately have been claimed by Centurus as an output but was so claimed, to the prejudice of SARS. Glass' answer to this, which is disputed, is that by oral arrangement he was allowed to do this and have the amount paid debited to his loan account which was then in credit.

- 5 The meetings between Glass, Naidu and the other directors were also attended by Centurus' attorney, Mr May. During the period February to November 2009, Glass and Naidu signed a total of five statements between them detailing the extent of the frauds they had committed and giving over their assets to Centurus. In November 2009, however, they changed tack: they claimed that all the statements had been induced by duress in which May played a prominent part, threatening them with criminal prosecution, being locked up and being raped in prison if they did not cooperate with him in his efforts to recover what Centurus said had been misappropriated. In addition, they said, the admissions of fraud were all untrue and they were entirely innocent of any wrongdoing.
- 6 Centurus launched an application for the winding up of Forlife in November 2009. As I have said, Van der Bijl AJ granted a provisional winding up order on 4 June 2010, with return day 4 August 2010. The fault for the long delay in getting the matter heard did not rest with Centurus. The return day of the liquidation order has been extended until November 2010.
- 7 In late December 2009, Centaurus applied for the provisional sequestration of Glass and Naidu. The matter came before Bertelsmann J who, according to the papers before me, took the view

that the matter could not be determined without evidence on the question of duress in regard to the five statements and whether the admissions in them were true. The matter could not be completed before the elevation of Bertelsmann J to an acting appointment in the Supreme Court of Appeal and the part heard provisional sequestration applications were postponed to December 2010 for completion of the evidence and for final argument on the applications themselves.

- 8 On 30 June 2010, on the application of the provisional liquidators appointed to Forlife, in provisional liquidation, the Master granted the order for the enquiry. The respective applicants have been subpoenaed as witnesses. Glass has commenced giving evidence, under protest and without prejudice.
- 9 The determination of the provisional liquidators to continue forthwith with the enquiry has prompted these applications. Although the applicants in their notices of motion attacked the very foundation of the enquiry and the validity of the subpoenas served on them, this relief has been abandoned and the only question before me is whether the enquiry should be adjourned in its entirety or in stayed in respect of the applicants as witnesses at the enquiry.

- 10 In *Nedbank Ltd v The Master of the High Court, WLD and Others*,¹ the court held that the powers of the court to intervene in matters such as the present are located in s 151 of the Insolvency Act, 24 of 1936 read with s 339 of the Companies Act and that a court will not intervene unless it is satisfied that the Master was clearly wrong. I am bound to follow this judgment unless I am satisfied that it is clearly wrong. It was not argued that the case was wrongly decided.
- 11 This conclusion undercuts much of the argument that was presented to me. The submission on behalf of the Ochse applicants was that it would be more convenient if the enquiry were, in regard to their evidence, stayed until it was determined whether the provisional winding up would be made final. The prejudice to the Ochse applicants was that their time and money would be wasted if the enquiry were to be terminated as it would have to be if the provisional winding up order was discharged.
- 12 The argument for Glass and Naidu was that although their actual evidence given at the enquiry would remain private and confidential, and thus not be able to be used at the hearing before Bertelsmann J without the leave of the learned judge², evidence obtained derivatively

¹ 2009 3 SA 403 W para 72

² See s 417(7)

from any evidence given at the enquiry would be admissible and that this could result in prejudice.

13 I have a fundamental practical problem with the approach of the applicants. On their versions, they are all innocent of any wrongdoing. All the legal proceedings up to now, they say, have been the result of a terrible misunderstanding. In these circumstances I cannot see how their giving evidence at the enquiry will prejudice them at all. It is in their interests that the provisional liquidators, Centurus and Attorney May (who, they say has been harassing them since the inception of the matter) should all be shown that they have got the wrong end of the stick. I should think that the sooner the applicants can do this, the better for them.

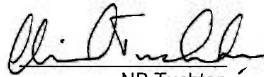
14 Furthermore, it is clear from the evidence produced by the provisional liquidators that there are good grounds for the enquiry to proceed as soon as may be lawfully possible. No statement of affairs of Forlife has yet been delivered to the liquidators as required by s 363(2) of the Companies Act. As the Ochse applicants were the sole directors of Forlife when its winding up commenced, they bear the obligation to see that this is done. Mr Ochse himself has admitted that the affairs of the company are in a chaotic state. I have referred to the *prima facie* evidence of fraud indicated by the invoice dated 1 August 2007.

In addition, there is the fact of the five statements, whether or not they were induced by duress and whether or not the admissions of fraud were correctly made and the fact that although many millions of rands flowed through Forlife's bank account, nothing remains. The applicants, with the possible exception of Mrs Ochse, were at the heart of the affairs which are sought to be investigated. In addition, Mr van der Merwe SC on behalf of the liquidators disavowed any intention of investigating the duress question itself at the enquiry.

- 15 The concerns of Glass and Naidu that Bertelsmann J might allow derivative evidence to be introduced to their detriment are, in my view, not matters on which I should pronounce by way of generalisations. Glass and Naidu will be able to raise their objections before the learned judge who will be in a position infinitely better than I am to decide what specific evidence should, or should not, be admitted in proceedings before him.
- 16 The same goes for the inquiry before the Commissioner appointed by the Master. He is a member of the Pretoria Bar and vested with the duty to ensure that the proceedings before him are fair and that the questions he allows are relevant. Here again Glass and Naidu are adequately protected.

17 I am satisfied that all the applicants will lose if the enquiry goes ahead as planned are, at the most, certain ill-defined tactical advantages. I respectfully agree with the conclusion in *Mitchell and Another v Hodes and Others*³ which translates in the present circumstances to the proposition that the applicants ought not to be allowed to defer being examined on matters pertaining to the trade, dealings, affairs and property of Forlife, even for the relatively short period sought by the applicants. Indeed, if the enquiry goes ahead they may benefit from disclosing their versions from the witness box. On the other hand, one knows that the longer assets are concealed or dissipated, the more difficult it becomes to recover them. Given the key positions the applicants occupied in the scheme which is alleged to have led to the harm done to Centurus, there is no basis for concluding that the Master was clearly wrong. On the contrary, I am satisfied that the Master had good grounds for directing that an enquiry take place immediately. In our country fraud is rampant. Where grounds are produced which show that fraud may have been committed, the sooner and the more efficiently the notoriously slow wheels of justice are propelled into motion, the better.

18 It follows that neither application can succeed. Both applications which are the subject of this judgment are dismissed with costs. Those costs are to include the costs of both senior and junior counsel who appeared for the provisional liquidators.



NB Tuchten
Judge of the High Court
3 September 2010