

Reportable: Yes / No
Circulate to Judges: Yes /
No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 621/03

Date heard: 2004-08-12

Date delivered: 2004-08-13

In the matter of:

Albert Willem De Villiers

Applicant

versus

Global Diamond Resources (Pty) Ltd

Respondent

Coram: **MAJIEDTJ**

JUDGEMENT

on

APPLICATION FOR LEAVE TO APPEAL

MAJIEDT J:

1. The applicant seeks leave to appeal against my judgement containing the decision to discharge the provisional order of liquidation against the respondent and for the applicant to pay the costs of that application.
2. The application is primarily premised on the fact that I had exercised my discretion wrongly in discharging the rule *nisi*. More particularly, the submissions are made that I have erred in the following respects:
 - a) In failing to give consideration thereto, alternatively giving insufficient consideration to the fact that the onus rested on the respondent to show on a balance of probabilities that the provisional order should not be confirmed.

- b) That I had erred in my assessment of the true financial position of the respondent company.
- c) That I had erred in not sufficiently taking into account the wishes and interests of the respondent's employees.
- d) That I had erred in taking into consideration the fact that funds were to be made available to the respondent company to continue its operations.
- e) That I had erred in taking into consideration as one of the factors in exercising my discretion, the strong suspicion that I harboured against the applicant as to his lack of *bona fides* in bringing the application for liquidation against the respondent.
- f) That, even if I was correct in discharging the rule *nisi*, I had erred in ordering that the respondent had to pay all the costs of the application. The submission is made that the applicant should at least be ordered to pay the costs up until the stage when a provisional order of liquidation was issued.

3. I do not propose dealing with these matters separately and in much detail. A convenient point of departure is to consider the powers of a Court of Appeal in an application for liquidation such as the present one, where the court below had exercised its discretion in discharging the rule

nisi. Mr. Botha, who appeared for the applicant, has referred me to the judgement in **Shepstone and Wylie and others v Geyser NO 1998(3)SA 1036 (A)** at 1044J – 1045A. He relies on this case as support for his proposition that the discretion contained in the Companies Act is a wide discretion as opposed to a restricted discretion. The aforementioned distinction is important, because if indeed it is a wide discretion as Mr. Botha contends, the effect would be that a Court of Appeal would have wide ranging powers to consider afresh all the relevant factors which I considered and also other factors on the papers, and to exercise its own discretion in deciding whether it would be just and equitable for the respondent company to be wound up. If, on the other hand, it is a discretion in the restricted sense of the word, a Court of Appeal would be significantly curtailed in its

powers and would in effect only be empowered to interfere with the exercise of my discretion if it is shown that I have acted unjudicially, i.e. that my decision had been capricious, or was based on wrong principles, or that it was not reached by unbiased judgement, or that it was not based on substantial reasons.

4. The **Shepston v Wylie** judgement, referred to above, is in fact not authority for the proposition advanced by Mr. Botha. In that case the Court pertinently found that it was not necessary to consider whether the discretion was a wide or a restricted one, since the parties before it were *ad idem* that the matter could be decided on the basis that the court *a quo* had merely exercised a restricted discretion.

5. Mr. Walters for the respondent has referred to the case of

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Tjospomie Boerdery (Pty) Ltd v Drakensberg

Botteliers (Pty) Ltd and another 1989(4) SA 31 (T). In

that case, a full bench of the Transvaal Provincial Division held that it was in the same position on appeal as the Court *a quo* to consider all relevant factors and circumstances and to exercise its own discretion in an application for liquation. I deem it necessary to quote in full the judgement of Stegman J at 43 G – 44 E:

“Having ascertained the nature of the discretionary power concerned in the present case, I must now answer the question whether it is to be characterised as belonging to the category of discretionary powers contemplated by the decision in *Ex parte Neethling and Others* (supra). As already mentioned, such category consisted of the discretionary powers to be exercised by a Judge in controlling the conduct of business in his own Court (including the granting of postponements and amendments), in making orders for costs, in imposing sentence, and in authorising the alienation of immovable property in which a minor child has an interest. It is not easy to see what distinguishing quality or feature those discretionary powers have in common to justify their being lumped together in the same category and distinguished from other discretionary powers. However, it can at least be said that the discretionary power established by s 344(h) of the Companies Act 1973 is not one of them. Nor is it one of the powers that have been identified by decisions in later cases as belonging to the same category as those

in Ex parte Neethling and Others.

The discretionary powers identified as belonging to the last-mentioned category are all to be contrasted with discretionary powers of the kind dealt with in *Mahomed v Kazi's Agencies (Pty) Ltd and Others* (supra). The particular discretionary power dealt with in that case was the power to grant or withhold the Court's validating sanction in respect of a compromise or scheme of arrangement under s 103(2) of the Companies Act 1926 (now s 311 of the Companies Act 1973). The feature which apparently distinguishes discretionary powers of that kind from other discretionary powers is that they are not of a kind which the Court of first instance is peculiarly advantaged to exercise, and that they are of a kind such as a Court of appeal is in as good a position as the Court of first instance to exercise.

In my judgment there is nothing about the power established by s 344(h) of the Companies Act 1973 which results in the Court of first instance having any special advantage that would enable it to exercise the power any more appropriately than a Court of appeal. The power seems to me to be one that a Court of appeal is in as good a position as the Court of first instance to exercise. I therefore hold that the power established by s 344(h) of the Companies Act 1973 does not belong to the category of powers contemplated by the decision in *Ex parte Neethling and Others*, and that it does belong to the category of powers contemplated by the decision in *Mahomed v Kazi's Agencies (Pty) Ltd and Others*."

6. The **Tjospomie Boerdery** case, *supra*, is still good law and have not been overruled to my knowledge. When I put it to counsel that this is indeed the legal position at present, both Mr. Walters and Mr. Botha agreed that it is the case.
7. In my judgement I had found that the applicant had made out a strong case against the respondent for the confirmation of the rule *nisi*. I had come to that finding based on the fact that I was satisfied that the applicant had *locus standi*, that the applicant was indeed owed certain monies by the respondent and that the respondent was deemed in terms of section 345(1)(a) of the Companies Act, nr. 61 of 1973, to be unable to pay its debt. I had in addition also found that the respondent's liabilities in fact exceeded its assets so that it was in fact

commercially insolvent. The only reason why I had declined to confirm the rule *nisi*, is the fact that in the exercise of my discretion I was of the view that it would not be just and equitable to have the company finally wound up. I came to that finding on the basis of a number of reasons as appears from my judgement.

8. Given the fact that a Court of Appeal will have the same wide ranging discretion that I had in considering matters which I was called upon to consider as far as the confirmation of the rule *nisi* is concerned, it seems to me that it cannot be said that there is no reasonable prospects of success on appeal. A Court of Appeal would be in a similarly advantaged position as I was to consider all the factors and circumstances which I had considered and others which may emanate from the papers and

which I had not dealt with.

- 9. Consequently I grant the applicant leave to appeal to a Full Bench of this Division. The costs of this application for leave to appeal will stand over to be determined by the Court of Appeal.**

**SA MAJIEDT
 JUDGE**

ADVOCATE FOR THE APPLICANT :	Adv CH Botha
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ADVOCATE FOR THE RESPONDENT :	Adv G Walters
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ATTORNEY FOR THE APPLICANT :	AB Horwitz
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ATTORNEY FOR THE RESPONDENT :	Neville Cloete
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DATE OF HEARING :	2004-08-11
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