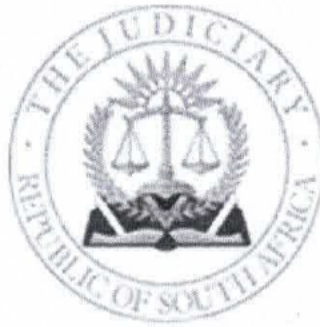


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

Date: **30 September 2024** Signature: _____

CASE NO: 2022/043254

In the interlocutory application between:

HENDRICKS HOLDING (PTY) LTD

APPLICANT

And

PHP ARMED RESPONSE (PTY) LTD

RESPONDENT

In re: the main action between:

PHP ARMED RESPONSE (PTY) LTD

PLAINTIFF

And

MAMBA PHP (PTY) LTD

FIRST DEFENDANT

HENDRICKS HOLDING (PTY) LTD

SECOND DEFENDANT

Coram: Dlamini J

Request for Reason: 31 July 2024 •

Delivered: 30 September 2024 – This judgment was handed down electronically by circulation to the parties'

representatives via email, uploaded to *CaseLines*, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on 30 September 2024.

JUDGMENT

DLAMINI J

Introduction

- [1] This is an interlocutory application in which the second defendant applicant sought discovery in terms of Rule 35 (1) of the Uniform Rules of Court against the plaintiff. 30 April 2024, I made an order dismissing the second defendant's application. Below are my reasons for dismissing the application.

Background facts

- [2] The facts surrounding this application are largely common cause and can be summarised as follows; -
- [3] The plaintiff had instituted action against the first defendant. The second defendant was cited as an interested party and no relief was sought against the second defendant save only for an order for costs in the event the second defendant entering an appearance to defend the action. On 7 November 2022, both defendants entered appearance to defend.
- [4] Amid this action, the second defendant's director applied for an order winding up the first defendant. On 15 February 2023, an order was granted finally winding the first defendant in terms of section 359 of the Companies Act¹ (the Act).

¹ Act 71 of 1966

- [5] Subsequent to this order, on 6 March 2023, the second defendant served a notice in terms of Rule 35(1) on the plaintiff calling discovery.
- [6] What is common cause is that on 5 May 2023, the plaintiff's claim in the action was proved at a first meeting of the first defendant creditors. On 9 June 2023, final liquidators were appointed in respect of the first defendant.
- [7] The plaintiff avers that once its claim was proved, the plaintiff did not give notice to the liquidator of any intention of the plaintiff to continue with the action, because its claim has already been proven.
- [8] Considering this development, the plaintiff avers that it was therefore not necessary for the second defendant to proceed with this application.
- [9] The second defendant is adamant and insists that it is entitled to discovery as it has claimed.

Issue for determination

- [10] The question that arises for determination is whether the second defendant is entitled to discovery in light of the Section 359 order granted against the first defendant.
- [11] The second defendant insists that it is entitled to the order on the basis that the plaintiff in their answering affidavit alleges that there is a pending application to expunge the plaintiff's proved claim and that the action will proceed in the event that the claim is expunged. Secondly, the second defendant avers that the plaintiff has not withdrawn the action and tendered payment of the second defendant's costs and as a result the action remains extant. Finally, the second defendant argues that as a matter of law, it is entitled to proceed with its defence.

Analysis

- [12] It is apposite at this stage to look at the provisions of section 359 of the Act, which provides as follows; -

“When a court has made an order for the winding-up of a company, all civil proceeding against the company shall be suspended until the appointment of a liquidator”.

“Every person who, having instituted legal proceedings against a company which were suspended by the winding-up, intends to continue the same, shall within 4 weeks after the appointment of the liquidator give the liquidator not less than 3 weeks’ notice in writing before continuing the proceedings”.

“If the notice is not given in accordance with the proceeding paragraphs, the proceedings shall be considered to be abandoned, unless the court otherwise directs”.

- [13] In my view, a businesslike and sensible interpretation of this section is that this action is now abandoned. This is because as at the hearing of this matter, the plaintiff has not given any notice to the liquidator that it intends to continue with this matter. In other words, absent the plaintiff’s notice to the liquidator, the matter is in fact and in law considered abandoned. Period.
- [14] Additionally, relief is being sought by the plaintiff against the second defendant who is cited only as a party who may have interest in the matter. Therefore, the second defendant’s arguments in this regard are simply meritless and are accordingly dismissed.

Costs

- [15] The trite principle of our law is that costs should follow the event. I have however decided to award costs against the second defendant on a punitive scale. This is because the plaintiff had on occasion drawn the provision of section 359 of the Act to the attention of the second defendant clearly indicating that the action has been abandoned and that to date of that letter, the plaintiff had not exercised its rights to pursue this matter. Despite the plaintiff's reasonable attempts of engaging the second defendant not to proceed with this unnecessary application, the second defendant went ahead with this application.
- [16] The application is nothing more than an abuse of the court process which has resulted in the plaintiff incurring unnecessary legal costs to defend this action. To show the court's displeasure, I have awarded the plaintiff's costs on a punitive scale.
- [17] The above are my reasons for the order.

ORDER

1. The order that I signed on 30 April 2024 marked X is made an order of this Court.



J DLAMINI
Judge of the High Court
Gauteng Division, Johannesburg

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