

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2024-121278

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

.....
SIGNATURE [REDACTED] **DATE** ...28/11/2024.....

In the matter between:

NEXNOVO AFRICA (PTY) LTD

APPLICANT

and

PRO-LOGISTICS FORWARDING (PTY) LTD

RESPONDENT

JUDGMENT

Manoim J

Introduction

[1] In this urgent application the applicant seeks an order interdicting the respondent from proceeding with an application for its liquidation in terms of section 345 of the Companies Act, 71 of 2008 ("the Act"), pending the final

determination of an action which the applicant has instituted against the respondent for damages.

- [2] The respondent has opposed the application both on the grounds of urgency and the merits.

Background

- [3] The applicant provides various telecommunications products. Amongst these products are lithium batteries. The respondent is a freight servicing company. Amongst its functions are to clear goods imported from overseas and to store them in its warehouse pending fulfilment of import requirements.
- [4] According to the applicant in either August 2020 or June 2022 the plaintiff entered into an oral or tacit agreement with the respondent to render it freight forwarding services in respect of a consignment of lithium batteries that the applicant was importing from China to sell to a third party. The respondent was to warehouse the goods imported by the applicant for a period of time.
- [5] In April 2023 the respondent was in possession of 3714 batteries at a warehouse in Kempton Park. These were goods that the applicant had imported on behalf of a third party and which it had contracted the respondent to clear. 792 of the batteries were stolen from the respondent's warehouse in May 2023. The applicant was thus unable to fulfil its obligations to the third party and so had to replace the stolen batteries with new ones. Each battery it alleges cost \$1000 to replace. This cost the applicant R 14 756 to replace. It also incurred shipping charges of R 414 299. Its total loss was R 15 170 606.

- [6] The applicant holds the respondent liable for this amount both in contract and in delict for failing to take the necessary care to prevent the theft from its warehouse.
- [7] However, this is only half the story. The respondent is claiming an amount of R13,503,916.00 from the applicant for its freight forwarding services which remains unpaid. The applicant does not dispute this claim. Rather it claims that its damages claim, which exceeds this amount, means that it does not owe the respondent but instead is owed by it the difference between the two amounts.
- [8] All of this might suggest that there would be two separate actions brought at the behest of each party. But it did not work out that way hence the present application.
- [9] It started in October 2023 when the respondent sent the applicant a notice in terms of section 345 of the Companies Act, 71 of 2008 (“the Act”) demanding payment of the outstanding R13,503,916.00, within 10 days of the notice. Section 345 has far reaching implications for the addressee. It provides that:

“A company shall be deemed to be unable to pay its debts if:

(1) (a) A creditor, by cession or otherwise, to whom the company is indebted in a sum not less than R100.00 then due—

(i) has served on the company, by leaving the same as its registered address, a demand requiring the company to pay the sum so due; or

(ii) ...

and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor

(b) ...; or

(c) It is proved to the satisfaction of the court that the company is unable to pay its debts.

(2) In determining for the purposes of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

[10] The respondent never proceeded with the winding up application at that time. It entered into negotiations with the applicant which were unsuccessful. What is relevant about the negotiations is there were discussions about the applicants claims and whether it was insured. The next development came in July 2024 when the respondent suggested that the dispute be referred to arbitration. The applicant accused the respondent of jumping the gun and again this came to nothing. Then on 14 October 2024, the respondent's attorneys sent a letter to the applicant to say given that no settlement could be reached between the parties they had been instructed to proceed with liquidation proceedings and they enclosed the letter they proposed to serve on the applicant in terms of section 345.

[11] During argument neither set of counsel was aware of whether the letter had in fact been served. However, after the hearing the respondent's counsel wrote to me to say that they had now been instructed that the letter had been served on 29 October 2024. I accept that counsel were not aware of this at the time the

matter was argued before me nevertheless this is relevant to the issue of urgency which I discuss next.

Urgency

- [12] The respondent argues that the applicant has delayed bringing this application since October 2023. Then it argues that even if this was excusable because negotiations were ongoing, it was clear in July 2024 when the respondent's attorney proposed arbitration, and this was rejected, that the section 345 application would be revived. Thus, it views the October 2023 and October 2024 letters, as part of a continuum. It was also suggested during the argument that the applicant had jumped the gun as the section 345 letter had not yet been served. It is now clear that this submission was mistaken. The section 345 process has been triggered and accordingly the three-week period for payment that the section contemplates, has been triggered.
- [13] Given the negotiations it would have been premature for the applicant to have come to court earlier. Nor did anything immediate happen after the July 2024 letter. The respondent has not acted with alacrity and the applicant could reasonably have considered it was not planning to go ahead yet with a winding up application. The October 2024 letter signalled that the respondent was now committed to going ahead and I consider that after that the applicant acted with sufficient urgency. There is no suggestion that the respondent has been prejudiced by the time periods as it filed later than the proposed deadline and was still able after the replying affidavits to provide two supplementary affidavits.
- [14] I consider that the matter is urgent. I now go on to consider the merits.

Merits

[15] If the applicant is correct its claim for damages exceeds the amount the respondent is claiming from it. If that is the case, there are two implications. First that the applicant has at least a bona fide defence to the claim. Second and the more significant implication is that the respondent has no basis to rely on section 345 given that it would not have a claim in excess of R 100, a jurisdictional fact for the reliance on that section.

[16] As was stated in an English case of *Mann v Goldstein*:

“When it is clearly established that there is no debt, it seems to me similarly to follow that there is no creditor, that the person claiming to be such has no locus standi and that his petition is bound to fail. Once that becomes clear, pursuit of the petition would be an abuse of process, and this court would restrain its presentation or advertisement. Indeed, I understand counsel for the second defendant to concede this proposition”.¹

[17] Of course, it could be said that the applicant has padded its possible claim so that it narrowly exceeds that of the respondent. But it has given a plausible basis for the quantum. It had to re-purchase the stolen items which required an outlay of \$1000 per battery stolen. The theft is common cause as is the number of items stolen. The parties spent months haggling over the question of whether applicants’ insurers would compensate it. There is no dispute over the quantum made out in the papers. Rather the dispute is over whether the respondent can

¹ *Mann and Another v Goldstein and Another* [1968]2 All ER 769 at 773

be held liable. To this end the respondent alleges that the applicant is bound by its terms and conditions in its standard contracts. In terms of this contract the respondent is indemnified for this type of loss. That might put an end to applicants' case. But it has simply deepened the dispute.

[18] The respondent annexed its standard contract to its papers. But ex facie that contract it requires the customer's signature. The respondent was unable to produce the one the applicant is alleged to have signed. The applicant denies having signed such a contract and hence being bound by the indemnity. The applicant therefore appears to have a bona fide defence to the respondent's claim that would exceed the respondent's claim.

[19] The applicant also contended that it was not insolvent if the respondents' claim was established and its own unsuccessful. To make out this it relies on an affidavit from its auditor. The auditor claims that he has knowledge of the day-to-day affairs of the applicant and that he could certify that as of 21 October the applicant was solvent and would be able to meet its financial obligations as they fall due. However, the respondent has validly criticised the value of this affidavit. The auditor does not put up any financial statements on which this assertion is made. Nor is it clear whether he has made his claim based on the assumption that the applicant is only able to pay its debts its claim for damages is proved. The applicant contends that its reluctance is to protect the privacy of its financial affairs. This is not a strong argument as counsel for the respondent put it the financial statements could have been tendered on a restricted basis to the counsel and the court to preserve the confidentiality.

[20] The respondent argues that if the applicant has a bona fide claim, it can use this as a basis for its opposition to the application for its winding up. There is no need therefore for it to follow the unusual route of interdicting its application particularly when its own insolvency remains a live issue between the parties.

[21] However, even if the solvency of the applicant is unknown at this stage a better case for its application is made out by its attorney. Ms Galaktiou is an experienced practitioner in insolvency law. According to her experience when a winding up application is instituted it triggers a chain of events. The applicant for the winding up has to apply for security from the Master. Once notified the Master informs the profession of liquidation practitioners so that a suitable person is identified if the order is granted. But here lies the rub. According to her the potential liquidators then contact banks, if necessary, by guesswork, to ascertain any outstanding liability that the company might have. They also, according to her, contact the creditor to get further information from it and whether it knows of any other creditor. The purpose of this activity is so the potential liquidator is well-positioned to get the creditors to nominate it for the job if the order is granted.

[22] According to Galaktiou this is a well-known practice that occurs behind the scenes. Thus, what her affidavit posits is a situation where the filing of a winding up application can threaten the solvency of even a solvent firm, by creating uncertainty amongst banks from whom the threatened firm may be getting credit.

[23] In this case the applicant is a relatively new entrant into the market. As an intermediary it is reliant on credit from banks to fund its business. It presently

has overdraft facilities with a variety of banks with a cumulated value of R 17,5 million. It is also planning to build a battery manufacturing business and an application for a facility of R 40 million to do this is pending. On the demand side it indicates what potential business it may get if the factory is built generating a profit of R 22 million in the first year and R 47 million in the second year.

[24] The applicant is also awaiting the outcome of a tender process that would generate a profit of R 20 million per year for three years. The applicant is also a joint bidder for another tender that may generate of R 180 million.

[25] Of course, all these claims are uncertain. Nevertheless, the applicant is a new entrant into the market and has a unique profile in being owned by black women only.

[26] Against this background the applicants' deponent states:

“The effect upon these facilities and prospects of the launching of liquidation proceedings would be disastrous and cannot be underestimated. Facilities would be withdrawn or frozen. The various institutions and applicant's JV partners would come to know of it and would impose severe restrictions upon the applicant, if not expel or force it to withdraw entirely. Most if not all of the enormous benefits, not only to the applicant itself but to its own employees and the prospective employees in all the projects, and the economy as whole, would be severely jeopardised.”

Has the applicant made out a case for an interim interdict?

[27] The applicant asserts that it has a prima facie right to protect itself from an abuse of process. The authority for this is the case *Gatx-Fuller (Pty) Ltd v Shepherd & Shepherd Inc* where the court reasoned as follows:

“If therefore a creditor purports to rely upon the provisions of s 345 (1) (a) (i) where there is a bona fide dispute whether the debt is then due and payable, an interdict may be granted to protect the company from the institution of liquidation proceedings based thereon. In such circumstances the creditor, who alleges that a debt is then due and payable, should establish his right by action if he wishes to rely on the provisions of s 345 (1) (a) (i).²

[28] The court then went on to state:

“In my view the applicant has made out a case for relief. A bona fide dispute exists whether the R50 000 is presently due and payable. The institution of the threatened winding-up proceedings based upon the provisions of s 345 (1) (a) (i) would be an abuse of Court proceedings, especially in view of the fact that, in the letter of 21 June 1982, the respondent anticipated a dispute of fact which has been raised in these proceedings.

² 1984 (3) SA 48 (W) at page 53

[29] It has also been held that where a party has a bona fide counter claim that exceeds another party's claim that would disentitle the latter to claim for summary judgment even if the counter claim is for damages.³

[30] Both parties relied on the judgment of the Supreme Court of Appeal in *Afgri Operations Limited* to bolster their argument.⁴

[31] The respondent relies on this passage:

"The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not."

[32] This passage taken on its own, might seem to be against the applicant. The court states later in its reasons that:

"The question of onus is indeed critically relevant in a case such as this. It bears repeating that once the respondent's indebtedness to the applicant for a winding-up order has, prima facie, been established, the onus is on it, the respondent, to show that this indebtedness is indeed disputed on bona fide and reasonable grounds. If one

³ *Weinkove v Botha* 1952 (3) SA 178 (C)

⁴ *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at paragraph 7.

accepts the test set out in the English cases upon which the respondent has relied, the respondent would have to show that its counterclaim was 'genuine'.

[33] But later, in the same decision the court explains what factors might be taken into account:

“As mentioned earlier, in this particular case the inertia of the respondent in pursuing its right of action alleged in the counterclaim generates a considerable sense of unease about the genuineness of its contestation. There are other relevant factors too: the illiquidity of the claim, the failure even to attach the summons, the failure to respond to the s 345 demand, the lack of any indication that the respondent may be solvent and the fact that the respondent does not appear to be trading. It has therefore failed to discharge the onus of demonstrating that its indebtedness to the appellant has indeed been disputed on bona fide and reasonable grounds. This court is therefore entitled to interfere with the discretion exercised by the court a quo. The correct order would have been to have placed the respondent in liquidation.”

[34] But contrary to the criticism made of the respondent by the Court in *Afgri* in this case the applicant has established the very factors absent in *Afgri*.

[35] Thus, the applicant was not dilatory in asserting its claim – it started negotiations as soon as theft was known, it has attached its particulars of claim

for the damages claim and it is trading and has demonstrated future prospects which are significant. Nor is the claim a classically illiquid claim as I pointed out earlier. At worst applying these factors to the applicant it may be criticised for not establishing that it is solvent. But it has put up evidence, at worst for it, it is just not verifiable, but this must be balanced against its future prospects in the market which are strong. Moreover, there is another factor to take into account - its counter claim if established would exceed the respondent's claim and hence result in a net credit to the applicant.

[36] On this basis the applicant even on the *Afgri* test, has established a genuine or bona fide claim. Thus, the reliance on section 345 in this context is abusive of the applicant's rights to be able to continue trading without a sword of Damocles hanging over it.

[37] The question of the irreparable damage to the applicant because of the way an application under section 345 can be interpreted in practice by the banking sector, satisfies the requirement of irreparable harm.

[38] The applicant in this situation has no other remedy. For reasons explained above opposing the liquidation application will not help avoid the irreparable harm. By then it would be too late.

[39] Finally, I turn to the balance of convenience. The respondent argues that its rights in terms of section 34 of the constitution are being curtailed by the interdict and it would have to wait until the end of the damages action to get its relief. However, nothing stops the applicant from instituting action proceedings itself. Nor if it has the evidence, from proceeding for liquidation under some other ground. The order refers specifically to the letters sent in terms of section

345 of the Act hence the relief sought is limited to the use of section 345. As the court noted in the *Gatx-Fuller* case:

“I agree with Mr Lazarus that the respondent has locus standi to seek a winding-up order against the applicant on grounds other than those created by s 345 (1) (a) (i) (if such grounds exist).”⁵

[40] The applicant has made out a case for its relief. As far as costs are concerned there is no warrant for the applicant getting attorney client costs. The law and facts of this case are unusual. Costs on a party and party basis will suffice whilst counsel is entitled to costs on Scale C given the novelty of the matter.

ORDER: -

[41] In the result the following order is made:

1. The normal manner and form of service provided for in the Rules of this Court be dispensed with, and this matter be heard as one of urgency in terms of Rule 6(12).
2. The respondent is hereby interdicted and restrained from instituting proceedings for the winding up of the applicant (including the application or obtaining for purposes thereof of a certificate under section 346(3) of the Companies Act No 61 of 1973) on the grounds reflected in the demands dated, respectively, 5 October 2023 and 14 October 2024 (copies of which are annexures “BIP2” and “BIP3” to the founding affidavit herein, or any such similar demand), addressed by the respondent's attorneys to the

⁵ *Gatx-Fuller*, supra, page 53.

applicant, pending the final determination of the dispute or disputes between the parties arising from the allegations contained in the aforesaid demands and from the applicant's particulars of claim under case number 2024/1 20216 (a copy of which is annexure "BIP6" to the founding affidavit herein); and

3. The respondent is liable for the applicant's costs on party and party scale, such costs to include the costs of counsel on Scale C.


N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 12 November 2024

Date of Reasons: 28 November 2024

Appearances:

Counsel for the Applicant: B M Slon

Instructed by: Nicqui Galaktiou Inc

Counsel for the First Respondent: N A Cassim SC

A Vorster

Instructed by: Cox Yeats Attorneys