

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-033125

Delete whichever is not applicable

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

10 March 2025

DATE

SIGNATURE

In the matter between:

LEBO TEBO TRADING AND PROJECTS CC

Applicant

and

AKANI BUILDING SOLUTIONS (PTY) LTD

First Respondent

MASTER OF THE HIGH COURT

Second Respondent

FIRST NATIONAL BANK

Third Respondent

REASONS

Mazibuko AJ

INTRODUCTION

[1] On an urgent basis, the applicant seeks to rescind, alternatively, stay an order placing it under provisional liquidation. The order was granted in its absence on 15

November 2024. The application is only opposed by the first respondent at whose behest the liquidation order was granted.

[2] The second respondent, who is the Master of the High Court, an institution with statutory responsibilities in the subject matter of this application and the third respondent, First National Bank (FNB), who is the applicant's banking institution, did not oppose the application. There is no relief sought against them.

BACKGROUND

[3] It was common cause between the parties that during October 2022, the applicant appointed the first respondent as sub-contractor to provide sanitation facilities, among others, at Mosesane Baloyi Primary School.

[4] In March 2023, the first respondent lodged an application for the winding-up of the applicant due to its alleged failure to pay the first respondent for services rendered. The application was opposed; the applicant filed its notice and answering affidavit. Though the notice of set down was properly served on the applicant's erstwhile attorneys, there was no appearance on its behalf on 15 November, when the application was heard. The court granted the provisional winding-up order against the applicant. It issued a *rule nisi* for all persons who have a legitimate interest to show cause why the court should not order the final winding-up on 29 April 2025. The order was uploaded onto Case Lines, an e-filing system that serves as an electronic court file.

[5] The parties' legal representatives attempted without success to resolve issues before the application with no success. A letter dated 2 December to FNB seeking to restrict applicant's bank account was dispatched by the first respondent. On 4 December, FNB informed the applicant of the restriction. The applicant launched this application on 6 December. It came before me, and I granted an order setting aside the provisional liquidation order. The reasons for that decision follow.

ASSERTIONS

[6] In summation, in its founding papers the applicant, through its sole member, Olebogeng Aubrey Mabe (Mr Mabe), avers that the order ought not to have been

granted as the provisions of the Companies Act were not observed. Further, the first respondent's claim was on bona fide and reasonable grounds disputed.

[7] In opposing the application, the first respondent, through its sole director, Zwelakhe Osagefo Davids, contends the urgency. He denies the allegations and seeks to dismiss the application. He raised the point that the applicant could not bring the application for rescission of the winding-up order as it was expressly precluded in terms of section 354 of the Companies Act.¹ Further, there were no grounds for the rescission or the stay of the provisional winding-up order.

ISSUE

[8] The issue for determination was whether the matter was urgent. Whether the applicant had the necessary locus standi and whether the applicant has made out a case for the setting aside or a stay of the provisional liquidation order

DISCUSSION

Urgency

[9] Concerning urgency, the argument advanced by Advocate Mokutu on behalf of the applicant was that the provisional liquidation order ought not to have been granted due to non-compliance with the provisions of sections 346(3), 346(4)(a) and (b), 346(4A)(a)(i) to (iv) and (b) and 346A(1)(a) to (c) of the Act when the provisional winding up order was granted. Such non-compliance ought to be construed as "exceptional circumstances" to hear the matter urgently and set aside the order.

[10] Further, through the liquidation order, FNB had restricted the applicant's banking account. If the order were not rescinded, 200 of its employees and 9 sub-contractors would suffer dire financial consequences as the applicant could not pay salaries and meet other contractual obligations, including sub-contractors. Further, it would suffer non-compliance with statutory deductions and payments to SARS, Compensation for Occupational Injuries and Diseases Act (COIDA).

¹ Act 61 of 1973.

[11] On behalf of the first respondent, Advocate Shongwe argued that the application is not urgent. The bank restriction benefits all applicants' creditors as none would be preferred over the other.

[12] It has been held that: '... Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief.'²

[13] When a matter is brought to court on an urgent basis, the question to be answered is whether or not the applicant will be afforded substantial redress in due course.³ In the event that the applicant does not succeed to convince the court that he will not be afforded substantial redress at a hearing in due course, the matter will be struck from the roll.⁴ The matter may also be struck from the urgent roll where the court finds that urgency was self-created.

[14] The threshold to establish the juristic fact of "absence of substantive redress" is lower than that of "irreparable harm" for the purposes of establishing an interim interdict.⁵

[15] Urgency does not relate only to some threat to life or liberty. The urgency of commercial interests may justify the invocation of the sub rule no less than any other interests.⁶ I find that urgency was created when FNB restricted the applicant's bank account at the behest of the first respondent. The restriction is a subsequent event to the order, and there are merits to not waiting for the return date of 29 April 2025. It is unclear what afforded the first respondent a right to seek the bank restriction when the applicant's estate is deemed to be in the custody and under the Master's control until a provisional liquidator has been appointed following the order.

² *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others* 2006 (4) SA 292 (SCA) at [9].

³ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

⁴ *SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA).

⁵ *Several matters on the urgent court roll* 2013 (1) SA 549 (GSJ).

⁶ *Twentieth Century Fox Film Corporation v Anthony Black Film (Pty) Ltd* 1982 (3) SA 582 (W) at 586G; *Bandle Investments (Pty) Ltd v Registrar of Deeds* 2001(2) SA 203 SE at 213(A) – (C) and (D) – (F).

[16] The applicant has set forth the circumstances that render the matter urgent, and the absence of substantial redress should the matter not be heard as a matter of urgency. As a result, the application ought to be enrolled and heard as urgent based on commercial urgency.

Locus standi

[17] Section 354(1) of the Act reads: '*The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.*'(own emphasis).

[18] In the reading of section 354 *supra*, the applicant has not ceased to exist after the provisional winding-up order. See *Ward and Another v Suit and Others*⁷ and *HR Computek (Pty) Ltd v Dr WAA Gouws*.⁸ It may oppose the application for the final liquidation. Further, it may bring a rescission application, notwithstanding the provisional winding up. Consequently, the applicant could validly bring this application, through Mr Mabe, its sole member.

Rescission

[19] Mr Shongwe, on behalf of the first respondent, argued that the order was correctly granted since the applicant has, despite the demand, and the 21-day period having lapsed, failed to make payment of R759 272.95 to the first respondent. Therefore, the order was properly granted. The first respondent placed its reliance on section 69(1)(a) and (c) of the Close Corporations Act.⁹

[20] An argument was advanced on behalf of the applicant that the court had discretion to set aside the order as it was irregularly granted. There was non-

⁷ *Ward and Another v Suit and Others* In Re: *Gurr v Zambia Airways Corporation Ltd.* (51/96) [1998] ZASCA 16; [1998] 2 All SA 479 (A) (23 March 1998).

⁸ *HR Computek v Dr WAA Gouws* 2023 (6) SA 268 (GJ) at para. 14.

⁹ Act 69 of 1984.

compliance with provisions of the Act when the application was brought, and the order was granted. Further, the indebtedness was bona fide disputed.

[21] The facts before the court reveal that no sufficient security had been provided for the prosecution of all the winding up proceedings and discharging thereof from the winding-up proceedings.¹⁰ The copy of the application was not lodged with the Master before the application was brought to court in terms of section 346(4)(a) and (b)¹¹ of the Act. The application was not furnished to the registered trade unions representing the employees of the applicant, the employees themselves, the SARS, or the applicant. There was also no service affidavit filed in terms of section 346(4A) (a), and the order was also not served on the union, employees, SARS and Lebo in terms of section 346A(1)(a) to (c). It was only uploaded onto Caselines.

[22] The provisions of the Act in this regard are peremptory. To the extent that there was no compliance with the provisions of the Act, I agree with the views expressed by Advocate Mokutu that the fact that the provisions of the Act, viz; sections 346(3), 346(4)(a) and (b), 346(4A)(a)(i) to (iv) and (b) and 346A(1)(a) to (c) were not observed when the provisional winding up order was granted ought to be construed as “exceptional circumstances” to set aside the provisional winding-up order.¹² I accept that non-compliance with the peremptory provisions of the Act is construed as exceptional circumstances that justify the setting aside of the winding up order.

¹⁰ **Section 346(3)** *Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (e) of that subsection, shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.*

¹¹ **Section 346(4)(a)** *Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the Gazette. (b) The Master or any such officer may report to the Court any facts ascertained by him which appear to him to justify the Court in postponing the hearing or dismissing the application and shall transmit a copy of that report to the applicant or his agent and to the company.*

¹² *Lyconet Austria GmbH v Weiglhofer and Others (2023/082122) [2023] ZAGPJHC 1197 (20 October 2023) at paras. 17 and 19.*

[23] Regarding the applicant's indebtedness to the first respondent, I express no view, that substantive relief is not to be determined for the issues before me.

[24] The applicant has passed the threshold prescribed in uniform rule 6(12)(b) for the mentioned reasons. The applicant has successfully made out a case for rescission of the provisional winding up order dated 15 November 2024.

[25] Concerning costs, the facts of the present matter and the interest of justice justify me to follow the general rule that the successful party should be awarded costs.

[26] Consequently, I make the following order.

Order:

[26.1] The application is hereby enrolled and heard as urgent.

[26.2] The provisional winding-up order granted on 15 November 2024 under the above case number is hereby set aside.

[26.3] The first respondent will pay the costs of this application, including that of counsel, on scale B.

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N G M MAZIBUKO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Heard on: 18 December 2024

Order granted on: 18 December 2024

Written reasons provided on: 10 March 2025

For the applicant: Adv E Mokutu SC with
Adv M Motlogelo

Instructed by: Kotze Low Swanepoel Attorneys

For the respondent: Adv C Shongwe

Instructed by: Mashiane, Moodley & Monama Inc