**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**EAST LONDON CIRCUIT LOCAL DIVISION**

**Case No. EL 539/2020**

In the matter between:

**GABOINEWE INVESTMENTS (PTY) LTD**
**(Registration No. 2012/194827/07)** **Applicant**

**and**

**D-FENCE MANUFACTURING (PTY) LTD**
**(Registration No. 2015/261609/07)** **Respondent**

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**JUDGMENT IN RESPECT OF URGENT APPLICATION TO ANTICIPATE THE RETURN DATE OF A PROVISIONAL WINDING UP**

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**HARTLE J**

[1] The respondent (as cited in the principal application for its provisional winding up which I will refer to herein as "the company") sought on an urgent basis to anticipate the extended return date of a provisional liquidation order

granted by this court in favour of the applicant on 22 July 2020 (subsequently extended by agreement to 6 April 2021) and to discharge that rule *nisi*.[1]

[2] The "respondent" (sic) tendered the costs of the "liquidation application" up until 11 February 2020 (this is the day preceding the launch of the present application), but sought an order directing the applicant (who initiated the liquidation proceedings) to pay the costs in the event that it opposed "the application to discharge the rule nisi". It goes without saying that it did so, both in respect of urgency and the purported grounds relied upon for the expedited discharge of the rule *nisi*.

[3] The basis for the discharge is that although at the time of the launch of the application for provisional winding up the company was indebted to the applicant arising from a judgment debt in an amount of R1 695 214.56 - which it has conceded provided a basis at that stage in terms of the provisions of section 345 (1)(a) of the Companies Act[2] for the applicant to have applied for its provisional winding up, it has since paid the balance of the capital sum owing to it in full and given an undertaking to pay whatever interest and costs remaining still are lawfully due to it.[3] It has also offered an undertaking to pay the costs of the winding up application and of the liquidation with a view to staving off a final liquidation order.

[1] It appears counterintuitive to ask for an order anticipating the return date when the respondent is by its own admission not able to raise all the monies still due to the applicant. One would have expected the respondent to ask for a stay of the proceedings. If the rule is discharged all of its problems will be eradicated according to it but ironically it is conceded that the company remains commercially insolvent.

[2] No 61 of 1973.

[3] The capital sum was paid in full on 22 January 2021.

[4] The capital payment was made by the respondent[4] following certain (in my view private) negotiations between the parties best demonstrated by the consent order granted by this court on 10 December 2020[5] to the following effect:

> "1.The matter is postponed to 23 March 2021 and the rule nisi of 22 July 2020 (is) extended.
>
> 2.The respondent shall pay to the applicant an initial sum of R1 500 000.00 on or before Tuesday 15 December 2020.
>
> 3.In the event that the respondent fails to comply with the provisions of paragraph 2 above, the applicant will be entitled to expedite and enroll this matter on 12 January 2021 for an order that the rule nisi be made final.
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> 4.In the event that the respondent complies with the order in paragraph 3 above but does not make payment of the full balance outstanding of the applicant's full claim (which includes the capital, interest thereon, costs of this application, the costs of the previous application under case number EL516/2018 as taxed, and the costs of the liquidation) or make arrangements to do so to the applicant's satisfaction, on or before 19 March 2021, the applicant is entitled to move for the rule nisi be made final on 23 March 2021.
>
> 5.It is recorded that the respondent has undertaken to withdraw its opposition in the event that it fails to make payment as set out in paragraphs 2 or 4 hereof.
>
> 6.The costs occasioned by the postponement and extension of the rule nisi shall be paid by the respondent on an opposed basis."

[5] Neither paragraph 2 nor 4 of the order was complied with in time which resulted in the expedited proceedings envisaged in paragraph 3 thereof been pursued by the applicant which the parties had agreed would be the applicant's recourse in the event of the failure of the payment of the "initial sum". That

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[4] I will assume for present purposes (in the absence of any detailed information in this respect) that payment was made *on behalf of* the company because the obvious effect of the provisional winding up order was to divest the directors of their functions in such capacity and to vest them instead in the joint liquidators (Garth Voigt and Irene Ponnen) who were appointed by the Master of this court on 15 December 2020. The provisional liquidators would also have taken charge of the assets of the company.

[5] By this date, the provisional liquidators had not yet been appointed although the rule *nisi* was issued some five months before.

application was however postponed to 26 January 2020 to afford the respondent a further opportunity to raise the balance of the capital. The capital payment was made in the interim, on 22 January 2021, but it is common cause that the "full balance outstanding" contemplated in paragraph 4 of the order of 10 December 2020 has yet to be paid. The winding up application was postponed once again on 26 January to 6 April 2021 (no doubt in the hope that payment of the interest and taxed costs at least arising from the applicant's claim under case No EL 516/2018 would follow suit)[6] with the rule *nisi* issued on 22 July 2020 extended accordingly.

[6] In further settlement discussions (the door was ostensibly left open in paragraph 4 of the order for the respondent to make arrangements to pay the full outstanding balance to the applicant's satisfaction) the respondent through its attorneys undertook (in a letter addressed to the applicant's attorneys dated 10 February 2021) to settle the balance of its indebtedness to the applicant comprising interest on the judgment debt (albeit there is a dispute between the parties concerning the calculation of what is due in this respect); the costs of the application giving rise to the judgment debt (which were taxed after the commencement of the winding up, but which are now due and payable); the costs of the winding up application; and the costs of the liquidation. When exactly these payments would be made was not stated. The respondent's attorneys revealed in this respect however that it "is in the process of receiving a payment sufficient to settle its indebtedness to (the applicant)." They explained why according to them these funds could not be accessed: "…(A)s advised, the payment cannot be made without a SARS clearance. SARS will not give a clearance whilst the company is under provisional liquidation."

[6] At that stage neither the costs of the winding up application or of the liquidation would have been due and payable.

[7] The respondent's attorneys hoped in exchange for the undertaking given to extract the applicant's agreement to withdraw the principal application and for the rule nisi to be discharged. Evidently it expects that this will facilitate the company being placed in the promised funds to *inter alia* make payment of the monies due to the applicant. Its attorneys urged upon the applicant's attorneys to revert with regard to the settlement proposal "as a matter of extreme urgency".

[8] Not surprisingly in my view, given the history of several postponements of the principal application at the behest of the respondent in order to settle the applicant's claim and the fact that the company remains commercially insolvent despite the payment of the capital to the applicant, its attorneys advised in response to the urgent demand on the morning of 12 February 2021 that the rule *nisi* would not be discharged unless all outstanding monies are paid. An alternative was however proposed, namely that "all monies" be deposited to the applicant's attorneys' trust account "as proof of the existence of these funds, and then the condition of the release of the funds will be the discharge of the rule *nisi*."

[9] When this did not go the respondent's way, the present application was immediately launched (in the name of the company ostensibly) and filed together with a certificate of urgency in which the submission was made on its behalf that it was left with no alternative but to approach the court on an urgent basis for an order to discharge the provisional liquidation order because of the applicant's purportedly unreasonable refusal to accept its proposal and or its suggestion of an alternative that is supposedly impossible to implement. The reasons set out in the certificate underlying the urgency is that the respondent had reached an impasse because of the applicant's refusal to accede to its request which meant that the company was doomed to final liquidation which was not in the interests of anyone including the applicant. For so long as the encumbrance posed by the

continued existence of the rule *nisi* remained, so the respondent's argument went, the facility of funding offered to the company would in all likelihood be withdrawn and the opportunity to resolve the matter to the satisfaction of all the parties and to "save" the company would be lost forever.

[10] The applicant was placed on terms in the notice of motion to indicate its intention to oppose the application by 15 February 2021 with a further injunction to file its answering papers on or before close of business on 17 February 2021. It reluctantly managed to meet these targets. The matter was enrolled for hearing before me on the unopposed motion court roll on 23 February 2021.[7] By the time the matter was heard the respondent had filed a replying affidavit and the application had burgeoned to in excess of a hundred papers not counting the two volumes comprising the principal application.

[11] The basis for the claimed urgency was expressed as follows in the application itself:

> "I furthermore submit that this is a matter of extreme urgency in that the respondent has now reached an impasse relating to its confirmed existence. Failure to have the rule nisi discharged almost certainly dooms the Respondent to final liquidation, which will not be in the interests of anybody, including the Applicant itself.
>
> A delay in the granting of the relief sought, and the resultant failure to uplift the obstruction to SARS granting a tax clearance, will in all probability cause the aforesaid

[7] The registrar placed the matter on the roll pursuant to the provisions of Rule 12 (a) - (c) which provide as follows in respect of what is required for an application of such a nature:

**"12. Urgent Applications**

(*a*) In all applications brought other than in the ordinary course in terms of the Rules of Court, the legal practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the Judge and in which the reasons for urgency are fully set out.

(*b*) The certificate of urgency shall set out the grounds for urgency with sufficient particularity for the question of urgency to be determined solely therefrom without perusing the application papers.

(*c*) In matters contemplated in Rule 12 (*a*) above, the registrar shall issue the papers and shall place the matter on the roll of cases as may be provided for in the notice of motion commencing the application."

> payee (Sic) to withdraw the proposed payment, and the loss of the opportunity to resolve this matter to the satisfaction of all parties concerned."

[12] Although the "proposed payment" is at the heart of all the fuss and the pressure that company feels itself under, it does not take the court very much into its confidence in this respect:

> "Despite being hampered in its ability to trade and do business, the Respondent has continued in its efforts to source funds to enable it to pay to the Applicant the balance of its indebtedness, and also to enable it to continue with its business operations.
> The Respondent has now been able to source payment, which covers its entire indebtedness to the Applicant. I am however not at liberty to disclose the source of these payments, due to confidentiality reasons. I was however informed on Wednesday 10 February 2021, by the prospective payee (Sic) of the funds to the Respondent that the payment was not able to proceed, as the payee was unable to obtain a tax clearance from SARS for the Respondent."

[13] Whilst the payment of the capital debt after the fact (even despite the commercial insolvency of the company being ongoing), the support of a financier in the wings ready to dispense lending, coupled with the views of one of the provisional liquidators that the proposed final winding up order may not necessarily conduce to the interests of creditors may well pose a basis for a discharge of the rule *nisi* in the exercise of the court's discretion on the settled return date instead of making the order final, the primary issue to be determined is whether the respondent was justified in seeking to expedite the return date in all the circumstances or, put differently, whether it has made out a case for the claimed pressing urgency.

[14] The provisions of Uniform Rule 6(12)(b) in peremptory language requires an applicant issuing out an urgent application to set forth explicitly the

circumstances which he avers renders the matter urgent and the reasons why he claims that he cannot be afforded substantial redress at the hearing in due course.

[15] In this instance not only has the respondent stinted on the details of the benefactor who is expected to rescue the company from its probable demise, the nature of the funding or the terms of such lending, but it has also failed to suggest why it, or the benefactor for that matter, cannot in the meantime put up security even conditionally as was proposed by the applicant's attorneys instead of insisting on a tax clearance certificate before it advances the monies. The respondent has further not said what constraints the benefactor has placed on it to provide the tax clearance certificate if this is an absolute requirement for the proposed financial assistance. Neither is any mention made of a date by when the proposed offer would fall away in the absence of a certificate being provided or why the urgent application necessarily had to be heard on 23 February 2021.

[16] Whereas the respondent had originally agreed to an extension of the rule *nisi* until 6 April 2021, what real emergency interposed itself that required the exercise of the court's discretion to be moved up in haste and evidently without the input of all the interested parties? Although the present application enjoys the support of one of the provisional liquidators, what about Ms. Ponnen, the other joint liquidator? The respondent concedes that the Industrial Development Corporation is a major creditor, but its views have ostensibly also not been canvassed in respect of the relief sought on an urgent basis (in this application) unless it itself is the undisclosed benefactor and thus knows of the present developments and their likely impact down the line. Other creditors may also be prejudiced by the directors of the company vindicating their own personal agendas or parochial interests. In this instance, although it appears to be fairly commonplace for negotiations between debtor and creditor to ensue after a provisional winding up, these settlement negotiations should not in my view

impinge on the formal process of winding up or be allowed to subvert the process. Winding up and liquidation proceedings take on a very public objective.

[17] The grant of a provisional order in winding up proceedings and thereafter having to confirm it after proper notice to all concerned by design allows an opportunity for properly founded objections to the winding up to be raised.[8] It is not only the parties cited as applicant and respondent respectively who have an interest in the outcome of the winding up application.

[18] It remains for the respondent to avail itself of the mechanisms of the facilities available to it to oppose the winding up proceedings on the extended return date. That option is not lost to it, but to impose its own self-created urgency in the midst of the formal process to force its hand in a private settlement arrangement with its creditor (for that very personal reason) can hardly constitute a pressing urgency of the kind that might usually entitle an interested party to anticipate the return date of a provisional winding up order.

[19] In my view the applicant abused the process of court by issuing out the application on an urgent basis, warranting its outright dismissal.

[20] Ms. Watt who appeared for the respondent submitted that the appropriate relief if the respondent did not succeed was to strike the matter from the roll, but I do not agree. The application itself was in my view misconceived.

[21] On the issue of costs, whereas it is generally accepted that a company's directors have what might be described as "residual powers" to act on the company's behalf in causing it to oppose the confirmation of the rule in a

[8] Ex Parte Strip Mining: In re Natal Coal Exploration Company Ltd 1999 (1) SA 1086 (SCA) at 1090 H – I.

provisional winding up, or to appeal against a winding up order, the nature of the present application appears to concern the vindication of what I have referred to above as the parochial interests of the chief executive officer, Mr. Luzuko Mbidlana, to force the applicant's hand in respect of the settlement negotiations commenced before the appointment of the provisional liquidators. I do not believe that Mr Mbidlana could, as contended for by him in the supporting affidavit, have competently launched the application on behalf of the company or have been duly authorised to do so given the legal effect of a provisional winding up which is to vest the functions of the company in the liquidators after their appointment. The issue of his authority was however not pertinently argued before me. Mr. Ayayee who appeared for the applicant magnanimously suggested that Mr. Mbidlana's *locus standi* to bring the urgent application stemmed from his entitlement to seek a setting aside of the provisional winding up order on the basis provided for in terms of section 354 of the (old) Companies Act, supposedly by reason of the alleged significant changed circumstances (being the payment of the capital at least) constituting proof towards the end of satisfying the court (in terms of that provision) that the winding up order fell to be set aside by reason of subsequent events. It is plain from a reading of the respondent's papers however that Mr. Mbidlana never suggested that the application resorted under these provisions neither did he qualify his *locus standi* on such a basis. It would I believe therefore be prejudicial for the respondent company to be responsible for the costs of the failed application. It is my *prima facie* view that these costs should be borne personally by Mr. Mbidlana who instituted the application but since this issue was not pertinently dealt with in argument, I propose to allow the parties an opportunity to make further representations in this respect on or before the return date.

[22] I should add my observation that my criticism above that these proceedings should not have been undermined by private debtor- creditor negotiations applies to the applicant as well.

[23] In the result, I issue the following order:

1. The urgent application to anticipate the extended return date with a view to an early discharge of the provisional order of liquidation is dismissed.
2. The issue of costs is to stand over for determination on the return date.
3. The chief executive officer of the respondent, Mr. Luzuko Mbidlana, is invited to show cause by the return date why he should not personally be held liable for the costs of the failed application.
4. The liquidators representing the interests of the respondent as well as the applicant are similarly invited to make representations regarding who should be liable for the costs of the failed application in either possible scenario, whether a discharge of the rule *nisi* on the extended return date or confirmation of the rule.
5. A copy of this judgment and order is to be served on both provisional liquidators appointed by the Master of this Court who should by the return date indicate their opinion whether is desirable for the rule *nisi* to be confirmed or discharged in all the circumstances.

**B HARTLE**
**JUDGE OF THE HIGH COURT**

DATE OF HEARING: 23 February 2021
DATE OF JUDGMENT: 12 March 2021*

*Judgment delivered electronically by email to the parties on this date.

*APPEARANCES:*

*For the applicant: Mr. A E Ayayee instructed by Drake Flemmer Orsmond (EL) Inc., East London (ref. Mr. Pringle)*
*For the respondents: Ms. K Watt instructed by Gordon McCune Attorneys, King William's Town (ref. Mr. McCune)*