REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED ✓

24/2/2012

DATE

SIGNATURE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. : 26368/11

ANDRÉ NICOLAAS NEPGEN Applicant

and

AUTOACHIVA (PTY) LIMITED Respondent

JUDGMENT

ANDRE GAUTSCHI AJ

[1]. This is the extended return day of a provisional winding-up order, which was originally granted on 15 September 2011. The return day of 10 November 2011 was extended to enable two other creditors to intervene by launching their own separate substantive applications to wind-up the respondent. Both creditors (Super Auto Glass CC and Franz Serithi N.O.) have launched the intended applications, but neither application is ripe for hearing at present.

[2]. The applicant seeks a final order of winding-up, alternatively that the rule should be further extended to enable all three matters to be consolidated and heard at the same time.

[3]. The applicant, through the Nepgen Family trust, holds a 25.5% shareholding in Logusta Supply Chain Management (Pty) Ltd ("LSCM") (presently in liquidation), which in turn holds 80% of the shares in the respondent. Until 12 April 2010, the applicant was a director of the respondent.

[4]. The applicant sought the winding-up of the respondent in his capacity as a creditor. His allegations in this regard in the founding affidavit were very vague. He said :

> "5.8 Myself, together with one Johngeorge Jacobus Landskron ("Landskron"), had signed surety for the debts of the Respondent, and to date hereof, both he and I have paid off and continue to pay off certain suppliers, in respect of amounts owed by the Respondent to such suppliers. ... he [Landskron], like I, has paid various debts of the Respondent, pursuant to having signed surety for the debts of the Respondent. ...
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> ...
>
> 6.1 The Respondent is current indebted to both the said Landskron and myself, in the sum of (approximately) R50,000.00 ... pursuant to monies paid by myself to various suppliers of the Respondent, in respect of goods sold and delivered (including services that may have been rendered from time to time) by such suppliers to the Respondent, in and during 2010 and 2011.
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> 6.2.1 The Respondent is also indebted to Unitrans Automotor (*sic*) (Pty) Ltd ("Unitrans"), in respect of goods sold and delivered by Unitrans to the Respondent, in an amount of R189,498.83. In support hereof I annex a copy of the Summons issued by Unitrans against the Respondent (and myself) on 27 October 2010 marked Annexure "B".
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> 6.2.2 That amount has been reduced by approximately R50,000.00, which both I and Landskron have paid to Unitrans in reduction of this debt. This is the basis of the amount that the Respondent owes to us, as mentioned in clause 6.1 above."

[5]. These allegations were challenged in the answering affidavit. In reply, the applicant denied that it was necessary to attach proof of payment, but nevertheless attached four documents reflecting EFT payments, as "proof of such payment". The documents attached showed four payments of R10 000 each, three to "A C Nothnagel Trust" and one to "Pat Hinde Boksburg".

[6]. Apart from the fact that the payments reflected in the annexures amount to only R40 000, and not R50 000, they do not reflect, in terms, payments to Unitrans. There is however a link in respect of one payment of R10 000. It appears in an annexure to the founding affidavit, which is a copy of the summons issued by Unitrans against the respondent as first defendant and the applicant as second defendant. In paragraph 1 of the particulars of claim, it is alleged that Unitrans Automotive (Pty) Ltd trades *inter alia* as Pat Hinde Boksburg. There is no indication in those papers that there is any link between the AC Nothnagel Trust and Unitrans. The allegations in the founding papers are further unsatisfactory since the amount of R50 000 was alleged to have been paid by the applicant "to various suppliers of the Respondent", whereas later it is said that that amount was paid to Unitrans (i.e. a single supplier) by both Landskron and the applicant. The applicant may have been somewhat fortunate to have been granted the provisional winding-up order in the light of the unsatisfactory allegations, but I shall accept for purposes of this judgment that the applicant had proved that he, as a surety, had paid R10 000 to a creditor in respect of which the respondent was the principal debtor.

[7]. After the granting of the provisional order, there was an exchange of letters between the parties' respective attorneys in which the respondent's attorneys had a frustrating time trying to obtain clarity on the precise amount paid by the applicant as a surety on behalf of the respondent. Eventually, on 3 November 2011, the respondent's attorney caused a payment of R40 000 to be made to the applicant's attorney, and wrote this in the accompanying letter of that date :

> "Attached is proof of deposit to your account of the amount of R40 000.00 which amount is paid in discharge of the amount claimed by your clients Nepgen and Landskron from our client.
>
> We are instructed to record that such payment is made on the basis of the allegations made by your clients, which allegations have not been proven, and is intended to discharge the alleged claims of both of your clients Nepgen and Landskron.
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> This payment is done as a result of your clients failing to stipulate what amounts are allegedly owed to each of them and accordingly is made under protest and with the reservation of our client's right to pursue your clients in respect of any amounts due by your clients to our client.
>
> In the circumstances your client Nepgen is invited to withdraw his application for the liquidation of Autoachiva (Pty) Limited (in provisional liquidation) and consent to the discharge of the provisional winding-up order granted.
>
> In the event that your client refuses to do so our client will proceed with an application to have the provisional order discharged on the return day, and will seek a special order for costs against your client."

[8]. Although the affidavits refer thereafter to payment into the applicant's attorneys' trust account, neither the letter nor the proof of payment reflect that. On the face of it, it was a payment made under protest to the applicant's attorney, with no condition that it should not be paid over to the applicant and/or Landskron. It was retained by the applicant (albeit in his attorney's trust account) and not returned to the payor.

[9]. Mr Hollander for the respondent submitted that this payment put an end to the applicant's *locus standi* as a creditor, if he ever had such *locus standi.* Mr Berlowitz for the applicant submitted that the payment did not constitute a proper or unconditional payment of the applicant's claim and that the applicant accordingly remained a creditor.

[10]. The fact that a payment is made "under protest" does not necessarily mean that it is payment under pressure coupled with the right to recover it if it is later found not to have been due[1]. It is not a term of art; the words have no distinct meaning by themselves, and their meaning will depend on the circumstances[2]. The various functions which the words "under protest" fulfil were spelt out as follows by Nienaber AJA in Commissioner for Inland Revenue v First National Industrial Bank Ltd[3] :

> "(i) The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress. (ii) It can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the *solvens* conceded the validity or the legality of the debt, or his liability to pay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment. The effect is not to create a new cause of action but to preserve and protect an existing one – namely, that the payment was an *indebitum solutum* which is recoverable in law, e.g. by means of the *condictio indebitii* or in terms of s 32(1)(a) of the Stamp Duties Act, 1968. (iii) It could serve as the basis for an agreement between the parties on what should happen if the contested issue is tested and resolved in favour of the *solvens.* Such an agreement would indeed create a new and independent cause of action."

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1 Port Elizabeth Municipality v Uitenhage Municipality 1971 (1) SA 724 (A) at 741D-742A

2 In re Massey (1845) 50 ER 180 at 181

3 1990 (3) SA 641 (A) at 649G-J. See also Venter N.O. v Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council 1998 (3) SA 1076 (W) at 1079F-I

[11]. The distinction between Nienaber AJA's categories (ii) and (iii) is important. In the case of (iii) a new agreement is created. For that to occur, the payment must be made with that intention, and must be accepted as such, for absent an acceptance, there can be no new agreement. It is not our law that every payment under protest implies a contingent promise to repay, which, if accepted, would give rise to an agreement to repay. A debtor cannot unilaterally foist an agreement to repay on his creditor[4], and requires the creditor's co-operation to create such an agreement. Category (ii) is different. Where the payment is made *animo solvendi* (with the intention of discharging the debt), but with the express purpose of protecting the payor against some undesirable or unacceptable fate (such as the payment of penalties[5] or the inability to transfer a property[6] or, as in the present case, a winding-up) then the purpose would be defeated, leading to an *impasse*, if the payee were at liberty to reject a payment because it was accompanied by the words "under protest"[7]. In this regard a payment under protest is different from a payment in full and final settlement; the payee is entitled to reject the latter with impunity, but not a payment made in order to discharge a debt in order to avoid, for instance, a winding-up but fully intending to recover it if it is found not to be due[8]. Such a payment is therefore a unilateral act, made as of right and not requiring

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4 CIR v First National Industrial Bank *supra* at 651D-G

5 CIR v First National Industrial Bank *supra* 651I

6 Venter v Eastern Metropolitan Substructure *supra* at 1080I-J

7 CIR v First National Industrial Bank *supra* at 651I. Such an impasse occurred in YST Properties CC v Ethekwini Municipality and Others 2010 (2) SA 98 (D&CLD)

8 CIR v First National Industrial Bank *supra* 651D-I

acceptance. It is a payment which falls into Nienaber AJA's category (ii), where there is no attempt to conclude an agreement with the payee.

[12]. A payment under protest which falls into category (ii) is therefore not a conditional payment, but serves to discharge the debt and place the payee in exactly the same position as any other person who receives money in discharge of a debt. The only difference is that the payor may establish in other proceedings that the amount paid was not actually owing and that it should be repaid[9]

[13]. I should comment also on the case of Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd[10] where the following was said[11] :

> "[17]. I am further of the view that the tender of payment of the admitted indebtedness, made by False Bay Optical CC, did not, as held by the court *a quo*, amount to a conditional tender. If one has regard to the correspondence referred to above, it is clear that the payment tendered was not subject to any reduction in future. The tender was made under protest and without admitting liability, whilst reserving the right to dispute the remainder of the alleged indebtedness. Respondent also did not accept the tender subject to any condition, but on account of the indebtedness of first to fourth appellants.
>
> [18]. The adding of the words 'under protest' to a tender of payment may fulfil one or more of several functions, depending on the circumstances prevailing at the time when such tender is made. See Commissioner for Inland Revenue v First National Industrial Bank Ltd 1990 (3) SA 641 (A) at 649G-J. However, as emphasised by Nienaber AJA (as he then was) at 651E, by merely adding the words 'under protest' to a payment, a debtor cannot unilaterally foist an agreement to repay on the creditor; from the creditor's point of view, what is accepted may simply be payment of a valid debt without an undertaking to make restitution. In the instant case, respondent expressly accepted the tender of payment on account of the indebtedness of first to fourth appellants, in circumstances where neither of the parties attached a condition that such payment would be subject to a reduction in future. I accordingly conclude that this was an unconditional payment made on

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9 YST Properties *supra* at 110I-J para [45]

10 2008 (2) SA 627 (C)

11 At 632F-633A paras [17] and [18] per Fourie J (Davis and Goliath JJ concurring)

> behalf of first to fourth appellants, which discharged their admitted indebtedness to the respondent ..."

Whilst the conclusion is undoubtedly correct, I with great respect do not agree with the reasoning. The first to fourth appellants in that matter were not satisfied with the correctness of the amounts claimed by the respondent, did their own calculations on what they alleged to be incomplete accounting information, and tendered payment of the amounts thus calculated. The payments were "tendered under protest in respect of each of the entities referred to and without admitting that any of the entities referred to are indebted in the amounts tendered ...". On an application of the principles set out above, the payment under protest signified that the appellants did not admit their liability and reserved their right to recover the amounts paid (or part thereof) if it later emerged that such amounts (or part thereof) were not due. They fell into category (ii), and not category (iii), of Nienaber AJA's three categories in CIR v First National Industrial Bank. The appellants did not seek or require of the respondent an agreement to repay (they did not need that), but they had nevertheless suitably reserved their rights to claw back the amounts in the future. To that extent the payments were subject to a possible reduction in future, not because of any agreement but because of the unilateral reservation of rights. They nevertheless remained unconditional payments, effective to discharge those parts of the debts claimed by the respondent.

[14]. On the above analysis, it is irrelevant whether the applicant accepted the payment or not. The applicant tried to have it both ways. He did not pay the

money back or refuse to accept it, but rather caused it to be paid into his attorney's trust account. That, to my mind, is not a rejection of the payment or return of the money, but in substance amounts to an acceptance of the payment. However, as I have said, it matters not whether it was accepted or not. The debt was discharged.

[15]. It follows that the *locus standi* established by the applicant as a creditor at the provisional stage has been defeated, and the applicant is no longer a creditor on the basis established (albeit unsatisfactorily) at the provisional stage.

[16]. The applicant, no doubt appreciating his vulnerability, alleged for the first time in his response to the respondent's opposing affidavit filed after the provisional order, that he is also a contingent creditor based on other suretyships executed by him in respect of which the respondent is the principal debtor, one debt being approximately R10 million. This is a new cause of action after the provisional order had been granted, and which did not form the basis on which the provisional order had been granted. The question is whether this is permissible.

[17]. The general rule in applications is that the applicant must make out its case in its founding affidavit, and is not permitted to introduce "new matter" in the replying affidavit. This is not an absolute rule, and the court has a discretion

which it will exercise in exceptional or extraordinary circumstances[12]. The rule is even more strict when a party seeks to jettison the cause of action in its founding affidavit and to rely upon a new cause of action in the replying affidavit, but even there the court still retains a discretion[13]. The reason for retaining the discretion is because rules of procedure are made to facilitate litigation and they are therefore always subject to the overriding discretion of the court[14]. One may say that rules are made for the court and not the court for the rules[15].

[18]. I have considered whether the position may be different on the return day, or extended return day, of a provisional winding-up order, but I have come to the conclusion that it is not. Whatever the nature of the matter, the means of proof are a matter of procedure, in respect of which the court has an overriding discretion, and which must ultimately be governed by considerations such as justice, fairness, convenience and, most importantly, prejudice. There is also precedent for permitting, in insolvency proceedings, new matter, and causes of action to be perfected, in reply[16]. Accordingly, notwithstanding my discomfort

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12 Shepherd v Mitchell Cotts Seafreight SA (Pty) Ltd 1984 (3) SA 202 (T) at 205E-G; Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368H-369A; Union Finance Holdings Ltd v IS Mirk Office Machines II (Pty) Ltd 2001 (4) SA 842 (W) at 847D-F

13 Triomf Kunsmis (Edms) Bpk v AE&CI Bpk en Andere 1984 (2) SA 261 (W) at 269C-270B, especially at 270B

14 Registrar of Insurance v Johannesburg Insurance Co Ltd (1) 1962 (4) SA 546 (W) at 574A-B

15 With apologies to Innes CJ in Robinson v Randfontein Estate GM Co Ltd 1925 AD 173 at 198

16 See for instance National Bank of SA Ltd v Silver, Weiss & Co 1921 WLD 60; Ringer v TW Beckett & Co Ltd 1927 TPD 714 at 718; Markus v Universale Produkte (Edms) Bpk 1962 (3) SA 242 (W); Berg v Gossyn (1) 1965 (3) SA 702 (O); Kleynhans v Van der Westhuizen N.O. 1970 (1) SA 565 (O)

with permitting an applicant to make out one cause of action at the provisional order stage, and then to make out an entirely different cause of action for the hearing on the return day, it still amounts in my view to a discretionary matter, where the threshold (exceptional or extraordinary circumstances) is very high.

[19]. The applicant did not explain why the new cause of action was not contained in the founding affidavit, or indeed even in the replying affidavit which served before the court at the provisional stage. It is clear that the applicant knew of the further cause of action at the stage of deposing to the founding affidavit. It seems rather cavalier to allege that one is a creditor for approximately R50 000 and not to mention at the same time that one is a contingent creditor for approximately R10 million. There being no proper, or indeed any explanation, the applicant has not come close to establishing exceptional circumstances. The fact that his original cause of action was defeated by the payment under protest is not in itself, in my view, an exceptional or extraordinary circumstance; indeed, it was a perfectly foreseeable event.

[20]. Mr Hollander has in any event persuaded me that the applicant has failed to establish that he is a creditor on the further causes of action pleaded. The applicant alleges that he is a contingent creditor of the respondent because he is a surety in favour of creditors of the respondent. It is clear that a surety in respect of the debts of a company is a contingent creditor[17]. The applicant

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[17] Wilde and Another v Wadolf Investments (Pty) Ltd and Others 2005 (1) SA 354 (W) at 357G-359G

relies on two deeds of suretyship, namely one in favour of Unitrans, and the other in favour of Logusta Auto Parts.

[21]. It is common cause on the papers that respondent's indebtedness to Unitrans has been settled in full, and the applicant therefore cannot be a contingent creditor of the respondent in respect of Unitrans.

[22]. In respect of Logusta Auto Parts, the applicant alleged in his affidavit in response to the respondent's opposing affidavit delivered after the provisional order, that the respondent is indebted to Logusta Auto Parts in an amount of approximately R10 million. No detail is given as to when or how the debt originated, and there is no documentary support therefor. There is also no allegation in the papers before me that Logusta Auto Parts is claiming that amount from the respondent. The applicant relies, for a different purpose, on what appears to be the respondent's unaudited balance sheet as at 31 March 2010, which reflects Logusta Auto Parts as a debtor (not a creditor) of the respondent in the amount of R3 548 052.32. This allegation was made in the respondent's affidavit opposing the final order. The applicant simply denied it as "incorrect", and in relation to this allegation said :

> "This "dispute" needs to be resolved with a liquidator and I can attest to the fact that Logusta Auto Parts is a creditor of the Respondent in the amount claimed by it."

[23]. I was invited to have regard to the application papers filed by Seriti N.O. as liquidator of Logusta Auto Parts for the winding-up of the respondent. I doubt that I can do so, but the allegations therein in any event do not assist. Mr Seriti

alleges that the respondent is currently indebted to Logusta Auto Parts in the amount of R10 481 372.34 "in respect of loans advanced for and on behalf of Logusta to the Respondent." He then annexes the balance sheet to which I have just referred, says that certain journal entries would have to be effected to reflect the correct balances with respect to both loan accounts and creditors, but that "[t]he debt is evidenced by the balance sheet attached hereto as annexure FS4." That is the balance sheet which reflects Logusta as a debtor of the respondent for the aforesaid amount of R3 548 052.32. It does not establish the indebtedness; on the contrary it negates it.

[24]. Accordingly, even if I would permit the applicant to make out a new case at the final winding-up stage, it has failed to do so.

[25]. The applicant has therefore lost his *locus standi* as a creditor, and has failed to establish his *locus standi* as a contingent creditor.

[26]. This finding makes it unnecessary for me to consider whether inability to pay debts has been established. I shall deal with it nevertheless. In this regard Mr Berlowitz submitted that, since it is clear and admitted that the respondent is surviving on advances of money from friendly creditors, it is unable to pay its debts. I do not agree with that submission. The mere fact that a company pays its debts using borrowed money does not render it unable to pay its debts. See in this regard Helderberg Laboratories[18] :

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18 *Supra* at para [16]

> "[16] I respectfully disagree with the finding of the court *a quo*, that the fact that the payment of the admitted indebtedness was made by a third party on behalf of first to fourth appellants, justifies the inference that the said appellants were unable to pay their debts. In my view, the ability of a company or close corporation to pay its debts may be demonstrated by itself making payment or by its ability to obtain the necessary finance from an exterior source. In the latter instance the creditworthiness of the debtor would normally enable it to raise the necessary funds. As submitted by Mr *Brusser*, the emphasis in determining the ability of a company or close corporation to pay its debts should be on the fact of payment and not on the source of the payment."

Inability to pay debts has therefore not been established.

[27]. In addition, the respondent has the support of an impressive array of creditors which do not support the application for a winding-up.

[28]. Mr Berlowitz submitted strenuously that, even if I would not grant a final order of winding-up, I should extend the provisional order further in order to allow this application to be heard together with the applications of the two intervening creditors. However, it seems to me that if there is no entitlement to a final winding-up order, and the provisional order is to be discharged, it would not be competent for me to grant a further extension. Even if I had that power, I would not be inclined to exercise it in the applicant's favour. The return day of the provisional winding-up order was extended on 10 November 2011 to enable these creditors to intervene. Had they done so expeditiously, their applications would undoubtedly have been ripe for hearing when this application was served before me. Instead, they launched their applications in January 2012. They have only themselves to blame if there is a *lacuna* between the discharge of the existing provisional winding-up order and any winding-up order they may obtain.

[29]. I would therefore discharge the provisional order for all the reasons stated above.

[30]. Mr Berlowitz further submitted that, even if I would come to the conclusion that the provisional order cannot stand, the applicant was nevertheless paid the amount due to him, which justified the application and warrants an order for costs in his favour up to the date when his claim was paid. Although the applicant was, as I have shown, perhaps fortunate to have obtained the provisional winding-up order, it was only after the payment under protest was made that he lost his *locus standi*. He would therefore be entitled, in my view, to his costs up to the date of the payment under protest, which was made on 3 November 2011. Mr Berlowitz asked for costs even beyond that, on the basis that the respondent had not tendered any costs when making the payment. It is however apparent from the events after 3 November 2011 that the applicant did not persist in the application only because his costs had not been tendered. Indeed, if that had been the case, I would have expected him to have abandoned the provisional winding-up order and to have withdrawn his application, and simply to have persisted with an order of costs. He did not do so, and clearly was not motivated purely by being aggrieved by a failure to tender costs. Under those circumstances, the respondent is in my view entitled to the costs after 3 November 2011.

[31]. I accordingly make the following order :

"1. The provisional winding-up order is discharged.

2. The respondent is directed to pay the costs of the application up to and including 3 November 2011.

3. The applicant is directed to pay the costs of the application after 3 November 2011.

4. The applications of the intervening creditors, namely the cases of Super Auto Glass CC v Autoachiva (Pty) Ltd (case number 223/2012) and Seriti N.O. v Autoachiva (Pty) Ltd (case number 224/2012) are postponed *sine die*."

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	8 February 2012
Date of judgment	:	24 February 2012
For applicant	:	Adv J K Berlowitz
	:	(instructed by Orelowitz Inc)
For respondent	:	Adv L Hollander
		(instructed by Ramsay Webber Inc)