REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2015/29277

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

9.2.2017
DATE

SIGNATURE

In the matter between:

HYPROP INVESTMENTS LIMITED **FIRST APPLICANT**

ABLAND (PTY) LTD **SECOND APPLICANT**

and

NSC CARRIERS AND FORWARDING CC **RESPONDENT**

AND

CASE NO: 201529278

HYPROP INVESTMENTS LIMITED **FIRST APPLCANT**

ABLAND (PTY) LTD **SECOND APPLICANT**

and

NORBERTO JOSE DOS SANTOS COSTA **RESPONDENT**

JUDGMENT

LAMONT, J:

[1] There are two matters before me Case No: 15/29277 a matter between the two applicants and the respondent (a close corporation) in which a winding-up is sought and Case No: 15/29278 a matter between the two applicants and the respondent (an individual) in which a final sequestration order is sought.

[2] The matters come before me on the return day of the winding-up and the return day of the provisional sequestration order.

[3] The close corporation and the individual are the judgment debtors jointly and severally of the applicants pursuant to judgments having been given against them for amounts exceeding R1,5 million once the interest is taken into account.

[4] The close corporation and the individual defended the action brought against them by the applicant. The defences raised by the close corporation and individual do not include the defences currently raised by those persons in the form of a delictual claim against the applicants.

[5] The debts the respondents were ordered to pay to the applicants in terms of the judgment have been due owing and payable some since 2010 and some since 2011. The close corporation and individual have accordingly for some five to six years been indebted by way of court order to the applicants and have to date not paid.

[6] The applicant has established in each of the winding-up and sequestration matters that it is a judgment creditor of the particular respondent in an appropriate amount as required by each of the different statutes.

[7] There is no dispute that the close corporation is unable to pay its debts and that the individual is factually insolvent.

[8] Insofar as the insolvency application is concerned there is similarly no dispute that there is a benefit to creditors.

[9] The defences raised by the individual and close corporation concern whether or not I should exercise a discretion in their favour. They submitted that:-

9.1 there is a process of execution in place insofar as certain assets of the close corporation are concerned as same were attached.

9.2 various assets belonging to the close corporation have gone missing (have been stolen) in circumstances which the respondent states are clearly worthy of investigation at the least and at best demonstrates that by the applicants are responsible for loss of the goods;

9.3 the close corporation and others (including the individual) have instituted an action against the applicant in delict for payment of damages on the basis of allegedly fraudulent misrepresentations made by the applicants to the close corporation which resulted damages being suffered.

[10] During the process of execution certain goods which the close corporation claims were present on the leased premises became missing. The close corporation claims that as the applicants were the holders of the key and accordingly controlled access that they are responsible for the loss and should bring the value of the missing goods into account. The process of execution is a process controlled by the sheriff. He is the entity who must take steps to care for the goods. The applicants in any event were not the owners of the missing goods and would have only a very difficult claim in the event they were sued which they have not been. Whether or not the close corporation has a claim against the applicants is a matter which can as well be decided by the liquidator. The fact is that such claim is illiquid and based on inference which the close corporation seeks me to draw.

[11] The right to payment of the value of the missing goods has in my view no impact upon the applicant's claim. There is at best a speculative contingent claim which is of unknown value if it exists at all.

[12] The execution process has not resulted in any payment by the sheriff. No proceeds have been forthcoming.

[13] The close corporation claims that it is due an amount by way of damages arising out of fraudulent misrepresentations made by the applicants which induced the contract which the close corporation concluded with the applicant. This claim seeks to avoid the contract and in as far as the surety (the individual) is concerned the suretyship. The contract in question is the contract which established the relationship between the applicants, close corporation and individual. A court has given judgment in favour of the applicants pursuant to the claims it brought against the respondents based on this contract.

[14] The claim currently raised by the respondents was not raised as a defence at the time the close corporation and individual opposed the action brought by the applicants for payment. It appears very much to be an afterthought. The claim is founded in delict and has no impact upon the contractual relationship between the parties. That relationship has been determined by court order. The court directed payment by the close corporation and individual to the applicants. This claim at best for the close corporation could only result in my view in a money amount becoming

payable to the close corporation. It appears to me that the claim is difficult. It is dependent upon evidence of fraud explanations as to why the defence was not raised originally, explanations as to why the close corporation remained in occupation of the premises for some 2,5 years prior to ejectment by the applicants if the facts alleged are true. It is also dependent upon a set of highly contracted and wide ranging facts. It appears to me that such speculative and highly contentious claims could as well be considered by the liquidator and dealt with in due course if he believes then to be of value.

[15] All the illiquid claims made by the close corporation are claims which relate to a mechanism by which payment can be made. They are not defences to the debt. The debt is determined by the court order and remains payable immediately.

[16] There is no question of a stay of payment as would be the case when an illiquid claim is raised during the course of proceedings. The purpose of allowing the illiquid claim to be determined during the course of proceedings is to enable a valuation to take place of the net amount which the court order should reflect one way or the other. These circumstances do not arise in the present case. In the present case the respondents raise a contingent right to payment based on an illiquid claim. The applicants have not been paid for some years.

[17] It was submitted that I should exercise discretion in favour of the close corporation and individual. See *Ter Beek v United Resources CC and Another*

1997 (3) SA 315 (C). In that matter Van Reenen J analysed the authorities and on the basis of the position prior to a judgment being granted proposed that there should be a right to extend it to a respondent to defend the winding-up proceedings on the basis of an illiquid counterclaim which affects the existence of the debt.

[18] The illiquid counterclaim in the present matter has no impact on the obligation to meet the judgment debt. It does not constitute payment. The rights of the creditor to immediate payment in terms of a court order should not readily be impaired. There is no prejudice to the close corporation or the individual in the event of the illiquid counterclaim not being determined prior to the winding-up and sequestration as it is open to the relevant liquidator and trustee to prosecute such claims. There is no suggestion that the applicants would be unable to meet any claim made against them. In these circumstances the only issue is whether or not it is proper that the applicants' rights as creditors in winding-up proceedings be allowed to be enforced.

[19] Winding-up proceedings are not proceedings directed to towards the enforcement of the rights of a creditor who brings the application alone. They are proceedings brought to effect a proper distribution of the assets and liabilities of the respondent to the benefit of all creditors. The applicant gains no particular advantage by reason of having brought the application for winding-up. He stands in the same position as any other creditor. See *Collier v Priest* 1931 AD 290 at 299. All that is required of a creditor in the winding-up proceedings is that he establish that he has a sufficient interest in the winding-

up by having a claim which exceeds the minimum amount set out in the relevant statute. The interests of creditors are best met by insolvency proceedings distributing the assets where the triggers set by the respective act are pulled (unable to pay debts, factual insolvency and benefit to creditors). In the present circumstances there is in my view no reason to apply my discretion in favour of the close corporation and individual.

[20] This being so the defences raised by the close corporation and the individual relating to illiquid claims and missing goods as well as the process of execution not being completed of the sheriff do in my view not constitute appropriate defences.

[21] In respect of the sequestration application an additional defence was raised. The defence is that unbeknown to the judge granting the provisional sequestration order there was at the time of its grant an existing provisional sequestration order granted against the individual in the provincial division. Subsequently this provisional order was discharged. The question is whether it having been discharged it is open to this court to grant either a provisional or final sequestration order or whether this court is obliged to dismiss the sequestration application.

[22] The individual relies on the authority of *Visser v Coetzer; GTR Investments Limited and Others v Coetzer* 1982 (4) SA 805 (W).

[23] In that matter a provisional sequestration order of the respondent's estate was granted and subsequently a further provisional sequestration of the respondent's estate was granted by another court. The court was hearing the subsequently granted provisional sequestration order. By the time of the hearing the original provisional sequestration order had been discharged. Similarly to the present matter the judge who granted the later provisional sequestration order was not informed of the provisional sequestration order already in existence at that time. There is no doubt that had the judge been informed of the earlier order that he would not have granted the later order. Myburgh J had before him at the time on the return day of the provisional sequestration order, that application and also an application for a fresh sequestration order. The respondent conceded that he was unable to defend the fresh application for a sequestration order. Myburgh J discharged the provisional order and immediately granted a provisional order in the fresh application.

[24] A provisional sequestration order is an interlocutory order but it has the same effect as a final sequestration order by reason of the definition section contained within the Insolvency Act 24 of 1936. The question to be answered is whether or not an order of provisional sequestration made at the time of an existing provisional sequestration order is a nullity which terminates the proceedings. The approach of Myburgh J to this problem was that if the provisional order impeding the new provisional order was discharged the applicant should have applied in those proceedings for a fresh provisional sequestration order and not have persisted seeking information of the abortive

order (at page 812). Myburgh J did not consider the provisions of S 149(2) of the Insolvency Act which provides "The court may rescind or vary any order made by it under the provision of this Act." The provisional sequestration order is before me on its return date and I am entitled, to set aside the provisional sequestration order granted in error and in its place issue a fresh rule and/or make such other procedural interlocutory orders as appear to me to be appropriate. The impediment is no more and it appears to me that there is no reason why a fresh rule in the same proceedings should not be issued. On this basis I do not need to decide whether or not I should issue a final sequestration order nor decide what the precise character of the interlocutory order granted at the time of the existing provisional sequestration was.

[25] I am accordingly of the view that the applicants in the winding-up application are entitled to a final winding-up order and that the applicants in the sequestration application are entitled to orders settings aside the provisional order and order of provisional sequestration order.

[26] I make the following orders:-

CASE NO: 2015/29277

1.

HYPROP INVESTMENTS LIMITED FIRST APPLICANT

ABLAND (PTY) LTD SECOND APPLICANT

and

NSC CARRIERS AND FORWARDING CC RESPONDENT

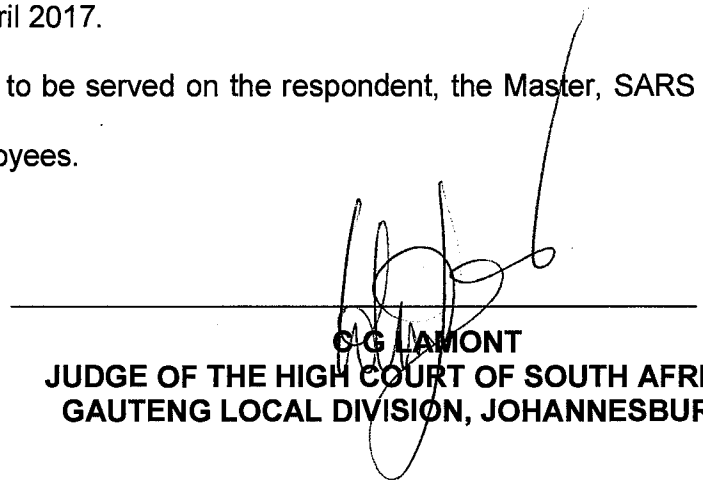
The respondent is finally wound up.

2

CASE NO: 201529278

HYPROP INVESTMENTS LIMITED	FIRST APPLCANT
ABLAND (PTY) LTD	SECOND APPLICANT
and	
NORBERTO JOSE DOS SANTOS COSTA	RESPONDENT

1. The rule is discharged.
2. The respondent's estate is provisionally sequestrated with return date 19 April 2017.
3. The rule is to be served on the respondent, the Master, SARS and upon employees.



C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT/S:	**ADV. M. NOWITZ**
APPLICANT/S ATTORNEYS:	**NOWITZ ATTORNEYS**
COUNSEL FOR THE RESPONDENT	**ADV. G. KARINOS SC**
RESPONDENT'S ATTORNEYS:	**E. DA. C. LUIZ ATTORNEYS**
DATE OF HEARING:	**6 FEBRUARY 2017**
DATE OF JUDGMENT:	**10 FEBRUARY2017**