



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

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

SIGNATURE

DATE: **23 JULY 2021**

Case No: 6950 / 2020

In the matter between:

NZWALO INVESTMENTS (PTY) LTD

Applicant

and

INFOGUARDIAN (PTY) LTD

Respondent

JUDGMENT

WILSON AJ:

- 1 The applicant (“Nzwalo”) seeks the winding-up of the respondent (“Infoguardian”) on the basis that Infoguardian is unable to pay its debts within the meaning of section 345 (1) (c) of the Companies Act 61 of 1973 (“the Act”).

2 The application was originally opposed. Answering affidavits and heads of argument were filed for both parties. Counsel for both parties submitted a joint practice note after the matter was placed on my roll.

3 However, Infoguardian's legal representatives then withdrew, and Infoguardian was left unrepresented. Nzwalo's attorneys contacted Infoguardian shortly before the hearing to confirm that the matter would proceed, but no-one ultimately appeared for Infoguardian at the hearing.

4 The matter accordingly proceeded unopposed, but Mr. Hollander, who appeared for Nzwalo, nonetheless carefully presented the case, and dealt fairly with the issues raised in Infoguardian's answering affidavit.

5 On a conspectus of the papers, I am not satisfied that section 364A of the Act has been complied with, and I will postpone the application to permit that to happen. I briefly set out my reasons for reaching this conclusion below.

6 The matter originally came before Francis-Subbiah AJ, on 30 June 2020. Francis-Subbiah AJ granted a provisional winding-up order. All those with a legitimate interest in the winding-up of Infoguardian were called upon to advance reasons why the winding-up order should not be made final on 30 September 2020. On 30 September 2020, the return day of the provisional order was extended to 30 November 2020. It seems that on that date, the papers had not been made available to the presiding Judge seized with the matter, and the matter was not entertained. The return date was not extended further.

7 Section 346A (1) (b) of the Act reads as follows –

(1) A copy of a winding-up order must be served on-

(a)

(b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;

(c) . . .

8 At first blush, this provision contains an anomaly, in that the opening phrase of section refers to the service of the order, but the body of section 346A (1) (b) refers to the application. Whatever the cause of the anomaly, the least the section requires is that both the application papers and any provisional winding-up order must be served.

9 Mr. Hollander accepted that the provisional order had not been served in this manner (although the application papers had). Francis-Subbiah AJ's order had been served on Infoguardian's erstwhile attorney, who had agreed to send the order on to Infoguardian's employees.

10 This is plainly unsatisfactory. It is inconsistent with the Act, and it fails to have regard to the fact that, in these proceedings, Infoguardian's employees have a fundamentally different set of interests to Infoguardian itself. In those circumstances, service on Infoguardian's attorney, whatever his undertakings, cannot be proper service, whether in terms of the Act, or otherwise.

11 Mr. Hollander very fairly conceded this. However, he argued that it may be appropriate to consider the provisional order as having the effect of a *rule nisi*,

which lapsed when it was not extended on 30 November 2020. A *rule nisi* has a fixed period of validity. Once that period of validity has expired, the *rule* lapses (see *Fisher v Fisher* 1965 (4) SA 644 (W)). If the *rule nisi* has lapsed, there is nothing to be re-served on Infoguardian's employees, and the final winding-up application can be disposed of without further delay.

12 The problem in this case is that I do not think that Francis-Subbiah AJ's order can be read as having the effect of a *rule nisi*. In the first place, the order does not describe itself as a *rule nisi*. Secondly, there is nothing in the Act that suggests that provisional winding-up orders are *rules nisi* by nature. This is to be contrasted with section 11 of the Insolvency Act 24 of 1937, which clearly states that provisional sequestration orders are *rules nisi*. Thirdly, there is nothing in the language of Francis-Subbiah AJ's order itself that suggests that the provisional order will lapse in the event that the return day is not extended.

13 The concept of a *rule nisi* is to be distinguished from that of a provisional or interim order. A *rule nisi* is an order to show cause on a return day why a particular order should not be made. On its own, a *rule nisi* has no legal effect other than to put those to whom it is addressed on notice that specified relief will be sought on the return day.

14 An interim or provisional order is different. The order has specified legal consequences beyond mere notice of the prospect of final relief being granted.

15 Often a *rule nisi* and an interim interdict are issued in the same order at the same time, but that does not mean they are the same thing. When a *rule nisi* is coupled with an interim interdict, the order sought to be confirmed on the

return day will have interim effect until the return day. If the return day passes then both the *rule* and the interdict expire.

16 But, unless a Court specifically directs that it should take the form of a *rule nisi*, it seems to me that a provisional winding-up order has a life of its own, underpinned by the Act, with legal consequences that do not depend on a court's willingness to extend them to a specified return day. The provisional order subsists until the final disposition, one way or the other, of the winding-up application.

17 The return day in Francis-Subbiah AJ's order was simply a date on which an application for the final winding-up order could have been considered in light of the submissions made by any person who responded to the provisional order. It was not intended to circumscribe the effect of the provisional order itself.

18 There is nothing that suggests that the provisional order would itself cease to have effect if the return day came and went without further action on the part of the court. It seems to me that such a consequence would be inherently undesirable, because it would mean that a company could be placed in and out of provisional winding-up simply because, as happened in this case, a clerical error meant that the return day could not be extended.

19 Had the Act intended provisional winding-up orders to have such a tenuous existence, it would surely have provided specifically for provisional winding-up orders to take the form of *rules nisi*, as section 11 of the Insolvency Act 24 of 1937 does.

20 It follows that Francis-Subbiah AJ's order remains in effect, but the provision of the Act requiring its service on the respondent's employees has not been complied with. The only relief to be granted in those circumstances is to postpone the matter to permit Nzwalo to comply with section 346A (1) (b) of the Act.

21 In the circumstances, I make the following order –

21.1 The application is postponed to the opposed motion roll at 10am on 4 October 2021.

21.2 The applicant is directed to serve a copy this judgment and the order of Francis-Subbiah AJ on the respondent's employees in the manner provided for in 346A (1) (b) of the Companies Act 61 of 1973.

21.3 All persons with a legitimate interest are called upon to put forward their reasons why this court should not order the final winding-up of the respondent on 4 October 2021 at 10am, or as soon thereafter as counsel may be heard.

21.4 Costs are reserved.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 23 July 2021.

HEARD ON: 19 July 2021

DECIDED ON: 23 July 2021

For the Applicant:

L Hollander

Instructed by Gjersoe Inc

For the Respondent:

No appearance