**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

27/5/2016.

**CASE NUMBER 62067/13**

In the matter between:

**ETANA INSURANCE COMPANY LIMITED** PLAINTIFF

DELETE WHICHEVER IS NOT APPLICABLE

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

27/05/2016
DATE SIGNATURE

and

| | |
|---|---|
| **KEREN KULA CONSTRUCTION (PTY) LTD** | 1ST DEFENDANT |
| **KK MECHANICAL (PTY LTD** | 2ND DEFENDANT |
| **KK HOLDINGS (PTY) LTD** | 3RD DEFENDANT |
| **NTOMBIZANDILE KEREN HOFMAN** | 4TH DEFENDANT |
| **MICHAEL JOHN HOFMAN** | 5TH DEFENDANT |
| **CHARLES ADRIAN HOFMAN** | 6TH DEFENDANT |

**JUDGMENT**

THULARE AJ

[1] The plaintiff instituted legal proceedings against the 1st defendant (defendant), which proceedings were suspended by a winding-up of the defendant. Plaintiff intends to continue with the proceedings against the defendant for purposes of enforcing its claims against the defendant, which claims arose before the commencement of, and the

proceedings in respect thereof was instituted, before the winding-up. The defendant, represented by the liquidator, argues that the plaintiff did not within four weeks after the appointment of the liquidator, give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings. As a result, the liquidator argues that the proceedings are to be considered abandoned.

[2] On 20 May 2016, on the date of hearing of this argument, judgment by consent was granted against 3rd to 6th defendant, and judgment by default was granted against the 2nd defendant. The third party was present.

[3] Summons commencing plaintiff's action was served on the defendant on 8 October 2013. Notice of intention to defend was delivered on 22 October 2013 and a plea was filed on 22 November 2013. The defendant's third party notice was delivered on 22 November 2013. A notice of set down for trial on 21 May 2015 was delivered on 21 Febuary 2014. On 25 February 2015 the defendant's then attorneys of record, Fasken Martineau Inc. (Fasken) of Sandton and Smit Jones & Pratt of Pretoria, filed a notice of withdrawal as attorneys of record of the defendant. On 17 March 2015 they addressed a letter to the attorneys of record of the plaintiff, wherein they enclosed a letter received from Van Greunen & Associates Inc. (Van Greunen) enclosing a letter from the Liquidator, instructing Fasken Martnineau Inc. to withdraw as attorneys of record on behalf of the defendant. In that letter, Fasken Martineau Inc also enquired whether the plaintiff had given notice in terms of section 359(2)(a) of the 1973 Companies Act that it intends continuing to pursue the action against the defendant, and if so, they ask for a copy thereof. This, it would appear, was informed by an earlier letter from Van Greunen, dated 20 February 2015, wherein Van Greunen had asked Fasken to provide copies of all procedural notices.

[4] Upon receipt of the letter of withdrawal and its attachments from Fasken, the plaintiff's attorneys wrote a letter to Van Greunen, dated 10 April 2015, wherein they ask whether

it was the intention of the liquidators to proceed with the litigation between the parties at all. In a letter dated 13 April 2015, Van Greunen responded, confirming that the defendant has been placed under final liquidation, and annexed a copy of the court order. Paragraph 2 and 3 of that letter reads as follows:

> *"2. We confirm that Keren Kula Construction has been placed under final liquidation. A copy of the order is annexed hereto for ease of reference.*
> *3. In view hereof, we would be pleased if you could advise whether you intend to proceed with the litigation and in this regard do we refer you to the provisions of the Insolvency Act."*

[5] The Plaintiff's attorneys responded in a letter dated 15 April 2015, the relevant parts of which read as follows:

> *"We acknowledge receipt of your letter dated 13 April 2015, received by us on 15 April 2015, the contents of which we have noted.*
>
> *Could we kindly request that you provide us with copies of the certificates of appointment of the liquidators. At this point in time we wish to advise that the matter has been set down for 21 May 2015 and that it is our intention to proceed with the trial. Bear in mind that there are five other defendants who are not affected by the liquidation. This letter thus also serves as notice of our client's intention to proceed with the matter on the aforesaid date."*

[6] On 4 May 2015 the plaintiff's attorneys re-iterated a previous enquiry as to whether Van Greunen would enter an appearance on behalf of the defendant, as the matter was set down for 21 May 2015. Van Greunen was specifically requested to advise if the liquidator was not going to participate in the trial. On 11 May Van Greunen filed their

notice of appointment as attorneys of record. A pre-trial conference was held. The plaintiff was represented by its attorneys of record and the defendant by Van Greunen.

[7] It has to be mentioned that these activities were engaged in by the provisional liquidator as the final liquidator had not yet been appointed. This very point was raised as a first point of concern by the defendant at the pre-trial conference and the defendant expressed the view that in light of the liquidation and the lack of appointment of a final liquidator, the matter is not ripe to proceed to trial on 21 May 2015. The defendant went as far as to request the plaintiff to give an undertaking that it would not proceed against the first defendant at trial, an undertaking the plaintiff was not willing to give at that stage. The plaintiff consequently served a notice of removal of the matter from the trial roll.

[8] On 10 June 2015 the provisional liquidator's appointment was made final, however, plaintiff was not aware of this. On 1 July 2015 the plaintiff's attorneys addressed a letter to Van Greunen wherein they sought to be advised whether a final liquidator had been appointed, and whether the liquidator, albeit interim or final, intended to continue the defence of plaintiff's claim and whether plaintiff's claim will be admitted. Plaintiff served on Van Greunen notice of application for trial date on 6 July 2015. On 13 July 2015 plaintiff delivered a notice of set down for the trial to be heard on 20 May 2016.

[9] On 25 September 2015 the plaintiff's attorneys adrresed a letter to Van Greunen. The contents whereof reads as follows:

> *"We refer to the above mentioned matter as well as the trial date set for 20 May 2016.*
>
> *We confirm that all the necessary pleadings have been finalized and we kindly request that you advise whether the first meeting of creditors has been convened by*

*the interim liquidator and whether or not the interim liquidator has been finally appointed.*

*We confirm that neither our offices nor our client has received any indication or communication confirming the final appointment of the liquidator.*

*In respect of the trial we kindly request that you advise whether or not our client's claim is admitted and whether the liquidator will continue the defence of the claim against Keren Kula Construction (Pty) Ltd (in liquidation).*

*We confirm that all our client's rights in the above mentioned regards remains fully reserved.*

*We await your urgent response."*

[10] In reply hereto, Van Greunen addressed a letter to plaintiff's attorneys dated 11 December 2015 the relevant contents of which read as follows:

*"1. The abovementioned matter as well as corresponden dated the 28th of September 2015 refers.*
*2. We apologise for the delay in our response.*
*3. We confirm that we are consulting with our client early in January 2016.*
*4. At this point in time we confirm that the defence is persisted with.*
*5. We attach the final certificate of appointment.*
*6. We confirm that the creditors meetings have already been convened."*

[11] On 9 February 2016 Van Greunen addressed a letter to the plaintiff's attorneys with the relevant parts in the following terms:

*"1. We refer to the abovementioned matter.*

*2. We have ascertained from our client that the second creditors meeting in the insolvent estate of Keren Kula Construction (Pty) Ltd was convened and finalized on/or about the 17th December 2015.*

*3. The consequence of the above, is that the legal proceedings currently pending against Keren Kula Construction (Pty) Ltd is deemed to have lapsed due to the Plaintiff's non- compliance with Section 75(1) of the Insolvency Act 24 of 1936 in that it failed to deliver the proper required notice.*

*4. As a result of the above, it is therefore our opinion that the Trial, currently set down for the 20th May 2016, cannot proceed against the 1st Defendant, and we invite you to provide us with your views in this regard.*

*5. Kindly confirm receipt of this correspondence.*

*6. We trust you find the above in order and await your response herein."*

[12] It has to be mentioned that Van Greunen in early 2016 sought to deny knowledge and receipt of the letter dated 15 April addressed to them. Counsel for the defendant, rightly so in my view, did not pursue that denial. The documents that plaintiff presented clearly show that the correspondence was not only sent to Van Greunen, but to their client as well, and the fax transmission result reports on both indicate that the documents were transmitted. Generally, the communication between the parties has been via fax or e-mail.

[13] The issue is whether the plaintiff gave notice as required by the law.

[14] Section 359 (2) of the Companies Act, 1973 (Act No. 61 of 1973) provides as follows:

> *"359. Legal proceedings suspended and attachments void. –*
> *(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.*
> *(b) If notice is not given the proceedings shall be considered to be abandoned unless the Court otherwise directs."*

[15] The parties are agreed that the word "liquidator" in the section refers to the final liquidator. (see *Strydom v MGN Constr. Ltd: In re Haljen (In Liq)* 1983 (1) SA 799 (D & CLD) at 807 C-G). The provisions of the section are enacted exclusively for the benefit of the liquidator of the company in liquidation. (see *Millman NO and Steub NO v Koetter* 1993 (2) SA 749 CPD at 758 B-C. The provisions provides a defence in the hands of the liquidator, which defence is not absolute because the court may direct that the proceedings are not considered to have been abandoned. *(see Barlows Tractor Co (Pty) Ltd v Townsend* 1996 (2) SA 869 AD at 884F-G).

[16] In *Umbogintwini Land & Investment Co v Barclays National Bank Ltd* 1987 (4) SA 894 AD at 910 F – 911A Viljoen JA said:

> *"In my view s 359(2)(a) is capable of one construction only. The obligation to give notice within a period of four weeks after the appointment of a liquidator is imposed upon the creditor who intends to institute legal proceedings forthwith.*

*The creditor who intends to enforce his claim by proving it at a meeting of creditors of that estate is not hit by the provision at all. ... The provision was designed, in my view, to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interests of the general body of creditors, the nature and validity of the claim or contemplated claim and how to deal with it – whether, for instance, to dispute or settle or acknowledge it. Cf Randfontein Extension Ltd v South Randfontein Mines Ltd and Others 1936 WLD 1 at 3. In the case of claims sought to be proved in the estate, the liquidator does not require such an opportunity. In the case of claims sought to be proved in the estate, the liquidator does not require such an opportunity. If the claim is rejected by the officer presiding in terms of section 44(3) of the Insolvency Act, the liquidator would be fully apprised and if disallowed by the Master in terms of s 45(3) he would be fully aware of the nature of the claim concerned because the Master acts on his report. Consequently, in neither case would he require three weeks' time within which to consider the claim."*

[17] The object of the section is to prevent the liquidator from being inundated with proceedings which he has had no time to consider. Dealing with the interpretation of the provisions of section 118 of the Companies Act, 46 of 1926, Greenberg J in *Randfontein Extension Ltd v South Randfontein Mines Ltd & Others,* 1936 WLD 1 at page 3 said the following:

*"The object of the provisions read together with sec. 118(1), is, I think, clear. It was intended that a person who is appointed liquidator of a company should not be embarrassed by actions before he has had an opportunity of considering the matter, and, a fortiori, costs should not be incurred by the institution of proceedings between the time when the winding up order has been made and the liquidator has been appointed."*

Vieyra J puts it this way in *Van der Harst and Another v Wells, NO* 1964 (4) SA 362 (WLD) at 363 F – G:

> *"It seems to me that the intention of the Legislature in requiring timeous notice to be given as also the provision for the three weeks' notice before commencing or continuing proceedings is for the benefit of the liquidator. I can see no other purpose to be served nor did counsel for the respondent suggest that there was any other purpose. This was the view taken by Miller, J., in Gilbert Hamer & Co. Ltd v Icedrome Promotions Ltd.,* 1962 (3) SA 372 (D) at p. 373D-H, with which view I respectfully agree."

[18] In Truter v Itzikowitz, NO 1962 (1) SA 572 TPD at 574 D-575A Cillie J said about a provisional liquidator:

> *"The appointment of a provisional liquidator, which is permitted by the Act, is a provisional appointment. It is for the liquidator once he is finally appointed to investigate the position and to institute action if he thinks that is desirable or to defend any action which he thinks ought to be defended. Because the property of a company in terms of the Act vests in the Master on the granting of the provisional order of liquidation, it is a matter of expediency that a provisional liquidator is appointed to carry out the duties which the Master confers upon him. In this case it is to look after the property of the company and to carry on or to discontinue the business or any part thereof as far as that may be necessary for the beneficial winding up of the company. I do not think it was intended that he should be the person who must investigate whether an action instituted against the company should be defended or should not be defended; more particularly, as he is not placed in the same favourable position in which a liquidator is who has all the facts at his disposal. So, for example, it appears from Rule 25 of the Winding-up of Companies, that*

*"the first meetings of creditors and contributories shall be held as soon as may be after the final winding up order."*

*It would appear that a provisional liquidator normally has no power to call such meetings.*

*I respectfully agree with the principles in the two cases to which I have referred, namely that the burden of deciding on facts such as these, should not be placed on the shoulders of the provisional liquidator. It is possible of course that he may later be appointed final liquidator in which case he will have more facts at his disposal and be in a better position to investigate what the merits of any action instituted against the Company are."*

[19] Discussing circumstances where notice was not given, Boshoff J in *Baskin v Levey and Others, NNO* 1967 (3) SA 121 (WLD) at 123 H- 124 A, said:

*"If no such notice has been given to a liquidator, proceedings are to be considered abandoned to bring about finality so that the liquidator may be in a position to report to the creditors of his company as accurately as possible on the state of and the claims against the company. It would, therefore, seem that a liquidator would, generally speaking, be entitled to oppose an application for the purging of a default if he can show that he had been prejudiced by the default or that the excuse advanced by the applicant is not bona fide and reasonable or, if it is necessary, to insist on terms on which an applicant should be allowed either to continue or to commence proceedings."*

[20] Civil proceedings against a company in respect of which the court has made an order for its winding-up, are suspended until the appointment of a liquidator. The appointment of a liquidator lifts up the suspension. The person in the position of the plaintiff, who, having instituted legal proceedings against a company which were suspended by a

winding up, and who intends to continue the legal proceedings, once the suspension is lifted, must give notice to the liquidator.

[21] The notice referred to, in my view, is an advance notification of the intention to continue with the proceedings. The notice is intended to allow the liquidator to discover and/or to determine the existence or presence of the fact that legal proceedings have been instituted and are intended to be proceeded with. It is an official written document containing information about the legal proceedings and a warning about something that is going to happen, which is the announcement of the intended process. It follows that, in my view, a notice of an application for a trial date cannot be a notice as envisaged in section 359 (2) (a) of the Companies Act, 1973. Notice of an application for a trial date is a step in furtherance of the action. It is a step in continuation of the action. Consequently, in my view, the plaintiff did not, within four weeks after the appointment of the liquidator, give the liquidator not less than three weeks' notice, in writing, before continuing the proceedings.

[22] If notice has not been given, as I found, the next question I have to consider is whether I should direct otherwise, (section 359 (2) (b), as an overall impression made on me by the facts set out by the parties before me. This question is made difficult by the recognition that the plaintiff chose not to bring an application for condonation of its failure to timeously give notice, but instead opted to argue for my indulgence on the date of trial, in that I should find that they have not abandoned the proceedings.

[23] In my view, there has to be good cause for me to grant the indulgence sought by the plaintiff. This means looking at all those factors which bear on the fairness of granting the relief sought by the plaintiff as between the parties and all the factors that may affect the proper administration of justice, amongst other factors, the *bona fides* of the plaintiff, the sufficiency of the explanation given as to why timeous proper notice was not given and the contribution of other persons including the defendant, to the failure

of the plaintiff to give notice as well as any evidence from which abandonment may be inferred.

[24] In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) Schreiner JA said at 352H-353A –

> *"The meaning of "good cause" which was considered by this Court in Cairns's Executors v Gaarn,* 1912 A.D. 181, *should not lightly be made subject to further definition. For to do so may conveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."*

The passage relates to a different legislative context, to wit, Rule 46 (5) of the Magistrates' Court Rules. In my view, it offers guidance to the approach to the question before me in terms of section 359 (2) (b) of the Companies Act, 1973. In my view, evidence of abandonment is a relevant consideration for the determination of good cause in these circumstances.

[25] In this matter, it is attorneys attached to the provisional liquidator who addressed a letter to the plaintiff, on 10 April 2015 wherein they enquired whether the plaintiff intends to proceed with the litigation. On 15 April 2015 the plaintiff gave them notice of intention to proceed with the matter. The provisional liquidator, on behalf of the defendant, after the notice, delivered a notice of appointment of its attorneys of record and participated in a pre-trial conference. This happened after the provisional liquidator

had caused the attorneys who were acting on behalf of the respondent before liquidation, to withdraw as attorneys of record.

[26] The same person who was appointed the provisional liquidator was appointed the final liquidator on 10 June 2015. Within four week of their appointment as final liquidators, the plaintiff served on them the notice of application for a trial date. On 11 December 2015, the final liquidator confirmed to the plaintiff that they are persisting with the same defence on the matter.

[27] The provisional liquidator took effective control of the issues between the plaintiff and the defendant. They were in charge of the defendant's case. By conduct, the provisional liquidator sought to lift the suspension, which is a benefit due to them, and signaled an entrance and in fact entered an appearance in the proceedings, through appointment of attorneys of record in the matter and participating in the proceedings. In my view, it cannot be said that the liquidators would not have been in a position to report to anyone as accurately as possible on the state of the claim of the plaintiff against the company.

[28] It is too artificial, in my view, in the circumstances, to hold that the permanent appointment wiped out all the knowledge the liquidator had, which was necessary for them to engage with the matter. In my view, for them to enter an appearance must of necessity suggest that they had investigated the matter, considered it responsibly and arrived at a position where they found it desirable to defend the action of the plaintiff against them. It is just, under the circumstances, to conclude that at the time of their appointment as final liquidators, from their conduct, they had all the facts in relation to this matter at their disposal. They were well informed of the plaintiff's legal proceedings and had taken a position on it.

[29] The defendant knew about the plaintiff's intention to proceed with this litigation, and after the permanent appointment of the final liquidator, the plaintiff, within 4 weeks, served on the defendant a notice of application for a trial date. The defendant subsequently confirmed that it is persisting, under the direction and control of the final liquidator, with its defence to the plaintiff's action. It is against the weight of the true facts in this matter, to suggest that the plaintiff can be deemed to have abandoned its action, under the circumstances. There is nothing to justify the opinion of the defendant that the plaintiff had abandoned its action. On the contrary, it is evident from the correspondence and conduct of the parties that it was at all times the intention of the plaintiff to pursue its claim against the defendant, and that the liquidator was aware of this fact.

[30] In my view, it is in circumstances like the present, where the company relies on the failure of a plaintiff to serve notice timeously on the liquidator, that the court may direct otherwise than that the proceedings shall be considered to be abandoned. The purpose of the direction otherwise, is to allow the legal proceedings to proceed despite the fact that notice was not given. In exercising its discretion, the court must determine whether, under the circumstances of the case, the company can rely on non-compliance with the notice requirement. It has not been shown that the defendant will suffer any prejudice arising out of the non-compliance with the notice requirement.

[31] A disturbing feature in this case, which invites comment from the court, is the certificate of appointment of the final liquidator. The court has a duty to ensure that persons involved in the administration of justice act appropriately. The Master of the High Court, in liquidation matters, is the nerve centre of the meeting point of business, government, and the law. Where officials demonstrate levels of incompetency and or laziness, it is necessary that the root causes of such conduct be established, so that it can be determined how a situation of such nature can be avoided in the future, through prompt and proper attention.

[32] The certificate is a pro forma form issued by the Department of Justice and Correctional Services. It has a number of options and the person completing the form must delete options which are not applicable. On the title, for example, the form reads:

> *"CERTIFICATE OF APPOINTMENT OF PROVISIONAL LIQUIDATOR(S)/ LIQUIDATOR(S)/ PROVISIONAL MANAGER/JUDICIAL MANAGER."*

All these options have been deleted with the result that the title of the form simply reads:

> *"CERTIFICATE OF APPOINTMENT OF".*

Throughout the certificate, all the options given still remain, with none deleted if not applicable. For an inductive reader, the appointment certificate is not clear. I suspect that practitioners may have learned to accept that nothing better can be expected from the Office of the Master of the High Court. I am not prepared to condone such lackadaisical attitude to one's duties which is in display on this form, and hold the view that the attention of the Chief Master needs to be drawn to such matters for his attention.

[33] I will elect to be guided by the wisdom of an Afrikaner when he says:

> *"Die plig van 'n regsprekende beampte is om verskil te bereg en nie om oor reg te verskil nie".*

Informed by that heritage, I will accept that the final liquidator was duly appointed on the 11 June 2015, on the instrument which finds the basis of my discontent.

For these reasons, I find it just and equitable to make the following orders:

1. The court declares that the plaintiff has not abandoned the proceedings against the 1st defendant in this matter.
2. The plaintiff is granted leave to proceed with the action, not earlier than three weeks from the date of this order.
3. Each party is to pay its own costs.
4. The costs of the third party are in the cause.
5. The Registrar is directed to serve a copy of this judgment, to which the certificate of appointment, appearing on page 70 of bundle F of the additional bundles to this matter is to be attached, to the Chief Master for his attention.

**DM THULARE**
**ACTING JUDGE OF THE HIGH COURT**

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|---|---|
| Date Heard: | 20 May 2016 |
| Counsel for Plaintiff: | Adv AJ Daniels |
| Attorney for Plaintiff: | Frese Moll & Partners |
| Counsel for 1st Defendant: | Adv HSL van Wyk |
| Attorney for 1st Defendant: | Van Greunen & Associates |
| Counsel for 3rd Party: | Adv. L Sisilana |
| Attorney for 3rdParty: | Norton Rose Fulbright South Africa |
| Judgment Delivered: | 27 May 2016 |