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

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

10-12-2015
DATE SIGNATURE

Case no: 2013/25849

In the matter between:

ABSA Bank Limited **Applicant**

And

Thermex Carbon Technologies (Pty) Limited (Registration No. 1999/007995/07) **Respondent**

JUDGMENT

KATHREE-SETILOANE J:

[1] This is an application to rescind and set aside the provisional and final winding up orders which were granted by Carelse J on 22 January 2014, and Wright J on 18 July 2014, respectively.

[2] On 22 January 2014 the respondent, ABSA Bank Limited ("ABSA") obtained

an order, in terms of which Thermex Carbon Technologies (Pty) Ltd ("Thermex") was placed into provisional liquidation. The provisional order was returnable on 7 March 2014 and obliged ABSA to:

(a) have a copy of the order served upon the registered office of Thermex ;

(b) publish a copy of the order in the Government Gazette and the Star newspaper ; and

(c) forward a copy of the order to each known creditor of Thermex by pre-paid registered post .

[3] The provisional order was extended on 7 March 2014 to 22 April 2014 and on 24 April 2014 it was again extended to 18 July 2014. On 18 July 2014, the provisional liquidation order was made final. Thermex , together with Lisa Cruikshank ("Cruikshank") and Ian Barnard ("Barnard") who are its directors and two of its members ("the Applicants") bring this application for the recission of both the final and provisional winding-up orders on the basis that they were erroneously sought and erroneously granted as contemplated in Rule 42 of the Uniform Rules of Court. The Applicants contend that the final liquidation order was erroneously sought on the following bases:

(a) That an agreement (which precluded the granting of a final liquidation order) existed between ABSA and Thermex at the time that ABSA sought the final liquidation order .

(b) That ABSA failed to comply with the provisions of section 346(4A)(b) of the Companies Act, 61 of 1973 ("the Companies Act") in respect of the provisional order; and

(c) That ABSA failed to comply with the provisional winding-up order, in respect of the granting of the final winding-up order.

Point of Law

[4] ABSA has delivered a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules, the purpose of which is to raise a point of law. Such a point in law serves the function, in effect, of raising a point *in limine.* The approach to dealing with such points of law should be the same as dealing with a point *in limine,* as set out by Kirk-

Cohen J in *Bowman N.O. v De Souza Roldao*,[1] where it was held:

"This type of objection must be considered on the basis of an exception to a declaration or a combined summons. The relevant considerations are:

(a) The founding affidavit alone is to be taken into account;
(b) The allegations in the founding affidavit must be accepted as established facts;
(c) Are these allegations, if proved, sufficient to warrant a finding in favour of the applicant?"

[5] The point of law raised by ABSA in its Rule 6(5)(d)(iii) notice is that the relief sought by Thermex ought to have been brought under s 354(1) of the Companies Act, and not under the common law or Rule 42. This contention, in my view, is flawed as our courts have long recognised that a winding up order may be rescinded under the common law or under Rule 42 of the Uniform Rules. Significantly, in this regard, the powers conferred upon the court in terms of s 354(1) are merely an amplification of its common law powers to rescind and set aside orders[2]. It is, similarly, against this background that Rule 42 was introduced[3]. Thus where a recission would not be competent under the common law, it might be brought in terms of s 354(1) of the Companies Act.

[6] In addition, ABSA contends that Thermae has no *locus standi* to bring this application for recission. This contention is without substance because although a company, such as Thermex, would not have *locus standi* under s 354(1) of the Companies Act to rescind or appeal a winding up order, or to oppose an application for winding up, it would have *locus standi* to do so under the common law or Rule 42 of the Uniform Rules[4]. Thermex, accordingly, has *locus standi* to bring this application for the recission of the provisional and final liquidation orders.

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[1] *1988 (4) SA 326 (T), at 327I*

[2] *Shorti v Nugent and Others* 2001 (3) SA 783 (W) at 705F.

[3] *Henochsberg* on the Companies Act (Vol 2) APP1-100 on the commentary of s 354 of the Companies Act.

[4] *Shorti v Nugent* at 795D-E-H.

The Requirements of section 346(4A)

[7] Section 346(4)(A) of the Companies Act, 61 of 1973 provides:

'(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application-

(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves-

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

(iii) to the South African Revenue Service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with.'

[8] Section 346(4A)(a) of the Companies Act imposes an obligation upon an applicant in a liquidation application to furnish a copy of the application to every registered trade union of the employees of the company sought to be liquidated, the employees themselves, the South African Revenue Service and the respondent company sought to be liquidated, whenever an application for liquidation is presented to court.

[9] Section 346(4A)(b) of the Companies Act provides specifically that an applicant for liquidation must either before or during the hearing of the application for liquidation file an affidavit, by the person who furnished a copy of the application, which sets out the manner in which section 346(4A)(a) was complied with.[5] As is

[5] Section 9(4A) of the Insolvency Act, 24 of 1936, has almost identical provisions, employing almost

apparent from the language of section 346(4A)(a) of the Companies Act, it is peremptory for an applicant furnish the application papers to the individuals mentioned in section 346(4A)(a) thereof[6]. Therefore, under sub-section 346(4A)(b) of the Companies Act, the applicant in a liquidation application must, before or during the hearing, file an affidavit by the person who furnished a copy of the application to the persons mentioned in subsection 346(4A)(a), which sets out the manner in which the "furnishing" required by subsection 346(4A)(b) was complied with.

[10] It is common cause in this matter that although the sheriff had served the application on the employees of Thermex and on the trade unions, ABSA did not file an affidavit in compliance with the provisions of section 346(4A)(b) of the Companies Act. Nor was one presented to the court prior to the hearing or at the hearing of the application, when the provisional sequestration order was granted.[7] The applicants, contend, that in the absence of any affidavit contemplated in section 346(4A)(b), there can be no compliance with the pre-emptory requirements of the section, therefore the provisional liquidation order falls to be rescinded and set aside as having been erroneously granted by the Court or, at least erroneously sought by ABSA, without admission of the affidavit required in terms of s 346(4A)(b) of the Companies Act.

[11] The recent judgment of the Supreme Court of Appeal in *EB Steam Co (Pty) Limited v Eskom Holdings*[8] is instructive. There the applicant failed to mention in the founding affidavit whether the company had any employees, and if so the locations at which they were employed. It, likewise, failed to file an affidavit in terms of section

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identical wording, to section 346(4A) of the Companies Act. Both section 346(4A)(a) and (b) of the Companies Act incorporate the word "must" in relation to obligations of the applicant for liquidation, as does section 9(4A) of the Insolvency Act.

[6] *Roberts v Taylor of Buckingham CC and Others* (2008/21864) [2008] ZAGPHC 435 (28 November 2008) and *Standard Bank of South Africa Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C).

[7] See index to the main application and the concession in the notice in terms of Rule 6(5)(d)(iii) that *"such service, in effect took place"*

[8] 2015 (2) SA 526 SCA.

346(4A)(b) of the Companies Act, to prove service of the application on such employees. Wallis JA writing for a unanimous Court held that[9]:

'Section 346(4A)(b) is of considerable significance because it reinforces the proposition that the papers must be furnished to the relevant persons only after the application has been lodged with the registrar. Additionally it requires the applicant to provide an affidavit, which may be presented to the court at the hearing itself, setting out the manner in which para (a) was complied with. It necessarily follows that, if for any reason it has not been possible to comply with those requirements, or compliance has taken an unusual form, the affidavit must spell this out. That raises the question of the court's powers in the event of such non-compliance.'

[12] The SCA according held that the requirement to furnish the application to the persons specified in section 346(4A)(a) was peremptory, but that the method stipulated in section 346(4A)(a)(ii) for furnishing the application to employees was merely directory. To 'furnish' the application meant to make it available in a manner that was reasonably likely to make it accessible to the named persons.(It was not a requirement that the papers, as a matter of fact, came to the attention of those persons.) Thus if a method other than those in section 346(4A)(a)(ii) was used to furnish the papers to the employees, there would be compliance with the section, if the method was reasonably likely to make the papers accessible to them.[10]

[13] The court in *EB Steam* went on to hold that if the court is satisfied that the method adopted by the applicant to furnish the application papers to the employees is satisfactory and reasonably likely to make the papers accessible to the employees, no reason exists for a court to refuse a final or provisional winding-up order, merely because they were not furnished to the employees in one of the ways indicated in s 346(4A)(a)(ii)[11] On the question of whether an applicant's inability to furnish the papers to the employees before the hearing precluded the court from

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[9] *EB Steam* at paras 10.

[10] *EB Steam* at paras 14, 17, 24 and 25.

[11] *EB Steam* at paras 17 and 19.

granting any relief, the Court held that if the papers were not furnished to the employees, it would be impermissible for a court to grant a final winding-up order, however it would be permissible to grant a provisional winding-up order, together with an order directing how the application was to be furnished to employees.[12]

[14] What emerges clearly from *EB Steam* is that, although it is peremptory for an applicant to furnish the application papers to the individuals mentioned in section 346(4A)(a) of the Companies Act, a failure to serve the papers is not fatal to the outcome of the winding-up application. So, in *EB Steam,* even though there was no mention of employees or service upon employees and no service affidavit had been filed, The SCA, on appeal, amended the order granted in the court *a quo* by setting aside the final winding-up order and declaring the company to be provisionally wound-up returnable eight weeks from the date of the order. The applicant was granted five weeks within which to serve the application upon the employees of the company, and within one week thereafter to deliver an affidavit of service, setting out details of when and in what manner they have complied with the order.

[15] As to the advantages of substituting a provisional order with a final order, where the court is not satisfied that the applicant has furnished the application papers to the employees in an effective manner as envisaged in s 346(4A)(a) of the Companies Act, the SCA in *EB Steam* stated thus:

'There are advantages that may flow from following this procedure. The court will be able to place the company in the hands of a provisional liquidator and the *concursus creditorum* will commence, so that assets may be preserved and the company is shielded from litigation.'[13]

[16] The SCA in *EB Steam*[14] referred with approval to the judgment of *Hendricks N.O. v Cape Kingdom (Pty) Limited*[15] ("*Hendricks*") in which the court was content to

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[12] *EB Steam* at paras 24-26

[13] *EB Steam* at para 26.

[14] At para 16.

[15] 2010 (5) SA 274 WCC.

grant a final winding-up order under circumstances where the Sheriff and the attorney attempted to serve upon all employees but were unable to do so. Even though, in *Hendricks,* no affidavit of service was filed in terms of section 346(4A)(b) of the Companies Act, the court granted a final order as the respondent failed to set up a *bona fide* or reasonable defence to the applicant's claim.

[17] Significantly, in this regard, the Court in *EB Steam* emphasised that the legislative purpose of s 346(4A), which is to enable employees to protect their interests, is not meant to constitute a technical defence to a respondent without a defence on the merits. It held that whether the defence should succeed depends upon the proper construction of the section and the powers of the court hearing an application for a winding-up order.[16]

Technical Defence

[18] The *Hendricks* matter is substantially similar to the current matter where the Sheriff served the application upon the employees, in terms of section 346(4A)(a) of the Companies Act, at a central place at the premises of the company. As in *Hendricks*, in the current matter I surmise that Wright J would have been satisfied with the return of service of the Sheriff, and did not request an affidavit as envisaged in s 346(4A)(b) of the Companies Act, from him or her – since a return of service constitutes *prima facie* evidence of service.

[19] Relying for support on *Hendricks*, ABSA contends that the Applicants have failed to set up a reasonable or bona fide defence to the liquidation application and, therefore, the failure of ABSA to comply with section 346(4A)(b) of the Companies Act, was not a bar to the court (Wright J) making the winding-up order final. A survey of the events leading up to the return day for the final winding-up order, makes clear that the applicant is, indeed, unable to demonstrate a defence on the merits of the liquidation application. The account of these events appears from the discussion below.

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[16] *EB Steam* at para 8.

The Agreement between Thermex and ABSA

[20] The Applicants contend that the final liquidation order was erroneously sought because an agreement (precluding the granting of a final liquidation order) existed between ABSA and Thermex at the time that ABSA sought the final liquidation order. The Applicants allege in their founding affidavit in this application that:

[20.1] On or about 13 August 2013, ABSA sued Thermex, Barnard, Brian Barnard and Paul Barnard, the latter three as sureties, in respect of the same loan, which forms the basis of the liquidation application. This action was withdrawn on 3 September 2013 without a tender for costs.

[20.2] On or about 19 September 2013, ABSA instituted action against Barnard, Brian Barnard and Paul Barnard as sureties in respect of the loan agreement, which is the subject of this liquidation application. This liquidation application was served on or about 6 August 2013 and notice of intention to oppose was delivered on or about 8 August 2013.

[20.3] In the week of 2 to 6 September 2013, a meeting was held between Barnard, Brian Barnard, Rene Chitolo and Quentin Olivier, who is the attorney for ABSA herein.

[20.4] Thermex, which is a property-owning company, had tenants in the factories and warehouses rented on its property. These tenants defaulted on their rental agreements, resulting in Thermex falling into arrears in terms of its loan agreement with ABSA. To remedy this situation, Thermex had entered into a loan agreement with Stafford MRF, a material recovery facility, however, it would require funding for its business to operate. A lease had nonetheless been concluded. The state of affairs of the prior tenants was set out in a statement, which ran until February 2014.

[20.5] On 19 September 2013 and 25 September 2013, correspondence was

exchanged between Esme Leeuw, from Olivier's office, and Brian Barnard, in respect of moneys owed by Thermex to the City of Johannesburg and amounts to be paid by Thermex to ABSA. There was a further letter by Leeuw on 5 November 2013.

[20.6] In the interim, Stafford MRF had made contact with the IDC and DBSA for financing and an "indicative term sheet" had been drawn up indicating that the DBSA was prepared to provide finance for the recovery facility to be run by Stafford MRF. This financing would have meant that Stafford MRF would be able to pay Thermex the rental in terms of the said lease. Also at about this time in January 2014, Barnard made contact with Tony Da Silva of Da Silva Attorneys, seeking legal advice on behalf of Thermex and the sureties who had been sued in the aforesaid litigation. On 23 January 2014, a letter was sent by Da Silva to Olivier.

[20.7] On 17 February 2014, Olivier wrote to Da Silva advising that Da Silva's letter of 23 January 2014 had only been received on 29 January 2014 and that summary judgment had been obtained against the sureties, Barnard, Brian Barnard and Paul Barnard, on 27 January 2014. Olivier also advised that a provisional liquidation had been granted on 22 January 2014.

[20.8] On 28 February 2014, Da Silva wrote to Leeuw, referring to a conversation between him and Leeuw on 19 February 2014, during which the possibility of resolving the matter arose. There was also mention of a further discussion on 27 February 2014 between Da Silva and Leeuw, in which Leeuw mentioned that Olivier had met with ABSA and that she would revert with instructions received by him. Da Silva called for an urgent meeting, given that the return day on the provisional liquidation order was 7 March 2014. Also on 28 February 2014, Olivier wrote to Da Silva indicating that ABSA sought a proposal prior to its meeting with Thermex, *"in order for [ABSA] to agree to a postponement of the Liquidation Application"*.

[20.9] On 3 March 2014, a proposal was put to ABSA, in terms of which Thermex would pay R500,000.00 towards the arrears then owing on the loan. A cheque in this amount was drawn by Sybil Barnard on 10 March 2014. On 4 March 2014,

Cruikshank wrote to Da Silva indicating that R500,000.00 would be forthcoming from Sybil Barnard and she called for ABSA's response to the offer, particularly in the light of the *"postponement"* of the matter.

[20.10] On 4 March 2014, Leeuw indicated that the offer of R500,000.00, which had been made on 3 March 2014 by Da Silva, was rejected by ABSA. Legal fees had become an issue by 7 March 2014 and Da Silva withdrew on behalf of Thermex. An extension of the provisional order was obtained on that date until 22 April 2014, whereafter Da Silva was again approached by Barnard and Brian Barnard. While not able to provide the cover sought, Thermex was able to provide a portion of the legal fees to Da Silva. What then ensued, was a notice in terms of which Thermex sought certain information from ABSA. ABSA declined to provide the documentation and an application to compel the provision of the documentation was launched on or about 17 April 2014. This application became opposed and the return date of the liquidation application was extended on 24 April 2014 to 18 July 2014, as a result of the pending Rule 35(12) application. This application was subsequently withdrawn.

[20.11] In the interim, Stafford MRF forged ahead with its negotiations with the IDC in order that it might be able to honour the lease referred to above. Thermex attempted to involve ABSA directly in the meetings with the IDC, however, Olivier put a spoke in the works, by insisting that all correspondence pass through the attorneys for ABSA. Meeting continued in June between Barnard, IDC and the DBSA concerning the funding project. IDC wished to have a meeting with Olivier, at the insistence of ABSA's Prashanta Ramchuran.

[20.12] On 24 June 2014, a letter from the IDC addressed to Da Silva indicates that a meeting had in fact been held between the IDC, DBSA and Stafford MRF. In this letter it was indicated further that the meeting needed to involve discussions with ABSA in order to proceed, having a clearer view of ABSA's position and the potential way forwared.

[20.13] A request was also made that ABSA be involved in a meeting and this request was forwarded by Barnard to Olivier and Ramchuran on 25 June 2014. There was even a request by Barnard to Nonhlanhla Zwana of the IDC on 25 June 2014 requesting her to make direct contact with Olivier in order to set up the meeting. In the letter of 25 June 2014, Da Silva wrote to Olivier and Leeuw setting out that meetings had been held with the IDC and the DBSA and that there had been a request by the IDC to meet with ABSA in order to resolve the matter. Rather than accede to a meeting, Olivier wrote on 26 June 2014 to Da Silva, insisting that before a meeting be held there would need to be proof of certain aspects. The following day Zwane addressed a letter to Da Silva indicating the keenness of the IDC to proceed with the proposed project. Most importantly, indicating that:

"'From a security perspective, over and above other security options, the intention would be for the IDC to replace the current mortgagee through a settlement of the outstanding property amount.' "

[20.14] Although the IDC was prepared to assume the liabilities of ABSA, by *"stepping into the shoes of ABSA"* in that it was prepared to settle the loan amount of Thermex to ABSA, but ABSA refused to attend any meetings nor to consider this option. Their *bona fides* are questionable in this liquidation.

[20.16] It was again emphasised by Barnard on 2 July 2014 that it was the intention of IDC to replace ABSA as the mortgagee through a settlement of the outstanding amount owed in respect of the property owned by Thermex. It was also pointed out that a meeting between ABSA and the IDC was imperative. The urgency of such a meeting was emphasised by Da Silva in a letter addressed by him to Olivier and Leeuw on 3 July 2014.

[20.17] Statements relating to the loan account were provided by Olivier on or about 4 July 2014 and on 8 July 2014 he wrote again to Da Silva, wherein he stated:-

'3.4 Our client can consider a postponement of the liquidation application on condition that

the arrears on the account, amounting to approximately R808,000.00 be brought up to date and monthly payments be made to keep the account up to date. This will provide the DBSA and the IDC time to conduct their diligence.'

[20.18] Da Silva responded on 10 July 2014 enquiring whether the payment was to be made directly into the bond account and whether upon provision of proof of payment the postponement would be agreed to. On 14 July 2014, Olivier pointed out in a letter to Da Silva that the proposal relating to the R808,000.00 did not amount to a settlement of ABSA's liquidation application. That this was so was acknowledged by Barnard in a letter written on 15 July 2014 to Olivier. Barnard also pointed out that the amount of approximately R808,000.00 had been raised and arrangements had been made to make the on-going monthly payments. It was also pointed out that a communication had been received from the IDC and the DBSA indicating that they would start their due diligence in the first week of August 2014 and would proceed timeously and would make their intention known to replace ABSA as the current mortgagee, by way of settling the outstanding amount owed in respect of the property.

[20.19] On 17 July 2014, Da Silva wrote to Olivier and Leeuw indicating that Thermex had written directly to Olivier confirming that it accepted the proposal relating to the payment of R808,000.00 and the monthly instalments thereafter, and that there would be a postponement of the liquidation application as a result. Da Silva also pointed out that he had been instructed to withdraw as the attorneys of record, since it appeared that the issue had been resolved for the moment and so that further costs were not incurred. This e-mail of Da Silva was sent at 13h00 on 17 July 2014 and had been preceded by an e-mail sent by Olivier to Barnard, in which he had indicated the account number into which the payment had to occur. At 19h03 on 17 July 2014, Barnard wrote to Olivier and advised that R500,000.00 had been paid into the stipulated ABSA bank account, but that R500,000.00 was the daily limit for the transfer of moneys. He indicated that there was every intention to transfer the balance of R308,000.00 as soon as possible the following day. A copy of this letter was sent directly to Ramchuran of ABSA.

[20.20] On 18 July 2014 at 08h32, Olivier wrote to Barnard, Da Silva, Brian Barnard, Ramchuran and *"g.meyer@law.co.za"*, in which he recorded acknowledgement of receipt of the proof of payment of the amount of R500,000.00 and noted that he would require proof of payment of the balance of R308,000.00 in order to secure an extension of the provisional liquidation order. Olivier indicated that that proof should be sent by return mail or by attendance at court on 18 July 2014 and concluded by indicating that an extension of more than three months at a time was unlikely.

[20.21] As it so transpired, the transfer of the moneys by Sybil Barnard out of her investment account and into her banking account had not yet occurred by the morning of 18 July 2014, notwithstanding the requested withdrawal on 11 July 2014. Brian Barnard indicated to Cruikshank that she should bring to court proof of the transfer request of the moneys from the investment account into the bank account, after Cruikshank and Sybil Barnard had determined at 09h04 on 18 July 2014 that the money had not yet cleared into the bank account of Sybil Barnard.

[20.22] Barnard proceeded to the Alberton branch of the FNB to obtain proof of the fact that the moneys have been withdrawn from the investment account and that their clearance into the bank account of Sybil Barnard was being awaited, in order that it could be paid over to ABSA. Documentary support for these contentions has been provided by an independent third party, namely Liberty.

[20.23] Having obtained the aforesaid letter from Liberty, Barnard returned to the property, where he found Cruikshank and Sybil Barnard. Together the three drove to the high court building, arriving at 10h16. There they found Brian Barnard, who informed them, as they drew up, that judgment had been entered. Barnard left the vehicle, in which Cruikshank, Sybil Barnard and he had been driving and went to speak with Brain Barnard, who was very upset. The two of them then drove off. Cruikshank telephoned Barnard and said that too much was at stake. Brian Barnard returned to the court and dropped off Ian Barnard. Cruikshank had parked her car and Sybil Barnard and her had gone into the court, where they had found two other shareholders of Stafford MRF, namely Linky Khubayi and Mpho Moshimane. When

Barnard returned to the court, he found all of them in the foyer and advised them what had occurred as related to him by Brain Barnard.

[20.24] Brian Barnard had been sitting in court at 09h45 and was there when court commenced at 10h00. He had been sitting at the back of the public gallery waiting for the matter to be called, when an advocate with grey hair, sitting in the front of the court, spoke to the judge first. However, Brian Barnard could not hear what was being said since he spoke softly. It seemed to him as if various matters were being dealt although they did not take very long and then the advocate left the court. Several other cases were called by other advocates and Brian Barnard could hear that these matters involved the Standard Bank, which claimed the repossession of a vehicle in one matter and the repossession of a house in another. It then occurred to him that the matters were being called in relation to their number on the roll and not their case number and that the names of the parties were being mentioned. He listened out for the names "ABSA" and "Thermex".

[20.25] After the court had heard two divorce matters, the presiding judge (Wright J) looked to the back of the court and enquired whether anybody had any further business in court. Brian Barnard stood up and mentioned the case of *ABSA Bank v Thermex Carbon Technologies* and that he was there for that case. The judge responded by looking at his roll and advising that the matter was the second matter and that it had already been dealt with . When Brian Barnard said that this could not be so since there was too much at stake, the presiding judge responded that it was so and that he should take it from there.

[20.26] After Brian Barnard had addressed the court, he left the court at approximately 10h15, shortly whereafter he telephoned Cruikshank and during which call Cruikshank, Barnard and Sybil Barnard arrived outside the court, the further events having been described above. Having enquired as to where Cruikshank, Barnard and Sybil Barnard ought to go in order to be in the correct court, they arrived in court 1A, when the judge entered after the tea adjournment. Sitting in the back of the court, Cruikshank, Barnard and Sybil Barnard waited until all the advocates in court had finished with their cases before moving to the front row of the public area.

It was then that Cruikshank stood up and addressed the court although highly distressed. Cruikshank indicated that Brian Barnard had been there earlier, which Wright J acknowledged. She advised the court that R500,000.00 had already been paid. It was at this point that Wright J enquired whether Thermex had lodged any papers and why they were not represented by counsel. Being too distraught, Cruikshank could not give a clear answer and the presiding judge appeared angry, indicating that he had dealt with the matter and could do nothing further. When Cruikshank tried to explain further, the presiding judge appeared even more angry and said that she would be arrested if she continued talking. Cruikshank then left the court.

[21] The Applicant contends that it is patent from the abovementioned allegations, that an agreement had been reached between Thermex and ABSA that the arrears of R808,000.00 would be brought up to date and that Thermex would commit to paying all further instalments in terms of the loan agreement on time. It is also patent, they contend, that R500,000.00 – by far majority of the arrears – had been paid prior to the commencement of court on 18 July 2014, and that the balance was genuinely available. They argue that since Thermex had indicated its *bona fides* in respect of the portion paid and the portion to be paid, it is probable that had these facts been made known to Wright J, particularly that there was an agreement along these terms, he would have enquired at the time that the matter was called whether there was any representation of Thermex in court, so that whoever was there could indicate whether there had been compliance with the agreement .

[22] The Applicants contend further that in the light of this agreement, it was incumbent upon ABSA, prior to moving for a final liquidation order, to enquire at court whether there was any attendance for or on behalf of Thermex and whether such person attending had with them proof of payment of the balance of R308,000.00. They point out, in this regard, that Brian Barnard attended court 1A on 18 July 2014 and was present by 09h45 .

[23] The Applicants contend that had Brian Barnard heard the matter he would have stood up and advised the court of the agreement between ABSA and Thermex,

that Thermex had paid R500,000.00 of the R808,000.00 agreed arrears, and that the balance of R308,000.00 would be paid within days. He would have advised the court that Barnard and Cruikshank were on their way to court with the necessary proof.

[24] In addition they contend that upon the arrival of Barnard and Cruikshank, with Sybil Barnard, they would have advised the court that a further R500,000.00 had been transferred from Sybil Barnard's investment account into her bank account, from which the balance of R308,000.00 could be paid. They would also have advised the court, they argue, that this transfer had already been requested on 11 August 2014 and its clearance was awaited. The Applicants also argue they would have requested the court for a day or two, within which to make payment, as soon as the funds had cleared. The Applicants contend that it is probable, in all the circumstances, that the court would have afforded Thermex a further day or two within which to make the payment of the balance of R308,000.00, at which point it is probable that the court would have extended the return date of the provisional liquidation order. Because of the existence of this agreement, they contend, the seeking of a final order in these circumstances means that the order was erroneously sought by ABSA.

[25] Southwood J in Naidoo v. Matlala N.O., 2012 (1) SA 143 (GNP), at 153C held:-

> *"In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment."*

[26] It is trite law that an applicant seeking a recission of a winding up order must show facts that would lead a court to set aside a winding-up order. In other words a proper and *bona fide* defense must be set out and the applicant must at least show that it was able to pay its debts when the order was granted.[17]

[17] *Ex parte Strip Mining (Pty) Limited In re: Natal Coal Exploration Co Ltd* 1999 (1) SA 1086 SCA.

[27] The applicant contends that had Wright J been aware of the agreement between Thermex and ABSA and of the fact that payment had been made partially and that the balance was available for payment, or would be available shortly, it is probable that he would not have granted a final liquidation order. In these circumstances, they submit that it would be proper to rescind that order.

[28] In so far as the Applicant's contend that there was an agreement between Thermex and ABSA, it was encumbent upon them to demonstrate that Thermex had complied therewith. Notably, Thermex failed to comply with ABSA's "condition" that the provisional order for the final winding up of Thermex would only be extended should the arrears of R808,000.00 be paid prior to the date of the hearing and all monthly instalments kept up to date.

[29] On the Applicant's own version, this amount was not paid in full, because Barnard's mother's funds were not available on the date of the hearing, but would have taken between 2 to 3 days to clear. The Applicants quite clearly failed to comply with the condition that an extension of the return date would only be agreed to should the arrears of R808,000.00 be paid and all monthly instalments be kept to date before the hearing of the matter. On the Applicant's own version, they have not, and, to state as they do, that had ABSA "honoured the agreement" the winding up order would not have been granted is disingenuous. The matter, on the applicant's own version was enrolled for hearing on 18 June 2014, and was the third matter on Wright J's roll. The applicant failed to pay the amount of R808,000.00 before the hearing of the matter, or even thereafter. There is no allegation on the papers that the arrears were ever paid.

[30] The Applicants now attempt to escape the consequences of their own breach by blaming ABSA for not satisfying itself before asking for the order that the full amount was deposited (which on the applicants' own version was not). The

Applicants also contend that ABSA should have called the name of the company, namely Thermex, at court. It is not generally practice for a Court in a liquidation application to call the names of companies before granting orders, even where, as in this case, the company's attorneys have withdrawn as attorneys of record.

[31] That Barnard's mother's policy and/or pension would have paid the outstanding debt renders the setting aside of the winding-up order, in my view, an instrument of injustice. The Applicants say that the insurance company took its time to revert to them, but, even so, these allegations do not assist the Applicants at all. Our courts are prepared to accept that a third party may pay the debts of a company in order to ward off a winding-up order, and will certainly take that into account where such third party has an interest in the company to be wound-up. However, in the current matter the mother did not and could not have an interest in the Thermex - as she is neither a shareholder nor a director - yet her pension or policy pay out would have been utilised to pay the debt.[18] Even a tender to pay the amount under circumstances where the tender does not consist of an amount being physically paid to ABSA cannot assist the Applicants, as the tender is bad in law.[19]

[32] It is clear that Thermex does not have a *bona fide* defense as it has failed to show that when Wright J made the final winding up order, that it was in a position to pay its debts. On its own version, Thermax was unable to pay its debts. In the circumstances, the final winding up order was not erroneously granted nor erroneously sought as there was no agreement between ABSA and Thermex, which precluded the grant of a final liquidation order, at the time ABSA sought the final winding-up order.

Non-Compliance with the Provisional Order

[33] The provision liquidation order, which was granted on 22 January 2014,

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[18] *Helderberg Laboratories CC v Sola Technologies* 2008 (2) SA 627 (C).

[19] *Body Corporate of Fish Eagle v Group 12 Investments (Pty) Limited* 2003 (5) SA 414 (W).

required, inter alia, that it be forwarded to all known creditors of Thermex by pre-paid registered post. It was known to ABSA prior to launching the liquidation application that the City of Johannesburg was a creditor of Thermex. It is common cause that the provisional liquidation order was not forwarded to City of Johannesburg. I, accordingly, agree with the Applicants' contention that the final liquidation order was erroneously granted, or, at least, erroneously sought, absent compliance with the provisional liquidation order, and falls to be set aside for that reason.

Conclusion

[34] However, in the absence of demonstrating that Thermex has a defence on the merits to the final liquidation application, I see no reason why the provisional order should also be set aside. The defences in relation to ABSA's non-compliance with section 346(4A)(b) of the Companies as well as its failure to furnish the City of Johannesburg with the provisional order by pre-paid registered post are technical defences, which do not go to the merits of the liquidation application. For this reason, I am of the view that it would be eminently prudent to keep the provisional order intact[20]– an approach that has been endorsed by the SCA in *EB Steam*.

[35] In the result, I make the following order:

1. The application for the recission of the provisional winding-up order granted against Thermex Carbon Technologies (Pty) Ltd ("the company") in case no. 2013/25849 on 22 January 2014 is dismissed.

2. The final winding-up order granted on 18 July 2014 in case no. 2013/25849 is set aside and replaced by a provisional winding up order returnable eight weeks from the date of this order.

3. The respondent is directed by no later than 5 weeks from date of this order :

[20] *Sphandile Trading Enterprises (Pty) Limited v Hwidsidu Security* 2014 (3) SA 231 GJ.

3.1 to furnish any known creditors of the company with a copy of the provisional order granted;

3.2 to furnish the employees of the company with a copy of the application papers as required in section 346(4A)(a) of the Companies Act, 61 of 1973, and within one week thereafter to deliver an affidavit as required in section 346(4A)(b) thereof setting out details of when and in what manner the respondent has complied with this order.

4. The costs of this application shall be costs in the winding-up of the company, unless the provisional winding-up order is discharged on the return date, in which event the respondent is ordered to pay the applicant's costs.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Counsel for the Respondent:	GH Meyer
Instructed by:	Jay Mothobi Inc
Date of Judgment:	10 December 2015