REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN & COAST LOCAL DIVISION **CASE NO. 7219/2008**

In the matter between:

REEBIB RENTALS (PTY) LIMITED **APPLICANT**

and

LETS TRADE 1163 CC
Registration No. 2000/014471/23 **RESPONDENT**

JUDGMENT Delivered on 19 February 2009

SWAIN J

[1] The applicant seeks an order provisionally winding up the respondent, as it were, for the second time. A prior provisional winding up order was granted by this Court on 18 July 2008, returnable on 15 August 2008 and thereafter adjourned on two occasions, when on 29 August 2008 the following order was granted by consent:

> "1. That the aforesaid *rule nisi* be and is hereby discharged.
> 2. That the application is adjourned *sine die*.
> 3. That the costs occasioned by the adjournment are reserved."

[2] The applicant then set the matter down again on the opposed roll on 09 December 2008, when an order was granted by consent adjourning the matter to the opposed roll on 10 February 2009, and making provision for the filing of supplementary affidavits by both parties. Only the applicant however filed a supplementary affidavit.

[3] I have set out the history of the matter in some detail, because it is relevant to the first point raised in opposition to the grant of a provisional order, by Mr. Skinner, S.C. who together with Mr. Bedderson, appeared for the respondent.

[4] Mr. Skinner, S.C. submits that it is not clear whether the applicant is seeking a revival of the former provisional order, or the issue of a "new" provisional order of winding up. In the applicant's heads of argument, Mr. de Beer. S.C. states that the applicant "seeks a (further) provisional winding up order".

[5] It seems to me however that when regard is had to the history of the matter, a revival of the original rule was not contemplated. This is because on 09 December 2008 the matter was adjourned to the opposed roll, with both parties being granted leave to file supplementary affidavits. The parties were therefore afforded the opportunity to place additional evidence before the Court which could pertain to what had happened in the interim. An agreed procedural indulgence of such a nature is, in my view, inconsistent with the

object of "reviving" the discharged rule. How could the discharged rule be revived, on the basis of evidence of facts which occurred after its discharge?

[6] It is therefore clear that the applicant seeks the issue of a "new" or "further" provisional order of winding up.

[7] Two further arguments raised by Mr. Skinner, S.C. require for their resolution a determination of what the status is of the present application.

[8] The first argument is that the discharge of the provisional order had the effect of bringing the application to an end. This is because when a court is not satisfied that a case has been made out for a final winding up, the order granted is to discharge the provisional order.

[9] The short answer to this is that when the rule was discharged the order provided that the application was adjourned *sine die* and the costs occasioned by the adjournment were reserved. Mr. Skinner, S.C. submits that the effect of reserving the costs was purely to keep the issue of the costs alive. I disagree. If this was the intention there would have been no need to adjourn the application. This made it quite clear that the application had not been brought to an end.

[10] The second argument is that if the application is not at an end, and a revival of the provisional order is not sought, then the application must be a "new" application. The consequence of this, so the argument went, was that the bond of security is stale and no longer operative because no provisional liquidator was appointed.

[11] Section 66 of the Close Corporations Act 69 of 1984 *inter alia,* applies the provisions of Section 346 (3) of the Companies Act 61 of 1973, to the winding up of a close corporation. This section provides for the furnishing of sufficient security for the payment of all fees and charges necessary for the prosecution of all winding up proceedings, and of all costs of administering the company in liquidation, until a provisional liquidator has been appointed or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding up.

[12] I do not understand this section to provide that if no provisional liquidator is appointed, and the company or close corporation is discharged from winding up, the effect is that the bond of security is no longer operative, or falls away. In such a scenario the bond stands as security to ensure payment of all fees and charges, necessary for the discharge of the company from winding up. This does not preclude the bond from remaining as security for the alternative objective of payment of any fees and charges necessary for the prosecution of any further winding up proceedings on the same application.

[13] In addition, I do not regard the pursuit of a further provisional order of winding up by the applicant on the present papers, as a "new" application as envisaged by Section 346 (1) and (3) of the Companies Act, requiring the furnishing of a "new" bond of security.

[14] An additional argument advanced by Mr. Skinner against the grant of a further provisional order, was the prejudicial effect which the retrospective nature of such an order would have upon transactions and business, conducted by the respondent subsequent to the discharge of the order on 29 August 2008. This argument was raised not only in the context of the submission that a "revival" of the provisional order was sought, but also in the context of the deeming provisions of Section 348 of the Companies Act.

[15] Section 348 of the Companies Act provides that a winding up is deemed to commence at the time of presentation to the Court of the application for the winding up. In terms of the definition of a "winding up order" in the Act, this includes "any order of Court whereby a company is placed under provisional winding up so long as such order is in force".

[16] The date of presentation to the Court is when the application is filed with the Registrar of the Court

Venter N.O. v Farley 1991 (1) SA 316 (C) at 320

[17] Mr. de Beer, S.C., who appeared for the applicant, answered this argument by submitting that the Court was vested with a discretion in terms of Section 347 of the Companies Act to grant "any other order it may deem just" in any application for a winding up. I therefore possessed a discretion to order that the winding up of the respondent should only commence on the date upon which a further provisional winding up order was granted.

[18] The nature and effect of the deeming provision in Section 348 therefore has to be considered. In

S v Rosenthal 1981 SA 65 (A) at 75G – 76A

the following was said:

"The words 'shall be deemed' ('word geag' in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject matter, eg a person, thing, situation or matter, shall be regarded or accepted for the purpose of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely *prima facie* or rebuttable. I

should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive."

[19] The mischief aimed at by the section is

"a possible attempt by a dishonest company, or directors, or creditors, or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding up order and the granting of that order by the Court."

Lief N.O. v Western Credit (Africa) (Pty) Limited
1966 (3) SA 344 (W) at 347 B-C

[20] When the object of the section is considered, together with the following words of Levinsohn J (as he then was) in the case of

The Nantai Princess Nantai Line Company Limited and another
v
Cargo laden on the MV Nantai Princess and other vessels and others
1997 (2) 580 (D) at 585 E – F

"The fact of the matter, however, is that the existing legislation provides for the date of commencement of the winding up and it is obviously a matter of

> great importance to commerce in general and companies in particular that there be certainty as to its ascertainment."

I am satisfied that the deeming provision in Section 348 must be regarded as conclusive, or irrebuttable. I therefore consider that I do not possess the discretion contended for by Mr. de Beer, S.C.

[21] It therefore remains to consider the effect of the prejudice averted to by Mr. Skinner, S.C., allegedly arising from the retrospective operation of any order I may grant. In this regard the following words of Levinsohn J in the MV Nantai Princess case *supra* at Page 585 are apposite.

> "There may be a debate as to whether this provision is really necessary given the fairly far reaching provisions of the Insolvency Act relating to dispositions, collusive dealings and the like. It is unnecessary for me in this Judgment to express my opinion."

[22] Consequently, even in the absence of the provisions of Section 348, it is trite law that business transactions conducted by the respondent before its insolvency would be affected. In any event, the prejudice caused by the operation of Section 348 upon transactions and business of an insolvent company, between the date of presentation of an application and the grant of a winding up order, is an inevitable consequence of its insolvency, in all cases. The only distinguishing feature on the present facts is the discharge of the

initial provisional order of liquidation. If the discharge of this order and the grant of any further provisional order of liquidation, were to cause problems with transactions and business conducted by the respondent, subsequent to the discharge of the order on 29 August 2008, then it was incumbent upon the respondent to set out details of this complaint. The respondent was afforded the opportunity of filing a supplementary affidavit but chose not to do so. The concerns of Fleming J in the case of

ex Parte S & U T. V. Services: In re S & U T. V. Services
1990 (4) SA 88 (W) at 91 D – F

consequently, do not assume such importance in the present case.

[23] I am therefore of the view that this argument does not constitute a sufficient ground for refusing to grant the order prayed.

[24] The further argument advanced by Mr. Skinner, S.C. relates to the respective identities of the creditor and the debtor on the underlying car rental agreements, which form the basis for the application.

[25] As regards the identity of the creditor, Mr. Skinner, S.C. submits that the applicant does not dispute that the documents annexed to the respondent's affidavit are the underlying agreements. Of these

documents, seven reflect the identity of the applicant but four reflect the identity of the creditor as "Avis Rent a Car, a Division of Barlow World (Pty) Ltd."

[26] The case however set out by the respondent in its answering affidavit by Boitumelo Rachel Kekana, who is the sole member of the respondent, is that she in her personal capacity concluded the car rental agreements "with the applicant". She conceded that "the vehicles that were hired from the applicant from time to time were utilised for the business of the respondent, but re-iterate were not rented out by the respondent". She also concedes that "two vehicles hired from the applicant were damaged in motor collisions".

[27] It is therefore quite clear that the respondent admits the vehicles were hired from the applicant, despite the misdescription of the applicant in certain of the agreements.

[28] As regard the identity of the debtor/renter of the vehicles, Mr. Skinner, S.C. points out that the rental agreements reflect "the renters name" as "Kekana, Boitumelo Rachel" and on the next line appears the words "Kekana Protection Services". In aid of his argument, Mr. Skinner, S.C. refers to the fact that the acknowledgments of debt were signed by her in her personal capacity and reflect that she is the person indebted to the applicant "in respect of the hire of certain motor vehicles and/ or damages arising out of a motor vehicle collision." He submits that the fact that the respondent applied for credit with the applicant, and that

certain payments were made by it, matters not, because this does not establish that it was the contracting party.

[29] The short answer to this argument lies in the provisions of Clauses 1 and 15 of the agreement. In Clause 1.1.14 "the renter" is defined as

"all of the persons, natural and juristic, jointly and severally, whose names appear on the rental agreement".

Under the entry "renter's name and address" appear the names "Kekana Boitumelo Rachel" and "Kekana Protection Services", which is the admitted trading name of the respondent.

[30] Clause 15 provides as follows

"the renter and every person whose signature appears on the car rental contract shall be liable jointly and severally for payment of all amounts due to the company in terms of or pursuant to the rental agreement."

[31] It is therefore clear that the respondent is a renter of the vehicles and jointly and severally liable to the applicant as the debtor, for payment of all amounts due in terms of the agreement, which includes damage to the vehicles.

[32] A final argument advanced by Mr. Skinner, S.C. was that because the applicant's claim was not just for car rental, but also for damages, and there was no breakdown as to how this amount is determined, it was not clear that in fact any amount is owing to the applicant. This argument rings hollow in the face of the two acknowledgments of debt furnished by M/s Kekana to the applicant. Although they reflect her as the "debtor", which she also was in terms of the joint and several liability provided for in the agreements, they clearly constitute an admission by her of the quantum of the applicant's claim and any action against the respondent, of whom she is the sole member.

I therefore grant the following order:

1. A rule nisi is hereby issued calling upon the respondent and all interested persons to show cause, if any, before this Court sitting at Masonic Grove, Durban, KwaZulu Natal on 13 March 2009 at 09h30, or as soon thereafter as the matter may be heard, why the respondent should not be wound up.

2. This order is to operate as a provisional order winding up the respondent.

3. A copy of this order is to be published on or before the day of 06 March 2009 once in the Government Gazette and once in a daily newspaper published in Durban and circulating in KwaZulu Natal.

_____

SWAIN J

Appearances …/

Appearances:

Counsel for the Applicant	**:**	Mr. H.A. de Beer, S.C.
Instructed by		Louis M. Podbielski Attorneys Durban
Counsel for the Defendant	**:**	Mr. B.L. Skinner, S.C. Assisted by Adv. B.S.M. Bedderson
Instructed by	**:**	Amar Sirpath Attorneys Durban
Date of Hearing	**:**	10 February 2009
Date of Judgment	**:**	19 February 2009