IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: **2021/18739**

(1)	REPORTABLE: Not
(2)	OF INTEREST TO OTHER JUDGES: Not
(3)	REVISED.
21 April 2022	
Date	Signature

In the matter between:

BLUE BULLS COMPANY (PTY) LTD Applicant

(Registration No.: 1997/021796/07)

And

MEGA BURST OILS AND FUELS (PTY) LTD Respondent

(Registration No.: 2016/227522/07)

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 21 April 2022.

Summary: Urgent rescission application of a final winding-up order. Application of rescission of a winding-up order to be brought under section 354 of the Companies Act. Rule 42 of the Uniform Rules of the High Court, not applicable. The court has wide discretion under section 354 of the Companies Act

to grant or refuse a rescission application. Factors to consider in determining the rescission application amongst others include the interest of the creditors and the liquidators.

JUDGMENT

Molahlehi J

[1] This is an urgent rescission application in which the applicant, MEGA Burst Oils and Fuels (Pty) Ltd (in Liquidation), seeks an order rescinding the winding-up order made by this court 18 January 2022. The application is brought in terms of section 354 of the Companies Act,[1] read with Item 9 Schedule 5 of the Companies Act,[2] and rule 42 (1) of the High Court Rules (the Rules). In the heads of argument, the applicant relies also on section 23A (1) of the Superior Courts Act,[3] and section 149 (2) of the Insolvency Act.[4]

[2] The issue that led to the winding-up application concerns a debt over the payment of the leased property at Loftus Versveld Stadium in Pretoria. The applicant leased suites at the stadium for use during internal events and matches staged at the stadium.

[3] In the main liquidation application, the first respondent claimed that the applicant was indebted to it in the sum of R158 303.26, which arose from the non-compliance

[1] Act number 61 of 1973.
[2] Act number 71 of 2008
[3] Act number 10 of 2013.
[4] Act number 24 of 1956.

with the terms of the lease agreement. The first respondent obtained the winding-up order in the absence of the applicant.

[4] Following the winding-up order, the third and fourth respondents, Mr Venter N.O and Ms Cronje N.O, were appointed provisional joint liquidators by the Minister. (the third and fourth respondents are hereafter referred to as "liquidators").

[5] After discovering that the winding-up order was issued, the applicant engaged with the first respondent to discuss the rescission of the order. The outcome of the discussion between the two was that the first respondent consented to the rescission of the order, the applicant having paid the amount of R80,876.63, including costs in the sum of R29 467.51. Attempts at reaching a similar agreement with the liquidators were unsuccessful. The parties could not agree on the fees to be paid to the liquidators. In light of the failure to reach an agreement on the issue of the rescission of the order the liquidators advised the applicant's attorneys of record that:

"19.1 they shall continue with the administration process until the determination of the Rescission Application;

19.2 they "urgently" require the completion of a CM 100 form and the Questionnaire "without any further delay."

19.3 they required details of the assets of the applicant and whether they are being utilised, and secured;

19.4 In the event of not being provided with the aforementioned information, "the provisional liquidators will have no alternative but to secure and/or remove all

estate's assets in an endeavour to preserve and protect the assets to fulfil their statutory duty."

[6] The liquidators insisted that they would proceed with the administration of the estate, pending the outcome of the rescission application. They took this stand on the basis that the order was enforceable until set aside and that they were lawfully appointed to administer the estate. They contended further that the rescission application did not suspend the operation of the winding-up order.

[7] The reasons for urgency are set out in the founding affidavit in the following terms:

"15.1 the matter has become settled as aforesaid;

15.2 the order should never have been granted for the reasons set out for hearing under;

15.3 the first respondent has consented to the rescission and setting aside thereof.

15.4 notwithstanding the foregoing, the Third and Fourth Respondents are forging ahead with the Winding Up process, displaying an attitude which suggest that they are embarking on an unnecessary and unjustified money–making exercise. In this regard, having been appointed as Provisional Liquidators in February 2022, they are demanding that their alleged Administration Costs be paid. This includes payment of R56 000.00 in respect of Security Bond which has been applied for, but not paid for yet. . ."

[8] The deponent to the applicant's founding affidavit alleges that he became aware of the winding-up order on 17 February 2022 and immediately the following the day

contacted the applicant's attorneys of record about the matter. He then instructed them on 21 February 2022 to proceed with the rescission application.

[9] On 4 March 2022, the applicant received an email from the First National Bank Business (FNB) informing them that it had come to their attention that the applicant was finally liquidated. It also demanded immediate payment regarding the Short-term Working Capital Facility availed to the applicant, the outstanding amount being the sum of R2 012 213.14. After that, and following the engagement between the parties, the first respondent accepted the offer of settlement of R 80 876.63 and agreed to the rescission of the winding-up order.

[10] It should be pointed out that at the time of the hearing all the papers were before the court and the issues raised were fully ventilated during the hearing. I have accordingly resolved that the matter should be entertained as urgent.

[11] The liquidators in opposing the application raised the following points in *limine*:

(a) "The *locus standi* of the applicant to institute the application, the company being in liquidation.

(b) The deponent to the founding affidavit and the attorney did not have the authority to institute the proceedings.

(c) The matter is not urgent."

[12] In addition, the liquidators filed a counter application to extend their powers to include the power as envisaged in section 386 (4) (a) of the Act if the court found that they did not have the power to oppose the application.

[13] In my view, the liquidators derive their authority in opposing this application from the reading section 386(1)(e) of the Act, whose language is broad enough to incorporate the power to oppose an application by the liquidators. Section 386 (1) reads as follows:

> "(e) subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.

[14] In response to the *locus standi* point the applicant contends that it was entitled to institute the rescission application on the authority of Praetor and Another v Aqua Earth.[5] In that case, the court in dealing with a similar issue held that:

> "[4] The effect of the winding-up order was to divest the first applicant of his functions as the company's director and to vest them instead in the liquidator(s). That raises the question whether the current application by the company, ostensibly at the instance of Mr Praetor, qua sole director, has been competently instituted. It appears to be generally accepted that a company's directors have what have been described as 'residual powers' to act on the company's behalf in causing it to oppose the confirmation of the rule in a provisional winding-up, or to appeal against a winding-up order. . . It seems to me that there is no rational basis to distinguish the standing of a board of directors to appeal in the company's name against a winding-up order

[5] Unreported judgment case number 1624/2016.

> from its standing similarly to apply to set aside such an order obtained without its knowledge.” Indeed, in Storti supra, loc. cit (Sorti v Nugent and Others 2001 (3) SA 783 (W))., it was stated that 'a company has the right to rescind ... a winding-up order'. It is clear from the context that the learned judge had in mind that the application to rescind would be mounted by the company at the instance of its board, not its liquidators. I am willing to accept therefore that the second applicant has standing to bring the rescission application, although it would probably have been correct in such circumstances to have cited it without the words 'in liquidation' after its name. Issues such as security for costs might arise in these circumstances, but they were not raised in the current case."

[15] In Attorney-General v Blumenthal the court dealing also with the legal consequences of a company in liquidation held that:

> "All the above show conclusively that on the granting of a compulsory winding-up order, the powers, duties, remuneration, tenure of office, and any special contract of the director automatically cease. How complete the ouster of the directors from their position as such on compulsory liquidation is, is borne out by what Gower says in his Modern Company Law at p. 585: 'Perhaps the most important rule of all is the basic principle of company liquidation, namely that on winding up the board of directors becomes *functus officio* and its powers are assumed by the liquidator. As we have seen, itis those in control who have the power to cause harm, i.e., generally the directors, or someone for whom they are nominees. Their removal is therefore almost invariably an essential preliminary to any remedial action, and this removal automatically occurs on liquidation."

[16] It seems to me that it can, on the above authority, be accepted that in the circumstances the applicant had authority to institute these proceedings.

[17] The issue of rescinding a winding-up order is expressly provided for in section 354 (1) of the Act, which provides as follows.

> "(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the court may deem fit.
>
> (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."

[18] In interpreting section 354 (1) of the Act, the Supreme Court of Appeal in Ward v Smit and 8 Others: In re Gurr v Zambia Corporation Ltd,[6] held that the language of the section provides the court in considering an application of this nature with a wide discretion to set aside the winding up order on either the ground that the order ought not to have been granted or that the subsequent events are such as to dictate for a rescission.

---

[6] 1998 l2) SCA 175.

[19] In Impac Prop CC v THF Construction,[7] the court held that the authorities are in agreement that an application for rescission ought to be based on section 354 of the Act and not the common law.

[20] The proposition by the applicant that a winding-up order can be rescinded under rule 42 of the Rules was rejected in Ragavan and Another v Karl Mining Services SA (Pty) Ltd.[8] In that case, the court held that the legislated basis for rescinding a winding-up order is found in section 354, and that includes orders that are alleged to have been erroneously made or granted. The court further agreed with the respondent's counsel that failure to bring the application within the purview of the provisions of section 354 of the Act was fatal to the application.

[21] In my view, the applicant's application stands to fail even if all the technical points raised in this matter were to be ignored.

[22] It is trite that the court has broad discretion to exercise in deciding whether or not to rescind a winding-up order. Of course, the discretion has to be exercised, having regard to the surrounding circumstances of each case. The principles to apply in this regard are set out in Klaas v Contract Interiors C. C. (in liquidation) and Others,[9] as follows:

---

[7] 409 06/16] [2019] ZAGP JHC 497 [5 December 2020
[8] [40723/2018] [2019] ZAGP JHC (40723/2018) (2 August 2019]
[9] 2010 (5) SA 40 (W).

"[65.1] The court's discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties interest, such as the liquidator, creditors and members.

[65.2] The court should ordinarily not set aside a winding -up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims.

[65.3] Where the claims of the liquidator and all creditors have been satisfied the court should have regard to the wishes of the members, unless (those members have bound themselves not to object to the setting-aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.

[65.4] In deciding whether or not to grant a setting-aside order, the court should, where appropriate, have regard to issues of 'commercial morality', 'the public interest and whether the continuation of the winding-up proceedings would be a 'contrivance' or render the winding-up 'the instrument of injustice."

[23] In the present case, even from the applicant's own version, it is clear that at least one creditor is still being owed money and has in this regard, demanded payment of the debt due by the applicant, and that is the FNB. As stated earlier the debt is for R2 012 213.14. There is no evidence that this amount has either been paid or that FNB, as a creditor, is aware of this application. In the circumstances, it cannot be said that the interest of the FNB has been taken into account in instituting these proceedings.

[24] In addition to the above, it is clear that the interests of the liquidators have also not been taken into account. In Re: Calgary Edmenton Land Co Ltd,[10] where the court held that:

> "Second, there is the liquidator. By s 309, all costs, charges and expenses properly incurred in the winding-up, including the liquidator's remuneration, are made payable out of the assets of the company in priority to all other claims. Where a liquidator has accepted office on this footing, I cannot see that in normal circumstances it would be right to stay the winding-up unless his position had been fully safeguarded, either by paying him the proper amount for his expenses or by sufficiently securing payment. A liquidator who loses control of the assets by reason of a stay ought normally to be properly safeguarded in relation to his expenses . . . "

[25] It is clear from the applicant's version that there is no intent in securing or safeguarding the remuneration of the work that the liquidators may have so far done in the present liquidation.

[26] In light of the above, I find that the applicant has failed to persuade this court to exercise its discretion in its favour and rescind the winding-up order of 18 January 2022.

[27] The respondent has requested that punitive costs be imposed on the applicant, including the deponent in the founding affidavit. I am not persuaded that this would in the circumstances of this matter be warranted. There is however no reason why the general principle that cost should follow the result should not find application.

---

[10] (1975) 1 All ER 1046 at 1051

Order

[28] The applicant's application is dismissed with costs on a party and party scale.

E Molahlehi

Judge of the High Court,

Gauteng local Division,

Johannesburg.

Representation:

For the Applicant: Adv. M Nowitz

Briefed by: Jardim Attorneys

For the Respondents: Adv. R de Leeuw

Briefed by: Scharbots & Portgieter Attorneys

Date of the hearing

Heard: 29 March 2022

Delivered: 21 April 2022