IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28118/12

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

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SIGNATURE **DATE**

In the matter between:

THABO LAWRENCE MATJI	Applicant

And

NICOLAAS VAN STRATEN N.O	
THE BODY CORPORATE OF VILLA MONTEGA	First Respondent
SIVALUTCHMEE MOODLIAR N.O	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent
NEDBANK LIMITED	Intervening Creditor

. This judgment was delivered electronically by uploading it on case lines.

JUDGEMENT

MATSEMELA AJ

INTRODUCTION

[1]. The applicant seeks an order in terms of Section 149(2) of the Insolvency Act 24 of 1936 ("the Act") alternatively Rule 42 of the Uniform Rules, alternatively common law an order setting aside the final sequestration order granted by my brother Sutherland on 1 August 2014 ("the Order").

[.2]. The application is opposed by the first respondent. To date neither the second nor the third respondent has entered the fray. Subsequent to the launching of the application Nedbank launched an application to intervene in the proceedings as creditor.

LEGAL FRAME WORK

[3] Section 149(2) of the act provides as follows:

"(2) The court may rescind or vary any order made by it under the provisions of this Act."

[4]. There are conflicting decisions on the issue whether the applicant can or should rely on Section 149(2) of the Act or the common law. In terms of the *Ward* v *Smit: In re Gurr v Zambia* Airways Co*rporation Ltd*[1] (Ward case) decision, it matters not if the order was granted on default or because of subsequent events as a basis for rescission, the order must be set aside in terms of the Act. Judge of Appeal Scott says the following at 180-G

"*The language of the section is wide enough to afford the Court discretion to set aside a winding up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events."*

[5] Howe*v*er, in *Storti v Nugent*[2] the Court stated one can, when the sequestration order should not have been granted in the first place, rely on the common law. Howe*v*er, in *Storti* matter, the Court did not have regard to the *Zambi*a A*i*rway*s* decision.

[1] 1998 (3) SA 175 (SCA) at 180.
[2] 2001 (3) SA 783 (*W*)

[6]. In terms of the relation between the common law and the Act, Scott JA proceeded to say the following in the Ward case at 181 para A-D:

"*There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission. However, in the Herbst case supra, Eloff J expressed the view (at 109F--G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also make a mockery of the principle of ut sit finis litium'. (Abdurahman v Estate Abdurahman (supra at 875G--H).) it follows that an applicant under the section must* not only show *that there are special or* exceptional *circumstances which justify the setting aside* of the *winding-up order; he or* she is *ordinarily required* to *furnish, in addition, a satisfactory explanation for* not h*aving opposed the granting of a final order or appealed against* the *order. Other relevant considerations would include the delay in bringing the application and the extent* to w*hich the winding-up had progressed."*

[7] The following principles, as appear from case law, apply to the exercise of the Court's discretion to set aside sequestration proceedings under Section 149 (2) of the Act and the common law[3]:

(a) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.

(b). Unusual or special or exceptional circumstances must exist to justify such relief.

(c). The section cannot be invoked to obtain a rehashing of the merits of the sequestration proceedings.

[3] *Storti v Nugent* at page 806 D-G.

(d) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission.

(e) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.

(f) A Court will not exercise its discretion in favour of such an application if undesirable consequences would follow.

[8]. In *Ex parte Van der Merwe*[4] other general principles are enunciated. The first deals with notice to interested parties which are fundamental to all applications. These include creditors, the Master and the applicant's Trustee.

[9] The second is that there should be no dispute of fact[5].

[10] The third is that the applicant is also expected to address the extent to which the winding up had progressed and to provide for payment of costs related to the administration of the estate[6].

[11] On either basis of relying on Section 149(2) of the Act or the common law, the applicant must at least bring himself within a rescission under the common law. That involves establishing 'sufficient cause'. The principles applicable in the determination of sufficient or good cause has been shown as the standard for common law rescission and was succinctly set out by Miller JA in *Chetty v Law Society, Transvaal*[7] the Appellate Division (as it then was). The Court proceeded at 756A-E:

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[4] 1962 (4) SA 71 (0) at 72E-H

[5] *Gautschi Al in Storti v Nugent disagreed with this requirement at stated: "I do not agree with this unqualified statement. If the application involves a rescission of an order which should not have been granted, an applicant for a rescission under the common law need only make out a prima facie case (Ideal more fully with this below). The effect of the order is interim only, and not final, and therefore factual disputes are ordinarily not a bar to success. If on the other hand the order was correctly made, i but is to be set aside (permanently) because of, for instance, a composition with creditors, the order of setting aside is expected to have final effect and factual disputes would then become an obstacle to the applicant (Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 635C)."*

[6] *Ward* decision *supra.*

[7] 1985 (2) SA 756 (A).

"The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (De Wet's case supra (De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A)] at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954 (3) SA 352 (O) at 357 - 8.)

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[12] A Court will not set aside a sequestration order if the correct course is for the insolvent to apply for his rehabilitation even if all the creditors have been paid in full out of the assets of the estate or by third-party[8].

APPLICANT'S DEFENCES

[13] In his founding affidavit, the applicant contends that he did not receive the sequestration application, had no knowledge thereof and the order was granted in his absence[9]. Although it is correct that the order was granted in his

[8] *Ex Parte Stanford 1981* (30 SA 947 (C)
[9] Rescission application, founding affidavit, page 8, para 5.11

absence, the allegation that he had no knowledge of the proceedings is brought into question.

[14] The sequestration application was served personally on the applicant, as required by the Act[10]. What the applicant fails to bring to the Court's attention is that he instructed attorneys to oppose the application who filed a notice of intention to oppose on his behalf. As a consequence, the rule nisi was extended and the final order was granted when the applicant failed to file answering affidavit[11],

[15] Prior to the provisional order being granted, the applicant made two payments in an attempt to settle his indebtedness[12]. Having said that it is evident that the applicant had the knowledge of the proceedings and notwithstanding that knowledge and the looming sequestration order, the applicant was in wilful default when the order was granted.

[16] The applicant alleges that the *nulla bona* return that the applicant relied on in the sequestration application was older than 6 months and this should have been addressed by the applicant in the founding affidavit[13].

[17] It does not assist the applicant to rehash the merits of the sequestration application. It is incumbent upon the applicant to set out allegations which, if established, could reasonably induce this Court to exercise its discretion in his favour. Recontesting the merits of the sequestration proceedings on the ground, for example, that the sequestration creditor's claim is not liquidated, or that a return of *nulla bona* had been obtained wrongfully, and by extension was older than 6 months, would not be sufficient as this would amount to a covert appeal against the sequestration order[14].

[18] The applicant contends that his estate was not insolvent[15]. This version by the applicant is vague and unsubstantiated. What is completely lacking in the

[10] Sequestration application, page 31
[11] Sequestration application, page 48
[12] first respondent's chronology of events
[13] Rescission application, founding affidavit, page 7, para 5.5.
[14] See *Abduraham v Estate Abdurahmon* 1959 (1) SA 872 (C) at 875 G-H
[15] Rescission application, founding affidavit, page 8, para 5.7 read with page 9, para 6

founding affidavit is an explanation why the applicant failed to pay his creditors but more importantly why he failed to file an answering affidavit in the original sequestration application.

[19] It is worth mentioning the often quoted dictum of Innes CJ in *De Waardt v Andrew & Thienhaus Ltd*[16]**;**

"Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him. ... Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

[20] These allegations merely amount to a rehashing of the merits of the original sequestration application which, on the authorities cited in the preceding paragraphs, does not amount to a justifiable reason for this Court to rescind the order.

[21] What the applicant fails to bring to this Court's attention, when he sets out his assets in the hope of persuading this Court that he was not insolvent, is that the unit at the Body Corporate of Villa *M*ontego was encumbered at the time when the application was launched and when the rescission order was granted. The mere fact that Nedbank intervenes as a creditor is no mere coincidence.

[22] Then the applicant also relies on the support from Trustees of the Body Corporate of Villa Montego[17]. These allegations fail to assist the applicant in any manner or form. Firstly, if there was permission from the second respondent or the body of creditors it would have been a factor to consider but

[16] 1907 TS 727 at 733.
[17] Rescission application, founding affidavit, page 6, para 5.13. Read with annexure "F".

the purported thoughts of 2 trustees of the Body Corporate in 2014 is legally irrelevant. Secondly, the Body Corporate was placed under administration in January 2015[18] in terms of which order the first respondent took over the management and administration of the Body Corporate. The final say rests with the first respondent as administrator of the Body Corporate.

[23] The purported attack on authority of the first respondent raised in the replying affidavit is impermissible and without merit. In *Ganes and Another v Telecom Namibia Ltd*[19] Streicher J*A* stated at paragraph 19 that:

"There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. <u>In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703(W) at 705C-J</u> [own emphasis]

[18] Rescission application, page 66.
[19] (608/2002) [2003] ZASCA 123; (2004) 2 All SA 609 (SCA) (25 November 2003)

[24] This challenge obviously necessitated the filing of the fourth affidavit on behalf of the first respondent and with of leave of this court the affidavit was accepted.

[25] It is evident that the applicant has simply failed to meet the minimum, requirements for a rescission of the order at common law. It leaves no doubt that the applicant was in wilful default when the order was granted which, on its own, would be fatal to this application succeeding[20].

[26] It has frequently been held that in order to show good cause, the defendant must at least furnish an explanation of his default sufficiently fully so as to enable the court to understand how it really came about, and to assess his conduct and motive[21]. It is my view that in this regard, the applicant has been remiss.

[27] The applicant failed to prove that unusual or special or exceptional circumstances exist to justify the relief being granted. The applicant has also failed to address the extent to which the administration of his estate progressed and failed to provide for payment of costs related to the administration of the estate.

[28] At best for the applicant, the correct procedure would be to apply for rehabilitation[22]

DELAY

[29] The rescission must be sought within a reasonable period of time. What a reasonable period of time is, will depend on the circumstances of the case[23]. The applicants' failure to approach a court at the earliest opportunity needs to be considered and if justified, condoned.

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[20] *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 SR; *Maujaen t/a Audio Video Agencies v Standard Bank* of SA Ltd 1994 (3) SA 801 (C) at 803H-I

[21] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (AD).

[22] En 7.

[23] *First National Bank of Southern Africa Limited v Van Rensburg NO & Others: In re: First National Bank of Southern Africa Limited v Jurgens & Others*, 1994 (1) SA 677 (T) at 681 H and *Roopnarain v Kamalapathi & Another*, 1971 (3) SA 387 (D) at 391 B-D. *Promedia Drukkers & Uitgewers (Eiendoms) Beperk v Kaimowitz & Others* 1996 (4) SA 411 (C) at 421 F-H.

[30] The first question which falls for determination is the time period which would be considered reasonable under the circumstances of this case. The reason for a time limit is that there must be finality in litigation and prejudice can be caused if rescission is not sought promptly.

[31] Guidance may be obtained a judgment made in a similar rule. In *Gisman Mining and Engineering Co (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd*[24] McEwan J held that *Prima facie*, a reasonable time would certainly not , be longer than the time prescribed in terms of Rule of Court 6 (5) (e) unless there were some special circumstances applying. In my view the 20 day period laid down in Rule 31(2) (b) thus provides guidance of what a reasonable time might be.

[32] Notwithstanding knowledge of the application and the order, it took the applicant 6 months to launch this application. This is an inordinately long period of time and most certainly not reasonable. The applicant has simply failed to address this delay at all.

[33] Any delay must be explained fully. The applicant must show good cause justifying an order for condonation. The party seeking such condonation should satisfy the court that the relief sought should be granted especially where the applicant is *dominus litis*[25].

[34] Furthermore, to date hereof the applicant has simply failed to enrol the matter or file his heads of argument and practice note. The heads of argument of the respondents are prepared out of sequence and in the absence of the applicant's heads of argument.

[35] In *Absa Bank v Petersen*[26] the Court stated:

"The reason for a limited period being afforded to a person who becomes aware of a default judgment to make application to have it set aside is manifest. It is in the public interest that there be finality in litigation. Any approach that would tolerate tardy challenges to judgments of the

[24] 1977 (4) SA 25(W) at 27
[25] *Standard General Insurance Co Limited v Eversafe (Pty) Limited* 2000 (3) SA 87 (W) at 936
[26] 2013 (1) SA 481 (WCC) at para 5.

courts determining litigation in too accommodating a manner would thus be inimical to the public interest. The effect of the time limitation is that a judgment debtor who fails to take steps timeously to have a default judgment set aside may be required to suffer the consequences of the judgment, notwithstanding that he or she might have had a defence to the claim on which it was premised."

[36] In *First Rand Bank of SA Ltd v Van Rensburg No and Others*[27] Eloff JP held at 681E that:

"It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue hereof to know that the last word has been spoken on the subject."

[37] It is therefore expected of a party in a rescission application to act expeditiously and not to delay the launching of the application, and by implication, the finalisation thereof. In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*[28] it was held that:

"It is well-established that an applicant for any relief in terms of rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in rule 27(1) as a jurisdictional prerequisite to the exercise of the court's discretion (Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (AD) at 352G). The applicant for any such relief 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 (Silber v Ozen Wholesalers supra at 353A). Where there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted Gool v Policansky 1939 CPD 386 at 390). This is, in my view, particularly so when the applicant for the relief is the dominus litis plaintiff." [Own emphasis]

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[27] 1994 (1) SA 677 (TPD)
[28] 2000 (3) SA (W) at 93 E- G

And at 94 C-G:

"Having regard to what was stated in Silber v Ozen Wholesalers (supra) in relation to the assessment of motive, it seems to me that the explanation of an applicant for relief under rule 27, particularly after an inordinate delay occasioned by the inaction of a dominus litis plaintiff, must be such as to dispel any impression of a reluctance to achieve an expeditious hearing of the true dispute between the parties. In the circumstances of this case it is appropriate that I should have regard to what has been held to be the proper function of a court. That function is encapsulated in the following passage in the judgment of Slomowitz AJ in Khunou and others v Fihrer & Son 1982 (3) SA 353 (WLD) at 355G-H:

"The proper function of a court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner." [own emphasis]

[38] The applicant has the burden of actually proving, as opposed to merely alleging, 'good cause' for a rescission[29]. In *Silber v Ozen Wholesalers (Pty) Ltd*[30] the Appellate Division, as it then was, held that the requirement of good cause cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, the *bona fide* presently held desire on the part of the applicant to actually to raise the defence concerned in the event of the judgment being rescinded.

[39] It is always been the hallmark of a *bona fid*e defence, which has to be established before a rescission is granted, that the litigant honestly intends

[29] *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1304H.
[30] 1954 (2) SA 345 (A) at 352 G-H

to place before a court a set of facts, which, if true, will constitute a defence[31] or justify the order sought. I am of the view that the application lacks *bona fides* and therefore make the following order.

Order

The application is dismissed with costs.

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MOLEFE MATSEMELA

Acting judge of the South Gauteng Local Division

HEARD ON	4 MAY 2022
DELIVERED ON	27 MAY 2022
FOR THE APPLICANT	IN PERSON
FOR THE FIRST RESPONDENT	ADV M LOUW
INSTRUCTED BY	LOCK DUPISANIE

[31] *Saphula v Nedcor Ltd 1999 (2) SA 76 (W) at 79C-D.*