IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: 04/07/2022 ***Signature***:

CASE NO: 2018/16100

In the matter between:

EMMANUEL CHOLA MWABA	Applicant
and	
JACQUES ANDRIES FISCHER N.O.	First Respondent
MARYKE LANDMAN N.O.	Second Respondent
STANDARD BANK OF SOUTH AFRICA LTD	Third Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG	Fourth Respondent

JUDGMENT

MAHOMED AJ

INTRODUCTION

1. This matter was on my opposed roll in January 2022, when it was postponed for the applicant to serve his papers on the liquidators whom he cited in these proceedings.

    1.1. The applicant served his papers on the liquidators and the parties thereafter approach the DJP, of this division for a special allocation. The matter appeared before me again, for determination of this application.

2. This is an application to rescind and set aside the final order for the winding up of African Management Communication (Pty) Ltd ("AMC"), which was granted by my brother Sutherland J on 11 May 2018**.**

3. The applicant was the sole director and the sole shareholder in AMC, which operated a business as conference organisers and publishers of magazines.

4. This rescission is brought in terms of the common law based on allegations of fraud and perjury, read with s 354(1) of the Companies Act 69 of 1973.

5. The applicant submitted that the third respondent obtained the order for liquidation fraudulently and alleged it had misled the court in the liquidation proceedings.

6. The applicant contends that the third respondent relied on the allegation that "it had learnt only on 20 April 2018, that AMC was using a Nedbank account to receive its book debts which it had ceded to the third respondent as security."

6.1. He submitted that the allegation was incorrect and was it was decisive when the order for final liquidation of AMC, was made on 11 May 2018.

7. The first and second respondents, are the joint liquidators of the AMC, they submitted that they have no interest in the outcome of this application and participated in these proceedings only to assist this court with an explanation / report on the progress in the winding up of the liquidated estate.

8. The third respondent opposes the application on several grounds, which it contends, if raised in limine are dispositive of the applicant's contentions and argument.

BACKGROUND

9. The applicant is indebted to the third respondent under several credit facilities.

10. The third respondent holds, as security for the indebtedness;

10.1. Four covering bonds over the AMC's immovable property, a home situated in Hyde Park, Johannesburg, and

10.2. A cession of book debts, concluded on 19 November 2013.

11. On 21 November 2017 the applicant, Mwaba passed a resolution and placed the AMC under business rescue. Four months later, the duly appointed business rescue practitioner resigned, due to a disagreement on the viability of AMC under business rescue. [1] Thereafter, Mwaba continued to manage and operate the AMC, without having appointed another business rescue practitioner, as is required by the Companies Act.

12. The evidence it that whilst "he managed" the business rescue process Mwaba instructed debtors to pay invoices into a Nedbank account, in breach of the cession of 2013 and absent a business rescue practitioner.

13. The third respondent obtained a final winding up order on an urgent basis.

14. The applicant seeks to rescind and set aside this order, he argued that the third respondent lied when it submitted to the court that it had learnt of the AMC's Nedbank account and the diverting of book debts for the first time on 20 April 2018. He submitted that the account was in place long before that date and its employees were aware of the practise for a long while.

[1] Caselines 008-4, judgement on liquidation

14.1. He argued that effectively, the third respondent “permitted” the practise.

15. Prior to the application for rescission being launched, Mwaba through the AMC sought leave to appeal the order of winding up which was refused, he then sought leave to the SCA, followed by a reconsideration to the President of the SCA and approached the Constitutional court on two occasions, when all courts, having considered his allegations of fraud and perjury, refused him leave to appeal. The National Prosecuting Authority has declined to prosecute in the matter.

16. The liquidators have applied for eviction which is opposed and that matter is pending.

THE APPLICANT’S CASE

17. The applicant raised two preliminary points when he submitted that his initial service on the attorneys who represented both the liquidators and the third respondent was good service. However, the third respondent argued that the attorneys were not the same attorneys for the liquidators in these proceedings, they were the same attorneys in the eviction proceedings. They were cited in these papers and must be served.

18. Advocate van Tonder appeared for the applicant and proffered that the third respondent and the liquidators had colluded and that the liquidators' affidavit was filed simply to bolster the case for the third respondent, and should not be admitted. He argued his client is prejudiced by the content of the affidavit. He argued that the affidavit is not an explanatory affidavit but in effect an answering affidavit. Its effect is only to weaken the applicant's right to bring a rescission application

19. Furthermore, he argued that the liquidators had from February 2022 to file their affidavit. They did not file papers then because they had initially decided not to but have however changed their approach.

20. Mr Scholtz appeared for the 1st and 2nd respondents and submitted that the court must note that it is four years since the order was granted and the liquidators have covered substantial ground in the liquidation during that time. Their inputs are relevant, particularly in that this court must be apprised of the full facts for it to exercise its discretion on the granting of this order for rescission.

21. Furthermore, the court must note that despite the directives of the DJP on the filing of further affidavits, this is not a "further affidavit" from the liquidators. The affidavit is not one that requires a court to "grant leave to file."

21.1. It is their only affidavit and that its purpose is not to reply to the application, but rather to explain the winding up process to date in this matter. He proffered that his clients have no interest in the outcome of this application.

21.2. He argued there is no purpose in serving the papers if the applicant aims to prevent any reply or response.

22. Mr Scholtz also alerted the court to correspondence sent to the applicant inviting him to respond, to his client's affidavit. No response was forthcoming, and it is fair to assume that he had no response.

23. Mr Scholtz submitted that the applicant could have even applied for a postponement of this hearing if he did indeed suffer prejudice.

24. He submitted that the purpose of an explanation is to inform the court of the progress of the liquidation process:

24.1. that substantial expenses have been incurred,

24.2. certain assets have been sold,

24.3. dividends have been paid,

24.4. claims have been proved and therefore the winding up process is at an advanced stage.

25. Counsel contended that in the circumstances, the rule 30 notice is of no more and it must be disregarded.

25.1. He proffered that the application favours only the applicant with no regard for the creditors, and the expenses incurred to date.

26. Mr De Oliveira appeared for the third respondent and submitted his client agreed with the submissions made on behalf of the liquidators.

27. He argued that the Mr van Tonder has caste aspersions on the third respondent's attorneys and against the liquidators and submitted that it is all speculation. No inference must be drawn.

27.1. He argued that if there are no positive proved facts from which an inference can be made, then it is mere speculation.

27.2. He argued further that the applicant has perempted his right to seek a rescission as his actions demonstrated that he accepted the judgment for liquidation.

27.2.1. The applicant purchased assets from the liquidated estate. He therefor considered the liquidation valid and accordingly

has perempted his right to appeal, as he considers himself bound to the judgment.

28. In reply Mr van Tonder placed on record that his client objected to paragraphs 26 and 27 of the liquidators affidavit, which referred to his unsuccessful attempts to appeal the liquidation order, and further to paragraphs 36 and 37 of their affidavit which referred to the eviction orders having been granted and the applicant's attempts to appeal that order have been unsuccessful.

29. Mr van Tonder submitted, however, that as a counter or a reply to the 1st and 2nd respondents' affidavit, the applicant seeks to present two letters which his client had written to the Master dated 3 December 2019 and 29 January 2020[2].

29.1. The first letter was a complaint against the Master for his failure to cooperate with the applicant to furnish him with documents to lodge his claim for his salary.

29.2. The second was a request to suspend the liquidation process due to a criminal complaint he laid against the third respondent.

30. Mr van Tonder proffered that the applicant in his letter demonstrated that he did not accept the liquidation as valid as proffered by counsel for the third respondent.

[2] Caselines 041- 43 to 46.

31. Both counsels for the respondents submitted that the letters cannot serve as evidence, they are not evidence under oath, and merely letters.

THE RESCISSION APPLICATION

32. The applicant applies for a rescission of the judgment, which placed the AMC in Liquidation in 2018.

32.1. The application is brought in terms of the common law read with s354 of the Companies Act.

32.2. Mr van Tonder submitted that the applicant seeks a rescission of the judgment on grounds that the judgment was granted on incorrect facts which the third respondent presented to the court.

32.3. It was argued that the court based on those submissions ordered the liquidation of AMC and if the correct facts were presented to the court, it would not have granted the order for liquidation, at that time.

32.4. He submitted that the third respondent misled the court when it submitted at the liquidation hearing, that it was only on 20 April 2018, that it became aware of the applicant's account with Nedbank, into which it was receiving payments in respect of book debts, which it had ceded to the third respondent as security.

INTENT TO MISLEAD

33. Mr van Tonder referred the court to email correspondence which the applicant sent on 17 February 2011[3], addressed to a Mabena, an employee of the third respondent, in which he referred to the transfers from AMC Nedbank account to Standard Bank account and annexed a Nedbank statement for February 2011.

33.1. Counsel proffered that over the years other employees of the bank were aware of the existence of the account, including one Pillay whose affidavit, which formed the basis of the criminal charges, is dated 25 February 2020.[4]

33.2. In a s 205 inquiry, Cappilati an employee of the third respondent confirmed that the third respondent knew of the Nedbank account before 20 April 2011.[5]

34. Counsel argued that the third respondent was a party to the fraud, it knowingly made the statement , with intent to mislead in its papers in the liquidation and that the email correspondence, and the affidavit of Pillay referred to above was proof that the third respondent knew of the existence of

[3] Caselines 002-106

[4] Caselines 002-220

[5] Caselines 001-47 to 48 par 103

the account and “permitted” the applicant to divert payments which he received for book debts even after they were ceded to the third respondent.

34.1. The banks employee Jalile confirmed in her affidavit for the liquidation that she oversaw the AMC’s account and the details of the account was within her personal knowledge.

34.1.1. It was submitted that she lied when she stated in her affidavit that she learnt of the Nedbank account and the diversion of book debts for the first time at a meeting of creditors held on 20 April 2018 at a meeting of creditors.

34.1.2. The applicant submitted that Jalile’s intention to mislead was established when she persisted with her statement that the third respondent did not know of the account before 20 April 2018 even after he stated this in his answering papers in the liquidation application.

35. Mr van Tonder submitted that it not unusual for a bank to “permit” the use of payments received for book debts, as trading funds, for the running of the business.

35.1. It does not follow, that as soon as the debts are paid they are to be paid over to the cessionary. The cessionary is to effect the cession in

order that the book debts be paid over to it.

35.2. He submitted that the third respondent had never effected the cession and that it only raised a complaint when it noted that the AMC had applied for business rescue.

36. Counsel further referred the court to s 332(1) of the Criminal Procedure Act of 1977, which provides that intent by a servant to advance the interests of a corporate entity, is seen as the entity's intent.

37. The applicant submitted that it is evident from the record of the proceedings and the judgment that this 'diversion of receipt of book debts into the Nedbank account" formed a decisive and essential ground[6], for the granting of the order of winding up.

38. It was argued therefor that the court would not have granted the order when it did, but for the third respondent's misleading the court on the true facts.

39. Mr van Tonder argued further that it should not be that the third respondent should arbitrarily be allowed to freeze access to funds, which it was relying on to revitalise the AMC. The ethos of business rescue is to help along a company in distress. The third respondent refused to release funds to pay the essential disbursements of the AMC.

[6] Caselines 001-25

40. The business rescue practitioner was forced to resign because the third respondent refused to release funds to pay his fee.

THE THIRD RESPONDENT'S SUBMISSIONS

41. Mr D Oliviera submitted that the application is an abuse of process and yet another attempt at delaying the inevitable, that the applicant must vacate the home he occupies rent free for the past four years. The home is the main asset in the insolvent estate, and he occupies and delays finalisation of the liquidation process at the expense of his client and the general body of creditors.

41.1. The evidence is that after two months of liaising with the liquidators the applicant presented for the first time a lease agreement which he alleged he concluded had with the AMC for lease of the house he occupies. The terms of the lease is for a period of nine years at a rental of R500 a month.

41.2. Counsel argued that in contrast the mortgage bond repayments prior to the liquidation were at R63 000 per month and the court must see this as another tactic by the applicant to frustrate the efforts of the third respondent and the finalisation of the winding up.

41.3. The evidence is that the home is in the luxury suburb of Hyde Park in

Johannesburg.

THE COMPANIES ACT SECTION 354(1)

42. Mr De Oliveira submitted that for the setting aside a final winding up order, the applicant is required in terms of s354(1) of the Companies Act 1973, to prove to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside. The court has a wide discretion to set aside the order either on the grounds that the order should never have been granted at all or that events after the order justify a setting aside.

42.1. Counsel argued that if the order ought never to have been granted at all, the applicant must show special or exceptional circumstances for the setting aside.

42.2. He referred the court to **WARD AND ANOTHER v SMIT AND OTHERS: IN RE GURR v ZAMBIA AIRWAYS CORPORATION**,[7] Scott JA stated,

> *"the object of the section is not to provide for a rehearing of the winding up proceedings …*
>
> *…an applicant under the section must show that there are special or exceptional circumstances which justify the setting aside of the winding up order, he or she is required to furnish, in addition, a satisfactory explanation for not having opposed the granting of the final order or appealed against the order. Other relevant*

[7] 1998 (3) SA 175 (SCA) AT 181

considerations would include the delay in bringing the application and the extent to which the winding up had progressed."

42.3. Counsel submitted there are no special or exceptional circumstances that justify a setting aside of the order and the applicant does not raise any either.

RESCISSION COMMON LAW / FRAUD

43. Mr De Oliviera submitted that an applicant who seeks a rescission of a judgment at common law must show:

43.1. The application was bona fide

43.2. That he was not in wilful default for failing to appear at the time the order was granted and

43.3. That he has a bona fide defence which he will advance at the trial.

44. Counsel submitted that the facts do not support an application for rescission at common law, relying on fraud.

45. The applicant has alleged a fraud, he must prove:

45.1. The successful litigant was a party to the fraud.

45.2. The evidence was in fact incorrect.

45.3. The fraud was made deliberately and with the intent to mislead.

45.4. The facts presented diverged to such an extent from the true facts that the court would, if the true facts were place before it, have given an judgment other than that which it granted , it was induced by the incorrect facts submitted.

46. The third respondent denied that it made a false statement and that Jalile intentionally misled the court, to obtain the order.

47. Mr De Olivera submitted that on 20 April 2018 at the creditors meeting the third respondent learnt for the first time that the AMC was diverting book debts to be paid into its Nedbank account, when the applicant directed debtors to pay into AMC's Nedbank account, whilst AMC was in business rescue, without a business rescue practitioner and in breach of the cession. The applicant was managing the business rescue process himself.

48. Counsel submitted the facts set out above was the basis for the decision to place AMC in liquidation.

49. It was further submitted that the cession was complete and effective as at the initial agreement. This meant that the applicant was to pay over the monies it received for book debts upon receipt thereof to the third respondent.

50. Mr De Oliveira argued that the facts which the applicant relies on may have triggered the urgency but denied that they were the substantive basis for placing the AMC in liquidation.[8]

51. The facts were not proven to be wrong. The applicant cannot simply allege the evidence was made with intent to mislead the court. The applicant has not produced any cogent evidence to support his contentions.

52. Ms Jalile learnt the facts set out in 46 above, as a recoveries manager at the time, she was required to depose to the affidavit on an urgent basis, she could not have been expected to know all that had transpired over the years in AMC's account or applied a forensic eye to its documents on file. She deposed that the facts were *"according to my knowledge*." It was submitted the applicant has failed to prove that she intended to mislead the court.

52.1. It was argued there was no causal connection between the alleged fraud/perjury and the judgment. Counsel referred the court to **MINISTER OF LOCAL GOVERNMENT AND LAND TENURE AND ANOTHER v SIZWE DEVELOPMENT AND OTHERS: IN RE SIZWE DEVELOPMENT v FLAGSTAFF MUNICIPALITY**.[9]

52.2. Mr De Oliviera argued that the submissions made by the third respondent did not diverge so markedly from the true facts, that a

[8] Caselines 030-13 par 24

[9] 1991 (1) SA 677 TK at 680 B

court would not have made a winding up order. The applicant's true intention is not to set aside the order but to delay the eviction proceedings and prolong his unlawful occupation of the property.

TIME BAR

53. The third respondent submits that the application was launched over three years after the order was made and that a reasonable time has elapsed. Furthermore, the applicant failed to apply for condonation and no substantial explanation for the delay has been put to this court for the delay.

53.1. The argument proffered by the applicant that he did not have the evidence to prove the fraud any earlier, must be rejected as he had known all along, it being the entire basis of his argument through several courts, that Jalile had misled the court as to her knowledge of the existence of the Nedbank account and is guilty of perjury.

53.2. Service of the application on the 1st and 2nd respondents was also out of time, almost nine months after the application was launched, and no condonation was sought for this either. The applicant was not entitled to assume that service on the third respondents attorneys was sufficient service, because in casu, the liquidators are represented by a different attorney.

PEREMPTION

54. In response to the 1st and 2nd respondents' affidavit, counsel for the third respondent submitted that the applicant has on the facts perempted any right to seek a rescission of the winding up order.

54.1. Counsel submitted that the applicant purchased assets from the insolvent estate of AMC.

54.2. He offered to purchase the immovable property he occupies.

54.3. He voluntarily released a motor vehicle owned by AMC to auctioneers appointed to the liquidators, which was financed by the third respondent.

55. Accordingly, it was argued, his conduct amounts to his having accepted the liquidation order. He demonstrates an intention not to assail a factual position. Mr De Oliviera relied on **L v THE CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA AND ANOTHER,**[10] and **VENMOP 275 PTY LTD**,[11] **QOBOSHIYANE NO and OTHERS**,[12] also in relation to rescission **NKATA**.[13]

[10] (24108/2016) [2018] ZAGPJHC 12 (20 February 2018) par 12

[11] 2016 (1) SA 78 (GJ) at para 25

[12] 2013 (3) SA 315 SCA at par 3

[13] 2014 (2) sa 412 (WCC) at par 27

THE COURT'S DISCRETION

56. Mr D Oliviera submitted that this court has a discretion whether to set aside a judgment given by another court. See **COLYN**[14] and **MABUZA**.[15]

57. He submitted that the order ought not to be set aside, given that almost 4 years have passed since the order was granted and the applicant has failed to show any special or exceptional circumstances as required by the Companies Act 1073, to set it aside.

57.1. Furthermore, the court must consider the advanced stage that winding up has reached,

57.2. Furthermore, that despite six attempts before other courts, who have considered his complaints of fraud and perjury, he has been unsuccessful in his attempts to set this order aside.

57.3. Counsel proffered that the applicant is not in good faith as he again places skittles in the way of the eviction proceedings by claiming he has a lease agreement in place with AMC for its property which he occupies. He submitted the applicant is acting in bad faith and has to know he has come to the end of the line.

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[14] 2003 (6)SA 1 SCA par 5

[15] 2015 (3) SA 369 GP par 21

JUDGMENT

58. Earlier I set out the submissions by the parties in regard to admission of the 1st and 2nd respondents' affidavit, although opposed, I am of the view that given the inordinate delay in bringing of this application and the requirements in **Ward**, infra, that this court "must consider all facts on the winding up process" to date, the affidavit is admitted.

58.1. Mr van Tonder's request to allow two letters be admitted as a reply to the affidavit is granted, in the spirit of effective resolution of the dispute between the parties.

59. The applicant prays for a rescission and setting aside of an order for liquidation of his company AMC which was granted on 11 May 2018.

60. He argued that the court granted that order only on the misleading submissions made by the third respondent, and had the court known the true facts, it would not have ordered for its liquidation when it did. He submitted that the third respondent knew of this Nedbank account at least since 2017.

61. He submitted that the court relied on the third respondent's submission that it "learnt only on 20 April 2018 of its diverting payments for book debts which were ceded to it, into a Nedbank account." It was submitted further that it was on this fact alone that the court ordered its final winding up.

62. I considered the judgment of my brother Sutherland, as he was then and noted:

> *"Thus, on the grounds of a diversion of funds the applicant was wholly justified in moving urgently."*[16]

63. In my view the applicant is incorrect when it contends that the fact of its diversion of money to another account, was the basis of the order for liquidation.

64. It was a point the court relied on for an urgent order.[17] I do not read it to mean that the diversion of funds and the existence of the account is the substantive basis for the liquidation order.

65. On reading further it is clear that the viability of the AMC was fully considered and that the applicant presented a weak case, for its revival and continued existence. The court referred to the applicant's supporting information as a "*wish list*."[18] It is noteworthy that the business rescue practitioner resigned as that he did not see the AMC as viable for any resuscitation as a business. The court took those facts into consideration as appears in the judgment.

66. The judgment reads further:

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[16] Caselines 008-3 lines 21-22

[17] Caselines 008 -4 lines 20 -22

[18] Caselines 008-5 lines 17-20

> *"Accordingly, in the absence of a concrete set of facts upon which to found an assessment that the respondent is indeed viable and the fact that none is forthcoming the resistance to the winding up application must fail."*

67. Upon a further reading of the[19] judgment there were no facts that permitted even a provisional order being granted. Therefore whether on the date or in the future, based on the papers before it, the court would have granted the same order. The respondent, the applicant in casu, failed to prove the viability of the business.

68. The applicant conveniently chooses only parts of the judgment to argue its case.

69. Section 354 (1) of the Companies Act 1973, provides,

> *" A 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."*

70. In **WARD AND ANOTHER v SMIT AND OTHERS : IN RE: GURR v ZAMBIA AIRWAYS CORPORATION LTD** [20], the court confirmed that the section does not contemplate a rehearing or an appeal, but,

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[19] Caselines 008-6 lines 20 - 23

[20] 1998 (3) SA 175 SCA at 181 B-D

> *"… 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 having opposed the granting of the final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding up had progressed."*

71. The applicant has not presented this court with any special or exceptional circumstances or any evidence of events after the order was granted which may justify its setting aside. The crux of Mr Pillay's affidavit, the only evidence that "surfaced" after the order was granted, was known to the applicant at the hearing of the liquidation matter.

72. The applicant brings this application almost three years later and fails to even apply for condonation for the late application. There are no details of the delay and the reasons thereof, except for the submission that he obtained Mr Pillay's affidavit, only a few years later. In **NKATA v FIRSTRAND BANK LIMITED,**[21] supra, the court stated,

> *" …Like all discretionary remedies, rescission under ruled 41(1) must be brought within a reasonable period of time. … The same applies to rescission at common law (see Roopnarian v Kamalapathy &Another 1971 (3) SA 387 (D) at 391 B-D). what is reasonable will depend on the circumstances of the case…, but the 20 day period laid down in rule 31(2) (b) provides some guidance as a starting point. The reason for the time-limit is that there must be finality in litigation and that prejudice can be caused if rescission is not promptly sought."*

73. I agree with Mr De Oliviera that the applicant has relied on the fraud and perjury argument all along and that Pillay's affidavit, which he procured

[21] Nkata supra par 27

recently, does not set out anything was unknown to him earlier.

74. The applicant has not set out a satisfactory explanation for the delay in seeking rescission and the winding up process has reached an advance stage that many creditors suffer prejudice at this late stage of the winding up.

74.1. Besides I am of the view he has failed to prove the necessary intention to mislead. There is no evidence to support his allegation before this court.

74.2. Ms Jalile deposed to the affidavit “to the best of her knowledge” and on an urgent basis, she could not be expected to know all details of a customer. It is noteworthy that the applicant relied on an email dated in 2011, when he informed the third respondent of his Nedbank account and his diverting of book debts into that account.

74.3. I perused the email, apart from noting the transfer of monies from Nedbank into Standard bank account for AMC, it was not clear to me that the funds were payment of book debts, which were ceded to Standard Bank and transferred to it.

74.4. Moreover, the third respondent’s main concerns were the fact that there was no business rescue practitioner in place at the time and that the diversion was on instructions of the applicant whilst the AMC

was in business rescue and in breach of the cession.

75. In any event, I do not hold the view that the court relied on that statement alone, when it ordered the final winding up of the AMC as contended by the applicant, as I mentioned earlier.

76. It is noteworthy that the winding up process has reached an advanced stage as submitted by the liquidators.

77. The court notes that apart from the second meeting of creditors having been held, certain claims have been proved and interim dividends were paid.

78. I noted that the applicant, purchased certain assets in the liquidated estate, he voluntarily surrendered a vehicle owned by AMC to the auctioneer representing the liquidators and he offered to purchase the main asset in the insolvent estate, the home he is living in.

79. It is clear he accepted the liquidation. It is illogical that he should want to set aside the liquidation order against that backdrop.

80. Years later the applicant wishes to set aside an order he clearly accepted,

81. In terms of s 354(1) the progress of the winding up process is an important consideration in the determination of the setting aside of the order.

82. I noted that the liquidators have had to expend large sums of money in the furnishing of security.

83. I agree with Mr De Oliviera that the applicant's aim is only to delay the eviction proceedings and continue to occupy the home, the main asset in the insolvent estate. The application appears to serve only the applicant at the expense of the general body of creditors and the insolvent estate.

84. The applicant has an option to start up another business, although Mr van Tonder argued that he had built up a client base in this business, no such evidence is before this court and therefor this argument is unsustainable.

85. In **L v THE CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA AND ANOTHER**,[22] Wepener J, stated:

> *"A person is said to acquiesce in something if such person by unequivocal conduct, knowing of his or her rights, inconsistently acts with the intention to the contrary and shows that the acquiesced to a set of facts. If such a person has clearly and unconditionally acquiesced in and abided by a situation he or she cannot thereafter challenge it."*

86. The same principles apply in regard to an application for rescission. See **SPARKS v DAVID POLLACK & Co. (PTY) LTD**,[23] "*the principles of peremption apply not only to appeals but also to the remedy of rescission. The general principle is that no person can be allowed to take up two*

[22] (24108/2016) [2018] ZAGPJHC 12 (20 February 2018)

[23] 1963 (2) SA 491 T at 496 D-F, Nakata v First National Bank Ltd 2014 (2) SA 412 (WCC) at par 30

positions inconsistent with one another , or as commonly expressed to blow hot and cold, to approbate and reprobate."

87. The applicant denied that he had perempted his rights and referred the court to correspondence in which he requested the liquidators to stop the winding up process, as he had laid a charge of fraud against the third respondent. It was argued that that is proof that he had not accepted the order and did not acquiesce.

88. I am of the view it is a weak argument to raise in the face of objective facts set out by the liquidators which was not disputed.

89. Having considered the conspectus of the evidence before me and particularly the reasons for the granting of the order of winding up, and am of the view this application cannot succeed.

COSTS

90. In my view in the face of the peremption argument, which succeeds on objective facts, the protracted litigation of this matter can only be described as an abuse of process.

91. The applicant has had his right constitutional right to a fair hearing, he has been to several courts as mentioned earlier, none of which found any merit in his argument.

92. The application was brought inordinately late, and the applicant's argument that Mr Pillay's evidence was not available any earlier is without merit, for the reasons I set out earlier. His last ditch attempt being the lease for R500 per month, to obstruct the eviction proceedings is a mala fides and once again prevents the finalisation of a matter.

93. I am satisfied that punitive costs are appropriate in the circumstances.

Accordingly, I make the following order:

1) The application is dismissed with costs on the attorney and client scale.

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MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 4 July 2022.

Heard on: 29 March 2022

Judgment delivered: 4 July 2022

APPEARANCES

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