REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

..... **.....**
SIGNATURE **DATE**

CASE NO:

19/17910

In the matter between:

CHAUCHARD, LUCIEN NORBERT **First Applicant**

CHAUCHARD, CALARIA GAY **Second Applicant**

HARBOUR TOWN HOMEOWNERS ASSOCIATION NPC **Third Applicant**

VAALMARINA BOATLOCKERS BODY CORPORATE **Fourth Applicant**

and

FIRE RING TRADING 15 (PTY) LTD **Respondent**

Lucien Norbert Guy Chauchard, Calaria Gay Chauchard, Harbour Town Homeowners Association NPC, Vaalmarina Boatlockers Body Corporate v Fire Ring Trading 15 (Pty) Ltd (Case No: 2019/4339) [2023] ZAGPJHC 507 (18 March 2023)

JUDGMENT

THOMPSON AJ

Introduction

[1] This is the return day in respect of a provisional liquidation order granted by my learned sister Keightley on 8 March 2023. The provisional order was granted by Keightley J on the basis that "[t]*here remained a possibility (albeit in my view no more than an outside chance) of the rescission order being finalized in the first respondent's favour without undue delay. Out of an abundance of caution, I elected to keep the door open for such eventuality by granting the order in provisional form*." Prior to dealing with the consequeces of the aforesaid, it is appropriate to, ever so briefly, deal with the protracted history of the matter.

[2] On 3 September 2012, the applicants obtained default judgment, granted by the registrar, against the respondent for payment of the sum of R2 715 000,00. In seeking judgment, the applicants relied thereon that there was due and proper service of the combined summons and particulars of claim ("*the action"*) on the respondent at its chosen *domicilium citandi et executandi* address at Block B, MH House, Capricorn, off Wroxham Road,

Paulshof Ext,40 ("*the domicilium address*'). As no appearance to defend was entered in respect of the action, the applicants applied for and was granted default judgment.

[3] A first rescission of judgment application was launched by the respondent during or about 5 July 2013. This first rescission application was initially an opposed application with an answering affidavit and replying affidavit being filed. As a matter of fact, on 15 May 2016, the applicant's indicated that they are "*prepared to permit* [the respondent] *to rescind the judgment*". No indication was given on what basis this concession was made. Despite this concession, the respondent did not prosecute the first rescission application to finality.

[4] For no clear nor cogent reason, a second rescission of judgment application was launched by the respondent on 25 July 2016. This second rescission application was also initially opposed, however on 17 August 2016, the applicants formally withdrew their opposition and defence to the second rescission application. Despite this withdrawal by the applicants, the also did not prosecute the second rescission application to finality.

[5] Again, for no clear nor cogent reason, a third rescission of judgment application was launched by the respondent on 2 July 2018. This third rescission application is opposed by the applicants and remain opposed by the applicants. Subject to what is stated below, this third rescission application has also not been prosecuted to finality by the respondent. It

behoves to mention that the answering affidavit to the third rescission application was delivered on 31 July 2018.

[6] No doubt discontent with the failure of the respondent to prosecute to finality any of the rescission applications, the applicants launched this application for the winding up of the respondent on 21 May 2019. The winding up of the respondent is opposed and has been opposed since June 2019 when the respondent delivered its answering affidavit. At the forefront of the respondent's opposition to the winding up application is the reliance on the fact that the judgment debt upon which the application for winding up is premised is to be set aside in terms of the rescission application(s) and, once so set aside, the applicants will have no *locus standi* to seek the winding up of the respondent. Despite this defence, and again subject to what is set out below, none of the rescission applications were prosecuted to finality. In other words, the since the delivery of the answering affidavit in June 2019, the respondent has not caused the rescission application(s) to be finalized for a further period of 2 years and 9 months.

[7] Voluminous papers have been filed in this liquidation application. However, as correctly pointed out by both counsel appearing before me, the provisional order by Keightley J has overtaken events. The granting of the provisional order kicked Section 359(1) of the Companies Act[1] into operation. As such, the civil proceedings by way of the rescission application(s) became suspended and could not be proceeded with. This had the effect that the third rescission application, which was set down for

[1] 61 of 1973

the week of 1 May 2023 on the opposed motion court roll was removed from the roll on 2 May 2023 by Smit AJ.

[8] *Mr Miller*, appearing for the respondent, commenced his argument by rightly indicating, in my view, that due to the provisional order having overtaken events, the matter now turns on one simple point. Although differently formulated by *Mr Miller*, the one simple point the matter now turns on is whether I am inclined to exercise my residual discretion to refuse the final winding up of the respondent having regard to the fact that if the rescission application proceeded, it would have been successful. *Mr Miller* indicated that unless I exercise my discretion in favour of the respondent, the doors of the court will finally be shut to the respondent as the rescission application(s) will not be proceeded with. To this end I have been informed by both counsel that the provisional liquidators have already indicated that they do not intend to seek an extension of their powers in order to prosecute the rescission application(s). It seems to be the parties also envisage that the likelihood of the final liquidators prosecuting the rescission application(s) is slim.

[9] It is trite that the discretion to refuse a winding up order where a proper case has been made out by a creditor is "*narrow*".[2] The extent of this narrow

[2] ***Afgri Operations Limited v Hamba Fleet (Pty) Ltd*** (542/2016) [2017] ZASCA 24; 2022 (1) SA 91 (SCA) (24 March 2017) at para [12]
"Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt. Different considerations may apply where business rescue proceedings are being considered in terms of Part A of chapter six of the new Companies Act 71 of 2008. Those considerations are not relevant to these proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual

discretion was not debated before me. Despite the extent of the narrow discretion not being debated before me, I have had regard to what was said in the judgment by Montzinger AJ in the matter of ***Firstrand Bank Limited v DLX Properties (Pty) Ltd***[3] with reference to ***Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and another***.[4] In my view, the learned acting judge over-complicated the issue pertaining to what constitutes the narrow discretion referred to.

[10] A narrow discretion is nothing more than a true discretion.[5] A discretion in the true sense is one where the court has an election which option it will apply and neither option can ever be said to be wrong as each is entirely permissible. The discretion must, however, be exercised judicially, not be influenced by wrong principles or a misdirection on the facts. Nor should it be a decision which could not reasonably have been made by the court if the court properly directed itself to all the relevant facts and principles.[6]

[11] Within the context of a winding up application, the reference to a narrow discretion means nothing more, in my view, than the exercise of a true discretion on a stricter basis. The starting point, inevitably, in the exercise of the narrow discretion is to accept that the creditor, upon having shown an entitlement to a winding up order, should be entitled to such an order. This does not mean, as stated in the authorities, that the court is to "*sit under a*

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circumstances only."

[3] (17096/2020) [2022] ZAWCHC 29 (24 February 2022)

[4] 2015 (4) SA 449 (WCC)

[5] ***Tafeni v S*** (A282/15) [2015] ZAWCHC 150; 2016 (2) SACR 720 (WCC) (16 October 2015) at para [3]

[6] ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*** 2015 (5) SA 245 (CC) at para [83] – [88]

palm tree" and without more just grant the winding up order. Otherwise stated, the court should not adopt a lackadaisical approach and just grant a winding up order because the creditor is entitled to such an order. The court must, where called upon to exercise this discretion, interrogate the facts relied upon and determine whether such facts are sufficient in nature to move from the position that the creditor is entitled to the winding up order.

[12] As a reliance on the discretion to be exercised by the court is sought to move away from an order the creditor is entitled to, the facts upon which the discretion is based should be compelling. Neither flimsy nor speculative reasons advanced will suffice to clear the hurdle of compelling facts necessary to invoke the court's discretion to refuse a winding up order. It would be unwise to even attempt to set out what would constitute compelling reasons, for to do so would seek to set rules or fetter the unfettered discretion of a court in the exercise of a discretion. Each case must be measured on its particular facts and what may be compelling reasons in one case may not be compelling reasons in another case, having regard to the overall conspectus of all relevant facts to a matter.

[13] Ultimately, the court must, for compelling reasons which are carefully weighed, come to the conclusion that it would be substantially proper and reasonable having regard to all the relevant facts of the matter to move away from granting a winding up order in the exercise of this narrow discretion.

[14] With this in mind I now turn to the facts of this matter. At the time that the matter was argued before me it was common cause that the applicant had satisfied the requirements to be obtain to a winding up order. As *Mr Miller* stated, the provisional order created an insurmountable obstacle for the respondent as the rescission application(s) can now never be heard. The only hope for the respondent is to call upon the court to exercise its narrow discretion in its favour. In this regard *Mr Miller* stated that if the court is with him on the exercise of the discretion, the provisional order should be discharged. In similar vein, *Mr Miller* conceded that if the court is against him in respect of the exercise of the discretion, a final order must follow.

[15] In essence, the respondent sought to argue the grounds upon which the court would have, so the submission goes, have granted the rescission if the rescission application was heard. Otherwise stated, the respondent sought to argue the rescission application as a defence to the winding up application. This approach creates, in my view, an unsatisfactory conundrum. Although *Mr Miller* contends that my finding on the grounds upon which the rescission would be sought will not be binding on a court finally hearing the rescission, I will have to deal with the probable degree of success of such grounds in this application. I would have to do so due to my earlier finding that the reason(s) upon which I can exercise my discretion should be compelling and that it should be substantially proper and reasonable to divert away from the applicants' right to have the respondent wound up. Ultimately, in order to amount to compelling reasons, I would have to find that the rescission application would have been successful on

the grounds advanced by the respondent. To find that there is a possibility that the rescission grounds have a measure of success would, in my view, be insufficient to muster compelling reasons.

[16] The respondent's attempt to argue the rescission in the winding up application, in light of the delay of more than 10-years in seeking to prosecute the first rescission application and the delay of almost three years in respect of the third rescission application, is in my view improper. The argument that a final winding up order will finally close the door on the respondent whilst a refusal of a final winding up order will not have the same effect on the applicant is, in the circumstances of this case, opportunistic and, in actual fact, a self-created state affairs. At the very least, since the winding up application has begun to hang over the head of the respondent like a sword of Decamoles, the respondent did not seek to act with any haste or real interest in seeking to have the rescission application set down and argued in order to, as the respondent contends it would, rid the applicants of their *locus standi*.

[17] To borrow, in a paraphrased manner from the *locus classicus* relating to condonation applications,[7] the respondent should provide a full and detailed explanation for its recalcitrance in having, at the very least, the third rescission application finally dealt with, which explanation should cover the entire period of delay. Above all, the explanation should be reasonable.

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[7] ***Van Wyk v Unitas Hospital & Another*** 2008 (2) SA 472 (CC) at para [22]

[18] Very little of an explanation is given why the rescission application was not proceeded with. What is known is that the third rescission application was enrolled, prior to it being opposed, on the unopposed roll for during August 2019. Thereafter the third rescission application has not again been set down, save as earlier mentioned at the eleventh hour.

[19] A proper reading of the first supplementary answering affidavit by the respondent, in my view, provides the answer why the third rescission application was not prosecuted to finality. The respondent states that due to the fact that the replying affidavit in this application was not filed by 24 June 2019, when it was due, and has not been delivered at the time the first supplementary affidavit was deposed to on 24 August 2022, the respondent adopted the assumptive impression that the liquidation application is not being proceeded with. Whether the liquidation was being proceeded with or not is, in my view, irrelevant. The judgment on which the applicants rely for the winding up of the respondent and the judgment on which the applicants relied in seeking execution remains extant. The failure to prosecute the liquidation application does not rid the respondent of this glaring danger of a valid, final and binding judgment existing. The practical effect of the failure by the respondent to prosecute the rescission application(s), is that each time the liquidation application is proceeded with or new execution steps are to be taken, the respondent will rely on the existence of the rescission application(s) to ward same off.

[20] The existence of the rescission application(s) is/are ultimately being used as a shield to, from time-to-time, ward off any attempts to recover that which is

due to the applications in terms of the judgment which they have in their favour. As the applicants had already executed against various assets of the respondent, it seriously boggles the mind (and calls into question the *bona fides* of the respondent) why the respondent has not prosecuted any of the rescission applications to finality and sought to claim back, at the very least the monetary value, from the applicants which they have received in terms of the execution steps. The rescission application(s) is/are, in my view, nothing more than an attempt to keep a defence alive for when the shoe pinches each time the applications seek to enforce their judgment.

[21] The inordinate delay by the respondent to rid itself of the troublesome judgment is, in my view, fatal to the respondent's call to this court to exercise its discretion in its favour. It is a trite principle of law that court orders, subject only to certain exceptional circumstances, none of which are applicable, are and remain valid until set aside. The judgment in this matter has now been in existence in excess of 10-years and any dispute relating to its enforcement must eventually be finalised. The principle of finality to litigation has been endorsed by the Constitutional Court, who pointed out that there must be an end to litigation.[8] In my view, this end to litigation is not limited to launching an application, but also to prosecute same to finality with due expedition, and not to leave it hanging in the air to be used as a shield as and when may be necessary in order to delay the finalisation of litigation.

[22] The respondent has submitted that nothing prevented the applicants from causing the rescission application(s) to be dealt with. Although the

[8] ***Minister of Justice v Ntulii*** 1997 (3) SA 772 (CC) at para [29]

applicants could have set the rescission application(s) down for hearing, they were under no duty to do so. As a matter of fact, nothing compelled them to do so as they were armed with a final, valid and binding judgment. The respondent was *dominus litis* in the rescission application(s). The respondent needed to rid itself of the judgment. To seek to pass the blame to the applicant is, in my view, demonstrative of the respondent's lack of *bona fides*.

[23] I am of the view that the respondent is the author of its own (mis)fortune. As much as *Mr Miller* strenuously and with some vigour advanced a proper and well-structured argument on why the third rescission application would be successful, the prospects thereof, to again borrow from condonation authority,[9] pale into significance having regard to the inordinate delay and the absence of a reasonable explanation why the rescission application(s) have not been prosecuted to finality. As the prospects pale into significance, coupled with my view that it would be improper to deal with the grounds advanced for the reasons already stated, I am of the view no compelling reasons exist to deviate from the starting point that the applicants are entitled to a final winding up order. I add, that even if it would not be improper for me to deal with the grounds advanced on which a rescission would be granted, I am still of the view that such grounds pale into significance once the inordinate delay and the absence of a reasonable explanation comes into play and, as a result, it is unnecessary to deal therewith. I am therefore disinclined to acquiesce to the respondent's request to exercise my discretion in its favour.

[9] ***Van Wyk***, *supra* at para [33]

[24] There are no reasons to deviate from the usual costs order in respect of winding up orders.

[25] In the premises I make the following order:

1. The provisional order for the winding up of the respondent granted on 8 March 2023 by Keightley J is confirmed and made final and the respondent is placed under final winding up and in the hands of the Master.

2. The costs of the application, including the costs occasioned by all supplementary affidavits and supplementary heads of argument, are costs in the winding up of the respondent.

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C THOMPSON

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:	16 MAY 2023
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