REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER : 24794/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

13 December 2022
DATE

SIGNATURE

In the matter between:

JAMES OPENSHAW ZERVAS **Applicant**

and

ADAMS & ADAMS ATTORNEYS **1st Respondent**

JOACHIM HENDRIK BOTHA NO **2nd Respondent**

MOLEKU JOSIAH MPYANE NO **3rd Respondent**

THE MASTER OF THE HIGH COURT, PRETORIA **4th Respondent**

Summary: Practice - Application in terms of section 354 of the Companies Act 61 of 1973
Rescission of a liquidation order

O R D E R

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1. The rescission application is dismissed.

2. The applicant is ordered to pay the first respondent's cost on an attorney and client scale.

J U D G M E N T

VAN HEERDEN AJ

[1] In this application the applicant seeks *"that the order of this Court, dated 3 June 2019, placing Scenic Route Trading 502 CC, the respondent in the main application under final liquidation, be set aside."*[1]

[2] Scenic Route Trading 502 CC (*"SRT"*) was however, according to the founding affidavit[2] finally liquidated on 27 May 2019, contrary to the relief sought in the

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[1] Notice of Motion prayer 1 pp 005-1 - 005-4

[2] par 31 pp 005-10

Notice of Motion.[3]

[3] Copies of both the provisional and final liquidation Orders were omitted from the papers.

[4] The relief sought, premised on the aforementioned permutations, is incompetent.

[5] However, this court continues to consider the applicant's case on the proposition that SRT was put under final liquidation on 27 May 2019.

[6] The provisional liquidation order was granted by this court on 16 July 2018[4] in circumstances where, according to the applicant, *"Counsel appearing for SRT at that time advised … that it would be better to let the liquidators recover the amounts owed to SRT, pay the first respondent and then have the provisional liquidation set aside"*.[5] SRT consequently did not oppose the application for provisional liquidation.

[7] SRT was *"subsequently advised by new counsel that the application should have been opposed. When the first respondent brought the application for the final liquidation of SRT, it was accordingly opposed … and removed from the unopposed motion roll and enrolled on the opposed roll"*.[6]

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[3] See also: the Applicant's Heads of Argument par 28 on 010-8; and the Common Cause facts contained in the Joint Practice Note par 10(d)

[4] par 24 of the founding affidavit pp 005-9 and par 10(c) of the Joint Practice Note pp 019-4

[5] par 23 of the founding affidavit pp 005-9

[6] par 26-27 of the founding affidavit pp 005-10

[8] SRT did conversely not have the necessary funds to instruct new attorneys, which resulted in the applicant, also the deponent to the founding affidavit, attempting to represent SRT during the liquidation proceedings. Unfortunately, in terms of legislation, SRT may only be represented by either an attorney or an advocate by virtue of the status of SRT as a corporation, which automatically disqualified the applicant. As a result the final liquidation order of SRT was granted.

[9] Inexplicably, the applicant only launched this application to rescind the liquidation order, on 8 July 2022, approximately three and a halve years after the final liquidation order was granted.

[10] Only the first respondent opposed this application.

[11] The applicant contended that SRT's debt, to the first respondent had been extinguished and that the first respondent will not suffer prejudice if the rescission is granted and accordingly that no reason remains for SRT to be under liquidation.[7]

[12] The first respondent however explained that a substantial amount remains owing to it by SRT to the amount of R460 758.55.[8] This amount was as a result of two taxed bills of cost.

[13] The applicant contrary contended that this debt was in respect of fees that

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[7] par 52 of the founding affidavit pp 005-13

[8] par 27 pp 007-8

weren't finally invoiced by the first respondent.[9]

[14] In an attempt to evaluate these competing factual versions by the applicant and the fist respondent, the issue is whether the version of the applicant is, after having consider the version of the first respondent so far-fetched and improbable that this court must accept and prefer the version of the first respondent above that of the applicant's allegations.[10]

[15] Where the applicant in *casu* claimed that all amounts owed to the first respondent were paid, he provided factually incorrect evidence to support such averment.[11] A perusal of the answering affidavit in spite of this, illustrated otherwise and showed that a substantial amount remains payable to the first respondent, which accordingly displays the applicant's failure to establish any defence (to the liquidation) and is therefore unable to satisfy the requirements for a rescission.

[16] Accordingly, this Court agrees with the first respondent's version that SRT was at the time of issuing the rescission application still indebted to the first respondent in the amount of R460 758.55.

[17] It is trite that the liquidation order then established a *concursus creditorum* which resulted in the appointment of the in *casu* liquidators care of Sechaba

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[9] par 15 of the replying affidavit pp 008-5

[10] **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA); Wrightman t/a JW Construction v Headfour 2008 (3) SA 371 (SCA)**

[11] See para 18 *infra*

Trust.

[18] The liquidators held the first respondent liable to pay a contribution of more than R200 000.00[12], collected in terms of section 106 of the Insolvency Act (Act 24 of 1936) as there was insufficient funds to pay the costs associated with the winding-up process. This contribution increased the amount owed by SRT to the first respondent.

[19] Furthermore, according to annexure "AA2"[13], SRT also owes SARS an amount exceeding R17 million, which proliferate SRT's total liability to the approximate amount of R22 million.

[20] It is against this factual backdrop, that section 354 of the Companies Act (61 of 1973) must now be reflected upon to determine whether the applicant is entitled to seek a rescission of the liquidation order.

[21] The full text of Section 354 of the Companies Act, which regulates the rescission of final liquidation orders is quoted for ease of reference and sake of convenience, where it provides as follows:

> *"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 of 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*

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[12] par 44 of the answering affidavit pp 007-16

[13] pp 007-31

setting aside that proceedings or for the continuance of any voluntary winding-up on any such terms and conditions as the court may deem fit."

[22] In ***Ward & Another v Smith & Others: in re Gurr v Zambia Airways Corporation*** 1998 (3) SA 175 (SCA) the Supreme Court of Appeal considered the provisions of section 354(1) and explained its application as follows:

"The language of the section is wide enough to afford the court a 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. In the case of the former, the onus on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances."

And,

"The object of the section is not to provide for a re-hearing of the winding-up proceedings or for the court to sit in appeal upon the merits of the judgment in respect of those proceedings. … 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 having opposed the granting of a final order or appeal against the order."

[23] In the matter of ***Storti v Nugent & Others*** 2001 (3) SA 783 (W) a detailed historical as well as an analytical account of section 354(1) was set out as follows:

> *"(1) The court's discretionary power conferred by this section is not limited to rescission on common law grounds;*
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> *(2) Unusual or special or exceptional circumstances must exist to justify such relief;*
>
> *(3) The section cannot be invoked to obtain a re-hearing of the merits of the sequestration proceedings;*
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> *(4) Where it is alleged that the order should not have been granted the facts should at least afford a cause of action for common law rescission;*
>
> *(5) 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;*
>
> *(6) A court will not exercise its discretion in favour of such an application if undesirable consequences will follow."*

[24] In the matter of ***Klass v Contract Interiors*** 2010 (5) SA 40 (W) at para 65 the court held that:

> *"A court should take note of the surrounding circumstances, the wishes of all the parties concerned, including the liquidators, and should never set aside the winding-up order if all the creditors will not*

be paid from the residue of the estate."[14] It is clear that the applicant has to show exceptional circumstances and that the rescission application is not an opportunity to simply re-argue the factual evidence that was before the court when the original liquidation order was sought. Under section 354(1) an applicant has to satisfy the requirements ordinarily applicable to common law rescission applications, those requisites must also be considered. An applicant in a common law rescission application must show good cause for the granting of the rescission application according to ***Ferris & Another v Firstrand Bank*** 2014 (3) SA 39 (SCA). A good cause must be illustrated in clear terms in the founding affidavit according to ***Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*** 1976 (2) SA 70 (D). Although the phrase *"good cause"* defies comprehensive definition it has been held that it ordinarily includes at least two requirements which an applicant is generally expected to establish to succeed in a rescission application, being (i) a reasonable explanation by the applicant for the default; and a *bona fide* defence which reflect some prospects of success, according to ***Scholtz v Marry Weather*** 2014 (6) SA 90 (WCC).

[25] The applicant admitted that a substantial amount is owed by SRT to Paragon Lending Services (Pty) Ltd in the amount of R3.5 million[15] and also claimed

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[14] See also **Nyhonyha & Others v Venter N.O & Others** 2021 2 All SA 507 (GJ).

[15] par 15 of the founding affidavit pp 005-8

that a settlement agreement in the amount of R3.2 million is in this regard eminent.[16] With this statement the applicant concedes that SRT still owes a large sum of money to one of its other creditors. The applicant has also not explained the source of the funds which will cover the debt owed to this creditor.

[26] The applicant suggested that the amount of R17 million owed by SRT to SARS is made up by penalties for the non-submission of documents or incorrect submissions.[17] The evidence in the answering affidavit however is that the SARS's claim is based on an assessment, and that an objection lodged by the applicant as long ago as June 2018 has been considered and rejected by SARS.[18]

[27] It is accordingly a concluded fact that SRT owes capital amounts of more than R22 million to all its creditors.[19] SRT does not have money or business to conduct and as such any possible result of a successful rescission application will be prejudicial to the creditors.

[28] The applicant consequently failed to illustrate and prove exceptional circumstances that would justify a rescission of the liquidation order.

[29] The applicant failed to give a satisfactory explanation for either not having

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16 par 14 of the replying affidavit pp 008-4

17 par 16 of the replying affidavit pp 008-5

18 par 20 -21 of the answering affidavit pp 007-6 - 007-7

19 par 26 of the answering affidavit pp 007-8

opposed the granting of the final order or not having appeal against such an order. Manifestly, the very same reason, namely not being in a financial position to afford an attorney, is given, which was the initial cause of action in the liquidation proceedings.

[30] The applicant moreover failed to address the period of approximately three and a halve years *supra* within which he delayed in bringing the rescission application. In this regard, the court in ***Herbst v Hessels NO*** 1978 (2) SA 105 (T) refused an application to set aside a final winding-up order which was brought some six months after the granting thereof, where the applicant who alleged *inter alia* that the creditor who had obtained such an order had not been a creditor of the company, had failed to oppose the application for winding-up because of legal advice that an opposition would be hopeless and of the fact of his own depression at his personal misfortune.

[31] This application also had the effect of further delaying the winding-up process of SRT to the detriment of the *concursus creditorum*.

[32] The applicant did not satisfactorily dealt with SRT's other creditors in his founding affidavit and did not provide any tender to pay the fees and costs incurred by the joint liquidators, where only in the replying affidavit there suddenly appeared a partial tender.[20] Such tender nonetheless appears both insufficient and the applicant has also failed to provide evidence of his ability

[20] par 12 thereof pp008-4

to pay the fees and charges incurred by the joint liquidators.

[33] SRT is undoubtedly factually and commercially insolvent.

[34] I find no cogent reasons why cost should not follow the event and especially under these circumstances why such cost should not be on a scale as between attorney and client.

[35] Accordingly the following order is made:

1. The rescission application is dismissed.

2. The applicant is ordered to pay the first respondent's cost on an attorney and client scale.

DJ VAN HEERDEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 22 November 2022
Date of judgment: 13 December 2022

APPEARANCES

For the applicant:

Adv A Du Plooy
Instructed by: E Neethling Attorneys Inc.

For the respondents:

Adv J Vorster
Instructed by: Adams & Adams Attorneys