Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 40491/14

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

___MAY 2022 _____

DATE SIGNATURE

In the matter between:

Anglogold Ashanti Limited **Applicant**

and

Nicolas Everardus Kleynhans **First Respondent**

Rephaphame Contractors 114 CC **Second Respondent**

The Companies and Intellectual

Property Commission **Third**

Respondent

Nicolas Everardus Kleynhans **First Respondent**

The Master of the High Court Pretoria **Fourth Respondent**

In re:

Nicolas Everardus Kleynhans **Applicant**

and

Rephaphame Contractors 114 CC **First Respondent**

The Companies and Intellectual

Property Commission **Second Respondent**

The Master of the High Court **Third Respondent**

JUDGMENT

MAKHOBA J

1. The applicant is ANGLOGOLD ASHANTI LTD, a public company with registration number 1944/01754/06, duly registered in terms of the company laws of the Republic of South Africa and which has its registered address at 76 Rahima Moosa Street, Newton, Johannesburg.

2. The first respondent is NICOLAS EVERARDUS KLEYNHANS (Kleynhans), with identity number: […] residing […]. The first respondent is the sole member of the second respondent.

3. The second respondent is REPHAPHAME CONTRACTORS 114 CC ("the CC"), a close corporation, which according to the records of the third respondent, has its registered office within jurisdiction of this Honourable Court at 73 Plataan Laan, Flamwood, Klerksdorp.

4. The third respondent is THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION ("the CIPC), a juristic person, established in terms of section 185 of the Companies Act of 2008 to function as an organ of state within the public administration.

5. The fourth respondent is THE MASTER OF THE HIGH COURT, PRETORIA ("the master") in his or her official capacity, with offices within the jurisdiction of this Honourable Court

6. The applicant and the second respondent concluded a contract for the performance of certain work at the Moab khutsong mine which is owned by the applicant. On the 6 March 2013 the applicant gave 30(thirty) days' written notice to the second respondent of the termination of the contract.

7. On the 5th April 2013 the second respondent vacated the mine. On the 10th April 2013, Mr Kleynhans (senior) and Mr H.M.L Malinga resigned as

members of the second respondent (hereinafter referred to as the CC). The first respondent (Mr Kleynhans) remained as the sole member of the CC.

8. On the 15th July 2013 it was resolved that the CC be wound up voluntarily by its creditors in terms of section 349 and 351 of the Companies Act, 61 of 1973.

9. On the 19 July 2013 the resolution to wound up the CC was registered by the CIPC in terms of the provisions of section 352 (1) of the Act.

10. On the 2nd December 2013, the applicant received a letter of demand from Douw Steenkamp attorneys. The letter stated an intention to institute proceedings against the applicant on the basis that the contract with the CC had not been lawfully terminated.

11. On the 4th June 2014, first respondent, acting in his capacity as sole member of the CC, launched the section 354 application under case number 40491/14, for an order to set aside the voluntary liquidation of the CC. The CIPC was ordered to deregister the special resolution of voluntary liquidation, and to change the CC's enterprise status from "voluntary liquidation" to "in business".

12. On the 15th August 2014, Tuchten J granted the order as sought by the first respondent the strength of the court order the CIPC changed the status of the CC to “in business” on 21 October 2014.

13. The second respondent then caused proceedings to be instituted against the applicant in Gauteng Local Division under case number 17143/2016. The matter was ultimately referred to arbitration in terms of a written arbitration agreement concluded in November 2018.

14. The applicant then sought a stay of the arbitration proceedings pending rescission application to be brought within 20 (twenty) court days of the ruling by the arbitrator given on the 14th July 2021.

15. The respondents are of the view that the application for rescission is without merit and only launched by the applicant purporting to avoid liability in the pending arbitration proceedings between the second respondent and AngloGold. The respondents ask for cost order inclusive of the cost of two counsels.

16. Furthermore, according to the respondents the application is fatally flawed in two aspects. Firstly, it was incorrectly launched on motion proceedings, whilst it should have been brought by way of action. Secondly the applicant has no *locus standi* to bring an application for rescission of the aforesaid judgment in terms of the requirements of the common law nor does it satisfy the requirements of Uniform Rule 42 (1).

17. First respondent in his affidavit dated 29 May 2014 expressly admitted having made an error by liquidating the second respondent instead of the company. In other words, the first respondent was at all material times under the understanding that he was placing Matlosana Mining under voluntary liquidation.

18. In my view it is clear from the case law and other authorities that a judgment obtained on ground of fraud or misrepresentation can be set aside by way of action and not by way of motion[1].

19. Thus therefore in my view the order of Tuchten J dated August 2014 cannot be rescinded in motion proceedings on the ground of fraud or misrepresentation.

20. The applicant avers that the real reason for section 354 application was so that the second respondent could institute proceedings against the applicant and that this fact ought to have been disclosed to the court, as it has a direct and substantial interest in the proceedings. The first respondent disputed the applicant's *locus standi.* The applicant further avers that it would have been entitled to intervene in the original section 354 application had notice been given to it.

21. In my view it is indeed correct to say that the applicant would have been entitled to intervene in the original section 354 application had notice

[1] De Beer v Von Lansberg and Others (36842/16) [2017] ZAGPPHC 1264 (26 January 2017) par 26;Santos v Cheque Discounting Co Pty Ltd 1986 (4) 752 (W) ;Motor Marine (Edms) Bpk v Thermotron; 1985 (2) 127 (SECLD) see also Munshi v Naicker 1978 (1) SA 1093

been given to it. For that reason alone it is clear to this court that the applicant had a direct and substantial interest in the section 354 application, and therefore has the requisite *locus standi* to intervene in these proceedings, and to bring the application for rescission of the court order[2] given by Tuchten J.

22. The applicant also brings the application for rescission premised upon Rule 42 (1) (a) in the alternative.

23. Rule 42 of Uniform Rules of Court, provides:

"*42.* ***Variation and Rescission Orders***

(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as the result of a mistake common to parties.

(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

[2] United Watch and Diamond Co (Pty) and Others v Disa Hotels Ltd- and Anothers 1972 (4) SA 409 (C) at 415B; Henri Viljoen (Pty) Ltd v Awebuch Brothers 1953 (2) SA 151 (O) at 169 see also Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, Fifth Edition, volume 1 page 226

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interest may be affected have notice of the order proposed."

24. In Naidoo and another v Matlala No and Others[3] in paragraph 6 the court said the following: *"In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment". The constitutional court expressed the same view in Daniel v President of the Republic of South Africa* [4]

25. It is patently clear to this court that if Tuchten J was aware that first respondent was under a mistaken belief that he was placing Matlosana Mining Company in voluntary liquidation instead of the second respondent, Tuchten J would have been precluded from granting the order in favour of the second respondent as he did.

26. Moreover if Tuchten J knew that the applicant in this matter was an interested party and that he was not aware of the application when it was granted Tuchten J wouldn't have given the order in favour of the second respondent as he did.

27. It is therefore my view that the order granted by Tuchten J on 15 August 2014 was erroneously granted.

[3] 2012 (1) SA 143 (GNP)
[4] 2013 (11) BCLR 1241 (CC) at par6

28.I make the following order:

1. The applicant is granted leave to intervene

2. The court order of 15 August 2014 is set aside

3. All actions taken by the first respondent, Nicolas Everadus Kleynhans after 15 August 2014 in his capacity as the sole member of the second respondent are set aside.

4. The third respondent is ordered to correct the status of the second respondent to its status as it was prior to 15 August 2014 alternatively October 2014 as being in voluntary liquidation with effect from 19 July 2013.

5. The third respondent is to take such further steps as it may deem necessary in compliance with its duties in terms of sections 168 and 187 of Companies Act, 2008 based on the information in these proceedings.

6. The first respondent is ordered to pay the costs of this application on an attorney and own client scale, such costs to include the costs of two counsel.

D MAKHOBA
JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the applicant:	**Advocate G.M Goedhart SC**
	Advocate M Mgxashe
Instructed by:	**Knowles Husain Lindsay Attorneys**
For the first and Second respondent:	**Advocate M du Plessis**
Instructed by:	**Theron, Jordaan & Smit Attorneys**
	C/O Coetzer & Steyn Attorneys
Date heard:	**19April 2022**
Date of Judgment:	**____May 2022**