IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2023-079433

Date of hearing: 9 January 2024

Date delivered: 2 February 2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

WN ATTORNEYS INCORPORATED	**Applicant**
and	
HERMANUS JOHANNES VAUGHN VICTOR N.O.	**First Respondent**
JOHANNA MINNIE MAHANYELE N.O.	**Second Respondent**
CAROLINE MMAKGOKOLO LEDWABA N.O.	**Third Respondent**
THE LEGAL PRACTICE COUNCIL	**Fourth Respondent**

JUDGMENT

SWANEPOEL J:

BACKGROUND

[1] This matter came before me in the urgent court. The applicant is an incorporated firm of attorneys which was provisionally wound up on 12 December 2023. The return date is 2 April 2024. The applicant is the company itself, which, through its sole director, Mr. Walter Niedinger ("Niedinger"), applies for the rescission, alternatively, the setting aside of the provisional liquidation order.

[2] It is perhaps necessary to explain the history of the matter briefly. Niedinger acts for the well-known diamond dealer, Louis Liebenberg, who, through various companies, has been selling diamond "parcels" to members of the public, with the promise that they would share in the profits generated by the sale of the diamonds. The scheme has been the subject of much controversy in recent times. One of Liebenberg's companies, Tariomix (Pty) Ltd which trades as Forever Diamonds and Gold ("Tariomix"), has been provisionally wound up by creditors who allege that Tariomix' business model was a Ponzi scheme in which they have lost large sums of money. The final winding-up of Tariomix is still pending.

[3] The first to third respondents are the provisional liquidators of Tariomix. The fourth respondent did not participate in the proceedings. I will refer to the liquidators as such. The liquidators allege that vast amounts of Tariomix money (in the order of R 97 million) was laundered through the applicant's trust account, and was used to pay various persons, including legal costs paid on behalf of President Jacob Zuma, and to set security in a private prosecution brought by the latter. Some R 35 million was allegedly used to purchase a mining right. These payments were, the respondents allege, *sine causa,* and should be repaid by the applicant. It is common cause that the applicant received a substantial amount of money for its services to Liebenberg and his companies.

[4] On 11 August 2023 the liquidators applied for the winding-up of the applicant. When the applicant failed to deliver an answering affidavit, the liquidators set the matter down on the unopposed roll of 12 December 2023. On 7 December 2023 applicant delivered an answering affidavit, an application for condonation for the late delivery of the answering affidavit, and an application to strike out certain passages in the liquidators' founding affidavit. The latter was mostly concerned with the striking-out of evidence which was delivered in a section 417 enquiry. The applicant averred that the evidence was not admissible in these proceedings unless both the commissioner hearing the matter and the Master of the High Court consented to its disclosure, which they had not done.

[5] Applicant was represented by counsel at the hearing on 12 December 2023. The applicant argued that condonation should be granted for the late filing of the answering affidavit, and that the matter should be postponed for the filing of further papers. The learned Acting Judge refused to hear either application, and expressed the view that both the condonation and striking applications should be heard in the opposed motion court in due course. Nonetheless, having refused to consider the applicant's applications, the Court granted a provisional liquidation order on the basis that the matter was essentially unopposed.

[6] The applicant says that the Court granted an order by default without considering the applicant's defence, and without considering whether evidence contained in the founding affidavit should have been excluded. In doing so, the applicant says, the applicant was deprived of its right to state its case before a provisional order, which could potentially have a devastating effect on its business, was granted. The order should, the applicant says, be set aside or rescinded under either rule 42 (1) (a), as having been granted erroneously, or under rule 31 as an order granted by default, further alternatively, under the common law. It is important to note that the application is not brought under section 354 of the Companies Act, 1973 ("the Act").

[7] The liquidators say that applicant does not have *locus standi* to bring the application, and that control of the affairs of the applicant now vests in its liquidators. They say that, although a company has residual powers to oppose a final liquidation, or to appeal the granting of a final order, it does not have *locus standi* to bring an application for rescission. The liquidators also argue that in a winding-up, a rescission application may only be brought in terms of section 354 of the Act, and by the persons mentioned therein. As applicant is not one of those persons, the liquidators say, applicant may not bring this application.

WHAT IS THE EFFECT OF SECTION 354 OF THE COMPANIES ACT, 1973?

[8] Section 354 (1) reads as follows:

> "**354. Court may stay or set aside winding-up**
>
> (1) 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 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."

[9] In a well-researched judgment in *Storti v Nugent and Others*[1] Gautschi AJ, having considered the comparative provisions in English law and the early South African law , came to the conclusion that section 354 was intended for situations where later events rendered a stay or setting aside of winding-up proceedings necessary. In cases where the winding-up order itself was assailable, the Court held, it should be rescinded under the common law and not under section 354. Gautschi AJ opined that section 354 envisaged the setting aside of the 'proceedings' and not merely the 'order', and thus did not apply to the

[1] 2001 (3) SA 783 (W)

situation where the order itself was assailable. He held that the company, represented by its board of directors, retained the residual power to oppose a final winding-up, and to appeal a final order, and may by parity of reasoning therefore, also apply for the rescission of an order which should not have been granted in the first instance.

[10] The *Storti* judgment contains an exhaustive analysis of the law, foreign and domestic, which I do not intend to repeat, but which I recommend as a very useful source on this topic. I do not, respectfully, join in the view that section 354 is only intended to govern the setting aside of all the winding-up proceedings as Gautschi AJ suggests. The section allows the Court to make any order on whatever terms and conditions that it deems fit, which would, in my view, include the setting aside of a provisional order whilst allowing the winding-up application otherwise to proceed. I do, however, respectfully agree with the view that if a company has residual powers to oppose a final order, or to appeal a final order, there is no logical bar to allowing the company to seek the rescission of an order that should not have been granted in the first place.

[11] The *Storti* judgment was preceded by the judgment of the Supreme Court of Appeal ("SCA") in *Ward and Another v Suit and Others In re: Gurr v Zambia Airways Corporation Ltd* [2]*,* and *Storti* is sometimes criticized as being at odds with the principles laid down in *Ward*. The SCA held in *Ward* that the provisions of section 354 were wide enough to allow for the setting aside of a winding-up order on the basis that it should never have been granted. The SCA also said:

> "In order to have the final winding-up set aside the appellants were obliged to invoke the provisions of section 354 (1) of the Act."[3]

[12] The above passage has been interpreted as meaning that save for section 354, there is no other path to the rescission of a winding-up

[2] [1998] 2 ALL SA 479 (A)
[3] Id at page 484

order. In *Ragavan and Another v Kal Tire Mining Services SA (Pty) Ltd and Others*[4], with reference to *Ward,* Fabricius J said:

> "In my view, it is correct to say that s 354 is the legislated basis to rescind winding-up orders, and that this would include orders that were allegedly erroneously sought or granted."[5]

[13] Fabricius J was therefore of the view that s 354 was the only pathway to the rescission of a winding-up order. In *Impac Prop CC v THF Construction CC*[6] Keightley was firmly of the view that *Storti* was not good authority, as it had overlooked the *Ward* judgment. The Court expressed the view that *Storti* was clearly wrong and that it was not obliged to follow the precedent set in *Storti*.

[14] The difficulty with that view is that *Ward* was concerned with an application to rescind a winding-up which was brought by the company's liquidators, being one of the persons referred to in section 354 (albeit that they were the liquidators appointed for an external company under foreign legislation). I do not, respectfully, read *Ward* to have dealt at all with the situation where the applicant is neither the liquidator, nor a creditor or member of the company. In any event, in my view, the Court's views in *Impac* were expressed on an obiter basis. The application was brought by the company represented by the sole member, who was herself under sequestration. Her trustee had thus stepped into her shoes as far as the control of the member's interest was concerned, and the trustee had not consented to the bringing of the application. On that basis the application was dismissed.

[15] A view contrary to *Ragavan* and *Impac* was expressed in *Praetor and Another v Aqua Earth Consulting CC*[7]. In this matter Binns-Ward J

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[4] (40732/2018) [2019] ZAGPPHC (12 August 2019
[5] Id at para 14
[6] (40906/160 [2019] ZAGPJHC 497 (5 December 2019)
[7] (162/2016 [2017] ZAWCHC (15 February 2017)

was faced with an application by the company under the common law, for the rescission of a winding-up order. The Court said:

> "It appears to be generally accepted that a company's directors have what has been described as 'residual powers' to act on the company's behalf in causing it to oppose the confirmation of the rule in a provisional winding-up or to appeal against a winding-up order. A useful collection of the relevant jurisprudence was put together by Gautschi AJ in *Storti v Nugent and Others*…. It seems to me that there is no rational basis to distinguish the standing of a board of directors to appeal in the company's name against a winding-up order from its standing similarly to apply to set aside such an order obtained without its knowledge. Indeed, in *Storti* supra loc. Cit., it was stated that a *'company has the right to rescind…. a winding up order'*. It is clear from the context that the learned judge had in mind that the application to rescind would be mounted by the company at the instance of its board, not its liquidators."[8]

[16] In this Division, in *Lak Investment Company No 26 v Pressure Advance Technology CC*[9] the Court, on application by the liquidated company, set aside a final winding-up order in terms of rule 42 (1) (a) for non-compliance with section 346 (4A) of the Act.

[17] Also in this Division, in *HR Computek (Pty) Ltd v Dr WAA Gouws (Johannesburg) (Pty) Ltd*[10]*,* applicant (represented by its sole director), which had been provisionally wound up, sought rescission in terms of the common law, alternatively in terms of rule 42. The applicant alleged that the order was obtained in its absence, without proper notice and by fraud. The respondent argued that the application could only be brought in terms of section 354. The respondent contended that the director had not obtained the consent of the liquidator to bring the application, and that the applicant did not, therefore, have *locus standi*.

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[8] Id at para 4
[9] (55018/20110 [2014] ZAGPPHC 25 (20 February 2014)
[10] 2023 (6) SA 268 (GJ)

[18] Coppin J expressed the view that the dicta in *Ragavan* and *Impac* were wrong, and had relied on an incorrect understanding of *Ward.* Seen in the context that the application in *Ward* had been brought by the liquidators, the *dictum* in Ward could not be understood to mean that section 354 precluded the rescission of an order under the common law or rule 42, and at the instance of persons other than those mentioned in section 354. The Court said:

> "Section 354 (1) of the Companies Act, excludes a company (i.e. under compulsory winding-up) from bringing the application envisaged in that section itself. Whether through its directors and without the co-operation of its liquidator(s), or otherwise. But if by virtue of their residual powers the directors of such a company may cause it to rescind a provisional or final liquidation order without the co-operation of the liquidators, then the company can clearly only do so in terms of the common law, or presumably, also in terms of Uniform Rule 42."[11]

[19] Coppin J held that the views expressed in *Ragavan* and *Impac* were *obiter,* and not binding authority. If the reasoning in *Ragavan* and *Impac* was to be followed it would mean that no persons other than those mentioned in section 354 would be entitled to seek the rescission of a winding-up order, notwithstanding that those persons may well have a direct and substantial interest in the matter. One must also ask whether it can be concluded from the wording of section 354 that the Legislature intended to oust the *locus standi* of persons other than those mentioned in section 354. In my view the wording of section 354 does not lend itself to such an interpretation. Consequently, I respectfully find myself in agreement with Coppin J.

MERITS OF THE APPLICATION

[20] Having found that the applicant was entitled to seek the rescission of the order under the common law or under rule 42, I turn to consider whether the applicant has made out a case in terms of either.

[11] Id at para 17

[21] The applicant argued before me that the application was in fact brought under rule 42 (1) (a), although the papers also attempted to make out a case for rescission in terms of rule 31, alternatively the common law. Rule 42 (1) (a) reads as follows:

> "**42 Variation and rescission of 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 granted in the absence of any party affected thereby."

[22] I have to reiterate that it is the applicant's case that, whilst it was represented in Court on 12 December 2023, the Court erred in:

> [22.1] Not considering the application for condonation for the late filing of the answering affidavit;
>
> [22.2] Not considering the striking out application;
>
> [22.3] Granting a provisional order winding-up the applicant despite the fact that a proper defence was made out in the answering affidavit.

[23] The applicant was present (albeit through counsel) at the hearing of the matter. The order was therefore not granted in the applicant's physical absence. It must, however be borne in mind that it is not necessarily a party's physical absence which is of importance. In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*[12] the Constitutional Court explained as follows:

> "[57] At the outset, when dealing with the 'absence ground', the nuanced but important distinction between the two requirements of rule

[12] 2021 (11) BCLR 1263 (CC)

42 (1) (a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The law considered below will demonstrate this.

[58] In *Lodhi 2*, for example, it was said that 'where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously. And, precisely because proper notice had not been given to the affected party in *Theron. N.O.,* that Court found that the orders granted in the applicant's absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[59] Similarly, in *Morudi*, this Court identified that the main issue for determination was whether a procedural error had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced. This Court concluded thus:

'[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these

applicants themselves - from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties' participation in the proceedings, satisfied the requirement of an error in rule 42 (1) (a), rendering the order rescindable. Whilst that matter correctly emphasizes the importance of a party's presence, the extent to which it emphasizes actual presence must not be mischaracterized. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this."

[24] In the *Morudi*[13] matter, to which the Constitutional Court referred in the above quotation, there was a dispute regarding the shareholding in a company. At the hearing of the matter in the High Court, the three applicants appeared and sought to participate in the proceedings. The Court held that the company (first respondent) was represented by its directors, and that applicants as potential shareholders, did not have a direct and substantial interest in the outcome of the matter. The applicants were thus not allowed to intervene in the matter, and the Court granted an order declaring who the shareholders were, thereby excluding the applicants and other potential shareholders. Seventy-one potential shareholders then applied for the rescission of the order, which application was refused, and on appeal, the Supreme Court of Appeal dismissed the appeal.

[13] [2018 ZACC 32. See: *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA); *Theron N.O. v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C)

[25] The Constitutional Court in *Morudi* concurred with the principle set out in *Amalgamated Engineering Union v Minister of Labour*[14], where it was held that even when there was agreement between the parties to a matter, that did not absolve the Court of its obligation to determine whether a third party, who was not a party to the proceedings, may be affected by the order. The Court held that the applicants were effectively prevented from stating their case, and thus they were deprived of their right to be heard.

[26] In this case before me the learned judge refused to consider the condonation and striking out applications, and she adjudicated the matter on the applicant's papers as if the matter were unopposed. In my respectful view the learned Judge erred by not first considering the condonation and striking applications, before adjudicating the main application. In doing so, the Court excluded the applicant from the proceedings, preventing it from stating its case. This view accords with the principles espoused in *Ferreiras (Pty) Ltd v Naidoo and another*[15], in which the facts were in material respects on all fours with the present case.

[27] The provisional order therefore stands to be set aside. As far as costs are concerned, this order is granted strictly on procedural grounds, and I have not considered the merits of the matter. It may be that the provisional order is re-instated, and therefore it is my view that the costs should be costs in the main application.

[28] I make the following order:

[28.1] The provisional winding-up order granted on 12 December 2023 under case number 2023-079433 is set aside.

[28.2] The costs of this application shall be costs in the main application.

[14] 1949 (3) SA 637 (A)
[15] 2022 (1) SA 201 (GJ)

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SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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ATTORNEY FOR RESPONDENT:	**Strydom Rabie Inc**
DATE HEARD:	**9 January 2024**
DATE OF JUDGMENT:	**2 February 2024**