IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 26799/2017

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED.
18 May 2022 _____
Date signature

In the matter between:

INFINITUM HOLDING (PTY) LTD **First Applicant**

GREGORY JOHN BOUWER N.O. **Second Applicant**

and

HUGO LERM **First Respondent**

NELIA LERM **Second Respondent**

JOHAN CHRISTO LOTTER N.O. **Third Respondent**

JJ VAN NIEKERK INCORPORATED ATTORNEYS **Fourth Respondent**

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 18 May 2022.

Summary: Rescission application of in terms Rule 42(1)(a) and (b) and the common law. The principles governing rescission restated. Applicant contending that settlement agreement made the order of the court was erroneously made in their absence, because their erstwhile attorney had no instruction to conclude the agreement. The applicants further contend that the business rescue planner was not properly authorised to conclude the agreement on behalf of the first applicant and those the order was erroneously granted. The resolution placing the first applicant under business rescue invalid as the first applicant was under liquidation. Interpretation of section 129(1) and 130 of the Companies Act. Resolution placing the first applicant under business rescue not invalid *ab initio*. The resolution could be set aside in terms of section 130 of the Companies Act.

JUDGEMENT

MOLAHLEHI J

[1] This is a rescission application in which the applicant, Infinitum Holdings (Pty) Ltd (Infinitum) and Mr Bouwer seek an order rescinding the order made by Wepener J on 28 August 2019 under case number 26799.

The order for rescission is sought either in terms of rule 42 (1) (a) of the Uniform Rules of the High Court (the Rules) or the common law.

[2] The applicants further seek an order declaring the resolution adopted on 7 August 2019 by Infinitum to be void *ab initio* in terms of section 130 (1) (a) of the Companies Act 71 of 2008 (the Act). The resolution in question was adopted by the second applicant and sole director, Mr Bouwer, placing Infinitum under business rescue proceedings.

[3] The order in which the applicants seek to rescind was consequent to the settlement agreement, which had been made an order of the court.

[4] Under the heading "Recordal" the agreement referred to above noted the action proceedings instituted under case number 26799/2017 for the payment of R1 million together with the payment of R377 324.00 to the second respondent. It is further noted that Infinitum had placed itself under the business rescue process and further that Mr Lotter was appointed the business practitioner.

[5] The terms of the settlement agreement are set out in the agreement reads as follows:

1. “The Second Respondent admits and accepts that the Second Respondent is indebted to the Second Applicant in the amount of R1000 000.00, which amount, together with interest thereon a set out in paragraph 3 below, is due and payable to the Second Applicant,
2. The Second Respondent is to make payment of the amount of R1000 000.00, together with interest thereon as set out in paragraph 3 below, to the Second Respondent,
3. The Second Respondent is to make payment of interest on the amount of R1000 000.00, to the Second Applicant, calculated at the rate of 10,25% per annum from 13 April 2017, to date of payment of the amount of R1000 00000 in full,
4. The Second Respondent is to pay the taxed or agreed costs of the action,
5. The Second Respondent is to pay the previously taxed and reserved costs of the Main Application launched and argued in the Gauteng Division of the High Court of South Africa, Pretoria,
6. . . .
7. The First Respondent accepts that the First Applicant is a creditor of the Second Respondent in respect of the amount payable in terms of paragraphs 2, 3, 5, and 6 above,
8. The Second Applicant will lodge the required claim documentation with the First Respondent within five days from the date of the settlement agreement been made an order of court,

9. The Parties agree that this Settlement Agreement is in full and final settlement of any claim the Applicants and the Second Respondent have or may have against each other."

[6] The applicants challenged the agreement's validity on the ground that it was concluded without the authority or instruction of Mr Bouwer.

[7] The dispute that resulted in the settlement agreement, which was made the court's order, relates to the controversy about the oral agreement that the respondents contend was concluded between the second respondent, Nelia Lerm and Infinitum. The oral agreement was co cluded in April 2014 and provided for a loan of R1 million to Infinitum. The respondents contend that Nelia Lerm performed her obligation in terms of the oral agreement by effecting the payment of R1 million into the account nominated by Mr Bouwer.

[8] The respondents aver that upon breach of the loan agreement, they instituted action proceedings for the payment of the said amount. The action proceedings were referred to the commercial court and allocated to Wepener J for trial. Infinitum defended the action, which was set down for a three-day hearing commencing 26 August 2019.

[9] Before the commencement of the hearing, the attorneys of Infinitum and Mr Bouwer, JW Botes, were removed because Mr Bouwer complained that they acted without following instructions. They were later replaced by JI Van Niekerk attorneys, the fourth respondent who later joined these proceedings following a successful intervention application.

[10] It is common cause that on 7 August 2019, Mr Bouwer took a resolution to place Infinitum under business rescue.

[11] The respondent opposed the application which was argued on the 26 and 27 August 2019, before Wepener J. After the hearing and whilst awaiting the finalisation of the order by the court, the parties engaged in settlement negotiations. They reached a settlement which was then made the court's order on 28 August 20219.

[12] Infinitum and Mr Bouwer challenge the validity of the agreement on the basis that their erstwhile attorney, JI Van Niekerk, did not have the instruction to settle the matter and, secondly, that the settlement was a

"quid quo pro" between the attorneys. They further contend that Infinitum never received the R1 million loan from the first respondent.

[13] As indicated earlier, the applicants seek the rescission of the order in terms of either rule 42 (1) (a) of the Rules or the common law. It is trite that the court has the power to rescind its orders or judgment in terms of rule 42 (1) (a) and (b), which provides as follows:

> "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 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 the parties.
>
> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[14] The import of rule 42 was explained by the Constitutional Court 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 and Others,[1] in paragraph [53] of the judgement in the following terms:

> "[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."

[15] As stated in Zuma (supra), to satisfy the requirements of rule 42 (1) (a) of the Rules, the applicant must show the existence of both the requirements that the order or judgment was granted in his or her absence and that it was erroneously granted or sought. However, the court retains the discretion to grant or refuse the rescission to rescind an order having regard to fairness and justice.

[16] In Tshabalala v Peer,[2] the court held that if the court finds that an order or judgment was erroneously granted in the absence of any of the affected parties, it should, without further enquiry, rescind or vary the order.

---

[1] [2021] ZACC 28.
[2] 1979 (4) SA 27 (T).

[17] The requirement that the judgment was erroneously granted is generally satisfied when the applicant can show that at the time the order was made, there existed a fact that had the court a been aware of, it would not have been inclined to grant the order.

Rescission under the common law

[18] For an applicant to succeed in a rescission application under the common law, he or she is required to prove that there is "sufficient" or "good cause" to warrant rescission.

[19] In the Zuma matter (supra), the Constitutional Court restated the two requirements that need to be satisfied under the common law as being the following:

> "First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a *bona fide* defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."

[20] In De Wet v Western Bank Limited,[3] held that under the common law, a judgment could be altered or set aside only under limited circumstances.

[3] 1977 [4] SA 770

[21] The contention that the order was granted in the absence of the applicant is based on two points namely; (a) their erstwhile attorneys and the business rescue practitioner did not have the mandate to sign the agreement, and (b) Infinitum could not consent to the agreement been made the order because it was already at the time in liquidation.

[22] The resolution to place Infinitum under business rescue was, the plaintiff contended, invalid *ab initio* for noncompliance with the provisions of section 129 (2) (a) of the Companies Act, which provides:

> "(1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that-
>
> (a) the company is financially distressed; and
>
> (b) there appears to be a reasonable prospect of rescuing the company.
>
> (2) A resolution contemplated in subsection (1)-
>
> (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
>
> (b) has no force or effect until it has been filed."

[23] In support of the above proposition, the applicants relied on the decision of Panamo Properties (PTY) Ltd and Another v Nel and Others

NNO,[4] where it was held that failure to comply with the procedural requirements concerning the commencement of the business rescue proceedings or to appoint a business rescue practitioner, will automatically terminate the business rescue proceedings.

[24] Section 130 (1) of the Act provides the procedure to set aside a resolution taken to place a company under business rescue when the liquidation proceedings have already been commenced.

[25] It is based on the above interpretation that the applicants contend that the appointment of the business rescue practitioner was unlawful and invalid. The appointment, according to them, was invalid because his appointment was made in circumstances where the liquidation proceedings had already commenced, and thus the resolution was void *ab initio.* They further contend in paragraph 20 of the heads of argument that there "is no provision in the Act to set aside such a resolution," and thus the resolution has to be *void ab initio*.

[26] The respondents opposed the applicants' application and raised several points in challenging the rescission application.

[4] 2015 (5) SA 63.

[27] The respondents' complaint in the answering affidavit is that the applicants unreasonably delayed in instituting these proceedings. The application for the rescission of the order was instituted twenty-two months after the order was issued.

[28] The allegation of the applicant was that the delay was caused by the "challenges" in obtaining the required documentation to launch the application. On the papers before this court, it would appear that, at best, the applicants had the documents needed to file the rescission application since 2017.

[29] Despite having claimed that their alleged default was "not willful," the applicant has proffered no proper explanation for the delay in instituting these proceedings.

[30] The critical point upon which this application turns on has to do with whether the resolution to place Infinitum into business rescue was invalid *ab initio* for lack of compliance with section 129 (2) (a) of the Act. As stated earlier, the applicant's case is that the resolution was invalid *ab*

initio because there is no procedure set out in the Act to set such a resolution aside. They also contend that their erstwhile attorneys and business rescue practitioner were aware that the liquidation proceedings had already commenced when the resolution was taken to place Infinitum under business rescue.

[31] The respondents denied knowledge of Infinitum having been under liquidation at the time the resolution to place it under business rescue was taken. Mr Bouwer does not, in their papers, make any allegation that he was aware of the liquidation proceedings at the time he, as the sole shareholder of Infinitum, made the resolution.

[32] I agree with the respondents that on the facts and the circumstances of this case, the interpretation given to section 129 of the Act by the applicants is incorrect. In this respect, the respondents contend in the heads of argument that had the legislature intended that to be the case, it would have phrased section 129 (2) (a) differently.

[33] I further agree with the respondents that had the legislature intended to automatically invalidate every resolution adopted to place a company

into business rescue proceedings where liquidation proceedings had already commenced, that would have been expressly stated in section 129(2) (a) of the Act.

[34] It is clear from the reading of the Act that section 130 of the Act provides grounds upon which a resolution adopted in terms of section 129 may be set aside. Subsection (1) (a) of section 130 specifically provides that a resolution may be set aside if the company has failed to satisfy the procedural requirements set out in section 129 of the Act. This means that even if it was to be accepted that at the time the resolution was adopted, the liquidation proceedings had commenced, the resolution was not void *ab initio*. For the resolution to have lost its legal effect, the applicants had to have sought a court order setting it aside. It is common cause that the resolution was never set aside by a court order. It follows, therefore, that the point relied on by the applicants that the resolution adopted by the sole director placing Infinitum under business rescue was invalid *ab initio* is legally unsustainable.

[35] The other point raised by the respondents is that the applicants are estopped from denying the validity of the agreement which was

subsequently made an order of the court. They contend in this regard that the representation made to them which induced them to conclude the agreement by Mr Bouwer was that the erstwhile attorneys of the applicants had the authority to sign the deal and to make it an order of the court. There is no evidence on the applicants' papers that the respondents were not entitled to accept that their (the applicants') erstwhile attorneys were duly authorised to agree on behalf of Infinitum.

[36] The applicants contended that estoppel could not sustain because it cannot be used to validate an invalid resolution to place Infinitum under business rescue.

[37] In my view, the point raised by the applicants is unsustainable when regard is given to the earlier discussion about the validity of the resolution.

[38] In relying on the issue of estoppel, the respondents contend that the applicants are estopped from relying on the allegation of the invalidity of the business rescue process and the whether the erstwhile attorneys were authorised to conclude the settlement agreement. They contend that in engaging with the erstwhile attorneys and reaching a settlement agreement

with them, they were induced by the representation which had been made both by conduct and expressly by Mr Bouwer about what they believed to be the true state of affairs concerning the authority to sign the agreement and made it the order of the court.

[39] In support of their contention that estoppel finds application, the respondents relied on the decision of Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Company Ltd,[5] where Cobert JA set out the requirements of estoppel as follows:

> "The essence of the doctrine of estoppel by representation is that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice ... the representation may be made in words i.e. expressly, or it may be made by conduct, including silence orinaction, i.e. tacitly ... and in general it must relate to an existing fact."

[40] In my view, considering the facts and the circumstances of this case, I am satisfied that the requirements of estoppel have been satisfied. This is particularly informed by the following. It has not been disputed that Mr. Bouwer was present at court when the matter was heard on 26 and 27 August 2019, before Wepener J. The erstwhile attorney for Infinitum on

[5] 1981 (3) SA 274, 292 D – F

those three days was J. I Van Niekerk. There is no evidence that Mr Bouwer ever raised an issue, objected to and or complained about the authority of the erstwhile attorneys. The settlement agreement further reinforces the representation and the conduct of the applicants after the settlement was made the order of the court. The claim for payment by the respondent was accepted by the applicants and was recorded as such even in the business rescue plan. This constitutes an ongoing representation that the respondents were entitled to rely on. The settlement agreement was concluded on 28 August 2019, and made the court's order on the same day. The respondents then instituted liquidation proceedings against Infinitum. The matter was then referred to case management which, amongst others, had to rule on the intervention application, which was opposed by the applicants.

[41] In my view, having regard to the facts and the circumstances of this matter, I find that the applicants have failed to make out a case for the rescission of the order under either rule 42 (1) of the Rules or the common law.

Costs

[42] The respondents have requested that costs be made on a punitive scale against Mr Bouwer. They complain that Infinitum is the alter ego of Mr Bouwer who has made unreasonable and unfounded allegations on the part of the attorneys. I agree with the respondent that the conduct of Mr Bouwer is unacceptable and vexatious. This in my view, was nothing but an abuse of the court process. It follows therefore that the appropriate order to make is that Mr Bouwer as the representative of Infinitum should be made to pay the costs out of his own pocket.

Order

[45] In the circumstances the following order is made:

1. The applicants' rescission application is dismissed.
2. The second applicant, Mr Bouwer, is to pay the costs of this application *de bonis propriis*.

_____

E MOLAHLEHI J

Judge of the High Court

Gauteng Local Division, Johannesburg

Representation

For the applicant: Adv. R Raubenheimer

Instructed by: Coombe Commercial Attorneys

For the respondent: Adv Gerry Nel SC

Instructed by: Richter Attorneys

Hearing date: 24 February 2022

Delivery date:18 MAY 2022