



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 5412/2008

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 1 JUNE 2022

SIGNATURE

In the matter between:

HENRIA BELGEGGINGS CC

Applicant

and

CHANGING TIDES 17 (PTY) LTD N. O.

Respondent

CASE NO: 43912/2016

CHANGING TIDES 17 (PTY) LTD

Applicant

and

COMPANIES & INTELLECTUAL PROPERTY

COMMISSION OF SOUTH AFRICA

First Respondent

HENRIA BELEGGINGS BK

Second Respondent

ANDRIES GERRIT HENDRIK DU PREEZ	Third Respondent
ANDREA WYNBERGEN	Fourth Respondent
ANATASIA WHYNBERGEN	Fifth Respondent
WILLEM CHRISTOFFEL ESTERHUIZEN N. O	Sixth Respondent
MINISTER OF TRADE & INDUSTRY N. O	Seventh Respondent
MINISTER OF FINANCE N. O	Eight Respondent
REGISTRAR OF DEEDS, PRETORIA	Ninth Respondent

Summary: Third Court Matter – heard in open court.

Practice – rescission of judgment.

Company – business rescue proceedings – setting aside – winding-up to follow.

ORDER

1. The rescission application in case no 5412/2018 is dismissed with costs.
2. The resolution in terms whereof Henria Beleggings CC was placed in business rescue, is set aside.
3. In terms of section 130 (5)(c) of the Companies Act 71 of 2008, Henria Beleggings CC is placed in final liquidation in the hands of the Master of this Court.
4. The costs in case no 43912/2016 shall be costs in the winding-up.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

There were two applications before the Court. The first (in case no 5412/2008) was an application for rescission of a judgment and the second (in case no 43 912/2016) related to the setting aside of business rescue proceedings and the winding-up of a company.

[2] The parties

- 2.1 The corporation which forms the principal subject matter of the litigation is Henria Beleggings CC (Registration number 1992/023080/23) (Henria). It is the applicant in case no 5412/2008 and the second respondent in case no 43912/2016.
- 2.2 The other principal role-player is Changing Tides 17 (Pty) Ltd (Changing Tides). It is the trustee of the SA Home Loans Guarantee Trust (SAHL Trust), formerly known as the Guarantee Trust, who features as a creditor of Henria. It is the respondent in case no 5412/2008 and the applicant in case no 43912/2016.
- 2.3 The Companies and Intellectual Properties Commission (CIPC) is the first respondent in case no 43912/2016.
- 2.4 The other respondents in case no 43912/2016 are the former members of Henria being A. Du Preez, A Wynbergen and N Wynbergen as third, fourth and fifth respondents respectively, the previous business rescue

practitioner of Henria, one W. C. Esterhuizen as sixth respondent (the BRP) and the Minister of Trade and Industry as seventh respondent (due to the fact that Henria at some stage faced deregistration).

[3] Relief sought

3.1 In case no 5412/2008

In this matter Henria (in business rescue) applied for the rescission of a judgment granted against Henria in favour of Changing Tides.

3.2 In case no 43912/2016

After it had become common cause that Henria was not deregistered, no relief was further necessary for the reinstatement thereof. The citation of the CIPC and the Minister therefore became superfluous. The remainder of the relief sought by Changing Tides in this application are the following:

- “4. *That the resolution in terms whereof the Second Respondent [Henria] was placed in business rescue be set aside in terms of section 130(5)(a) of the Companies Act 71 of 2008;*
5. *That an order be granted in terms of section 130(5)(c) placing the Second Respondent [Henria] under liquidation in the hands of the Master of the High Court;*
6. *Costs of the application be costs in the winding up, except in the event of opposition ...”.*

[4] The factual matrix from Changing Tides’ perspective

- 4.1 On 2 March 2005 Henria borrowed R 1 490 194, 60 million from a company known as Blue Banner Securitisation vehicle RC1 (Pty) Ltd (Banner) in terms of a written loan agreement with an option for an additional R 550 000,00.
- 4.2 The advance of the funds to be lent in terms of loan agreement were conditional upon the issue of a guarantee by the SAHL Trust in favour of Banner in terms whereof the Trust, (represented by its trustee Changing Tides) would undertake to make payment in the event that Henria failed to repay the loan. Such a guarantee was issued on 3 March 2015.
- 4.3 In return for the guarantee, Henria issued an indemnity in favour of the SAHL Trust. In terms hereof, should the SAHL Trust become obliged to make payment to Banner, Henria would indemnify the SAHL Trust.
- 4.4 As security an “indemnity bond” was registered in favour of the SAHL Trust on 18 May 2005 over a certain property in Waterkloof, Pretoria.
- 4.5 On 14 January 2008 Banner ceded all its rights arising from the loan agreement with Henria to Blue Granite Investments No1 (Pty) Ltd (Granite).
- 4.6 Henria fell behind in the loan repayment installments and the outstanding balance on 27 November 2007 in the amount of R 1 499 634,71 became due and payable.
- 4.7 As a consequence, the SAHL Trust was called upon to make good its guarantee.
- 4.8 Changing Tides thereupon instituted the action under case no 5412/2008 against Henria to make good its indemnity.

- 4.9 The cause of action and, in particular, the cession to Granite was scantily pleaded. Nevertheless, Changing Tides obtained judgment against Henria for an agreed settlement amount of R 1 650 000.00 plus interest on 31 July 2014. This order was granted by agreement between the parties on the eventual trial date.
- 4.10 Banner and Granite are both companies established for the purpose of advancing home loans under the SA Home Loans brand and operate as lenders for SA Home Loans clients. As such, its loan businesses are administered by SA Home Loans (Pty) Ltd (SAHL). The SAHL Trust in turn operates as a guarantor for SAHL and/or its lending companies. Although Changing Tides is the trustee of the trust (appointed as such by the Master of this Court) SAHL has been appointed as the accountant for the SAHL Trust and authorised by trustee resolution to act on behalf of the SAHL Trust regarding indemnity bonds. The Master's latest appointment letter is dated 12 October 2012 and reads "*Master reference IT/10713/00. This is to certify that Changing Tides 17 (Pty) Ltd represented by Kurt Wade van Staden is authorised to act as trustee of the SOUTH AFRICAN HOME LOANS GUARANTEE TRUST*" and a trustee resolution dated 19 February 2008 reads that "*It was resolved that SA home Loans and/or SA Home Loan Investment Holdings (Pty) Ltd are authorised to attend to the administration of the indemnity bonds passed in favour of the Trust ...*".
- 4.11 The order agreed to on 31 July 2014 provided that, should the settlement amount not be paid before a specific date, Changing Tides would be entitled to proceed to obtain default judgment in the amount originally sued for. The parties also agreed in the order that all previous disputes have been settled in full and final and that no defences based on any such

disputes will in future be capable of being relied on in any legal action on application.

- 4.12 When Henria defaulted on the settlement terms embodied in the aforesaid order, Changing Tides proceeded to obtain default judgment on 12 May 2015 in the amount of R 1 499 643, 71 plus interest at the rate of 15,65% per annum compounded monthly in arrear from 27 November 2007 to date of payment.
- 4.13 On 13 July 2015 Henria provided SAHL with a special power of attorney to sell the bonded property as its agent for a gross selling price of R 1 850 000.00. In terms of the special power of attorney Henria again acknowledged Henria's indebtedness to the SAHL Trust and undertook to make good any shortfall.
- 4.14 When a purchaser could not be found in satisfaction of the power of attorney to sell at the agreed price, Changing Tides proceeded with execution with a sale to be held on 8 September 2015.
- 4.15 The day before the sale in execution Henria provided Changing Tides with an offer to purchase the property from "the Luvhombé Group" for an amount of R 2,5 million. The sale in execution was accordingly called off.
- 4.16 On 20 January 2016 Henria's then attorneys informed Changing Tides that the abovementioned sale was cancelled but that a new sale was on the cards. On 11 April 2016 Changing Tides informed Henria that the new offer was not acceptable to it due to it being a proposed installment sale agreement to which Changing Tides was not a party and with no right of enforcement thereof. This resulted in Henria's termination of the mandate of its then attorneys.

- 4.17 On 11 May 2016 the two Wynbergen sisters attended the offices of Changing Tides' attorneys and indicated their (and Henria's) willingness to settle Changing Tides' claim by way of a once-off payment of R 1, 5 million. As part of the motivation to settle for a lesser amount, the one Wynbergen sister provided photographs the next day showing the dilapidated state of the bonded property.
- 4.18 On 16 May 2016 Changing Tides declined the settlement offer and thereafter arranged to proceed with a new sale in execution already scheduled for 24 May 2016.
- 4.19 Four days before the new sale in execution, Changing Tides was informed by Henria's new attorneys that Henria had filed a notice to commence business rescue proceedings. At that stage the outstanding amount had escalated to R 1 970 341, 53.
- 4.20 At the date of the launching of the application in case number 43912/2016 the outstanding amount was R 2 701 191, 38 and the arrears equated to more than 78 months of missed instalments.
- 4.21 It is clear that the sole purpose of the business rescue proceedings and the appointment of the BRP was to proceed with rescission of the judgment previously agreed to on 31 July 2014. Henria had no employees, no annual turnover and is and was always simply a property holding company. The resolution placing Henria under business rescue accordingly fell short of the requirements for such a procedure. This aspect shall be dealt with more fully hereinlater.

[5] Henria's contentions

- 5.1 In the founding affidavit in the rescission application (in case no 5412/2008), Ms Andrea Wynbergen stated that the basis for the application are as follows:

“13. I am advised that the current application stands to be adjudicated in terms of the principles of common law rescission alternatively lack of authority alternatively the principles of Rule 42(1)(c), that of common mistake.

14. the relevant common law principles in terms of which the application stands to be adjudicated are:

14.1 Fraud;

14.2 A Justus error in the consent to judgment”.

- 5.2 As a first ground thereafter, Ms Wynbergen alleged that Changing Tides, representing the SAHL Trust never had *locus standi* to claim against Henria. This argument was premised on the following:

“20. I submit that the Respondent could in fact not plead to that effect because Blue Banner could never have enforced its rights in terms of the guarantee as it ceded its rights and obligations under the loan agreement in terms of a written cession dated 14 January 2008 to Blue Granite.

21. On the basis of the written cession the vague averment pleaded by the Respondent that the lender enforced its rights in terms of the guarantee, therefore can legally not hold any water.

22. *In any event, apart from its averment in paragraph 9 of the particulars of claim, the Respondent failed to allege with any particularity, a nexus between it and Blue Granite either on the basis of a guarantee called up by Blue Granite against the respondent or otherwise”.*

- 5.3 Ms Wynbergen, in trying to explain the long delay between the judgment sought to be rescinded and the launch of the rescission application (more than 2 years), alleged that “... *the actions of the applicant are reasonable within the circumstances given the fact that it immediately acted upon the newfound knowledge/advice of the cession by taking the necessary steps*”.
- 5.4 As a further ground of rescission, Ms Wynbergen alleged that Du Preez had no authority to agree to the order of 31 July 2014. This ground was not formally abandoned during the argument of the matter, but Adv Wagener SC who appeared for Henria (and the BRP) declined to make submissions in support thereof.
- 5.5 In short, Henria’s contentions are that, as Banner had ceded its rights to Granite, it could not have made a demand on either Henria or on the SAHL Trust and accordingly Changing Tides could not rely on the indemnity issued by Henria to the SAHL Trust. The SAHL Trust could therefore, on this construction, not execute on the indemnity bond and everyone had been in error thinking that it could.

[6] Evaluation

- 6.1 The existence of the cession could never have constituted “newfound” knowledge. It had been annexed to the original particulars of claim as long ago as when the action was instituted on 4 February 2008. All that could

possibly be “newfound” was advice received from Henria’s current set of attorneys.

- 6.2 From the answering affidavit, facts emerge which indicate that this advice or the facts upon it was premised, was also incorrect. After the cession from Banner to Granite, both being companies in the SA Home Loans stable and whose administration is done by SAHL, Granite was the one who (correctly) demanded payment, first from Henria, then from the SAHL Trust. The demand from Henria, was contained in a written letter of demand in terms of section 129 of the Consumer Protection Act 34 of 2005. This letter was annexed to the particulars of claim.
- 6.3 Granite, having become the successor in title to Banner by virtue of the cession, as “lender” also sent demands to those who had provided security for repayment of Henria’s loan, being Du Preez as surety and SAHL Trust as guarantor.
- 6.4 In respect of the “lawful claim by the lender” on the SAHL Trust, this was expressly confirmed on oath in the answering affidavit in the rescission application (to which there was no reply): *“After sending the Section 129 notice and the applicant having failed to conclude any arrangements with Blue Granite Investments NO 1 to remedy its default in terms of the loan agreement, Blue Granite Investments NO 1 called upon the trust to make good its obligations under the guarantee. The Trust was accordingly subject to a lawful claim by the lender to call up on the indemnity bond ...”*.
- 6.5 This statement on oath accords with what had been pleaded in Changing Tides’ particulars of claim, in paragraph 13 thereof, a paragraph which Ms Wynbergen conveniently failed to deal with in her founding affidavit. The paragraph reads *“13. As a result of the Defendant’s failure referred to ...*

above, the Trust is subject to a lawful claim by the Lender requiring it to discharge its guarantee obligations ...”.

6.6 Henria’s arguments are based on the fact that the particulars of claim, although having annexed to it the cession, did not plead it in so many words. Based hereon, Henria argues that Changing Tides had sued as if Banner was still the (only) lender and had not been succeeded by Granite. Admittedly, the relevant paragraph in the particulars of claim is not the model of clarity but the facts referred to in paragraphs 6.2 and 6.3 above, dealing with the subsequent title by Granite were pleaded as follows: *“All rights and obligations of the lender under the loan were acquired by Blue Banner ... (although not formally amended, the affidavits make it clear that this should have been a reference to Granite) who became the actual and beneficial holder of the rights under the loan particularized in paragraph 3 above and the guarantee particularised in paragraph 4 above. Reference to the lender in these particulars shall include reference to Blue Banner Securitisation Vehicle RC1 (Pty) Ltd and/or Blue Granite Investments NO 1 (Pty) Ltd as the case may be”*. The reference to the loan agreement is to the one between Henria and Banner which is the agreement in respect of which Banner had in writing ceded its right, title and interest to Granite.

6.7 It appeared that there were some disputes between Du Preez (who acquired his 20% interest in Henria at the instance of the Wynbergen sisters’ mother) and the Wynbergens themselves. In fact, when the claim against Henria initially surfaced, Du Preez had his own set of attorneys. However, by the time the matter was ripe for trial, these attorneys had withdrawn and Henria was represented by the Wynbergens’ attorneys. These attorneys, as long ago as on 2 June 2008 already, in writing advised Changing Tides’ attorneys that they represent Henria, based in their mandate from the

“majority membership”, being the Wynbergens sisters. These same attorneys later advised that the sisters had launched a sequestration application against Du Preez.

- 6.8 All concerns that Henria (and the Wynbergens) might have had regarding the clarity of the particulars of claim have been overtaken by their plea, which followed upon summary judgment proceedings. These were followed by various pre-trial conferences and a first trial date on 8 April 2013 on which date the trial was postponed at Henria’s costs who was then compelled to remedy its deregistration process. During all this time Henria was represented by the same set of attorneys, Potgieters Inc. and by counsel. The existence of the cession and the reliance thereon continued throughout this whole process.
- 6.9 The next trial date was for 31 July 2014. On 29 July 2014, Henria, through the offices of Potgieters Inc, made a written settlement proposal to Changing Tides in terms of Rule 34. This entailed a payment in full and final settlement of the claim in an amount of R1,5 million and an additional amount of R150 000,00 as a contribution to costs. The next day Changing Tides’ attorneys responded to the proposal by incorporating the settlement proposal into a draft order. The draft order was in writing agreed to on 30 July 2014. It is this order which the then Deputy Judge President Ledwaba made an order of court on 31 July 2014 which Henria says should be rescinded.
- 6.10 The defence of the alleged lack of authority of Du Preez to have consented to the settlement, which had been proposed by the attorneys of Henria and the Wynbergens can therefore not be upheld. Incidentally, another factor which militates against this defence, is the retention of Du Preez’s liability in paragraph 6 of the order: *“This Order will have no effect on the surety’s*

liability to the Plaintiff. The plaintiff obtained default judgment against the surety under case no 23057/2011 on 26 May 2022”.

- 6.11 The allegation that the Wynbergens had seen to the payment of the R 150 000,00 contribution to costs into the trust account of Changing Tides’ attorneys, has also not been denied.
- 6.12 As I have already indicated, in the more than two years since the settlement had been made an order of court, Henria (and the Wynbergen sisters) had attempted to comply with the order or to otherwise settle Henria’s debt to the SAHL Trust, but to no avail. It is against this background that this Court must adjudicate the alleged “newfound” grounds of rescission which surfaced once new attorneys came on board. It is against the same background that this Court must adjudicate the validity (or continuance) of the business rescue proceedings and, indeed its *bona fides*.
- 6.13 The grounds upon which Henria sought to have the judgment rescinded, as referred to in paragraph [5] above are a common mistake or error as contemplated in Rule 42(1)(c), lack of authority, fraud or a *iustus* error on the part of Henria.
- 6.14 Having regard to the contents of the answering affidavit, there can not be any talk of a “common” error. Neither Changing Tides nor the SAHL Trust was ever in any doubt that a cession had taken place between Banner and Granite and that Granite had lawfully demanded that the SAHL Trust make good its guarantee. This entitled the trustee of the SAHL Trust, being Changing Tides to rely on the indemnity furnished to the SAHL Trust by Henria. The documentation and evidence to which I have referred clearly support these contentions. The grounds for rescission in terms of Rule 42(1)(c) have therefore not been established.

- 6.15 Having regard to the alleged lack of authority, I have already dealt with the representation of Henria (and the Wynbergens) above in how the settlement came about. There is no merit in this point.
- 6.16 On the issue of fraud, it has merely been mentioned in the founding affidavit, but not proved.
- 6.17 This brings one to the last remaining ground, that of *iustus error*. It is a ground often relied on in the law of contract where one party seeks to resile from something which he had acquiesced to. On the issue of acquiescence in an order of court and its role in rescission applications, counsel for Changing Tides referred the Court to the following extract from *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C): “*Acquiescence in the execution of a judgment must surely in logic normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment would ... I am satisfied that the applicant did indeed acquiesce in that judgment ... in my view, a litigant cannot purport to eat his cake and have it too in the matter of rescinding a judgment any more than a party to a contract can approbate and reprobate. Public interest requires that the Court’s orders should be certain and final*”.
- 6.18 The term *iustus error* (on which Henria relies as an alternate ground for undoing its “acquiescence”) envisages a mistake (“error”) which is reasonable and justifiable (“*iustus*”). The learned author Kerr in *The Law of Contract* (4th Ed) at 169 (with reference to earlier works) puts it as follows “*before a person is allowed to claim nullity of a contract on the ground of mistake, he must show that he was laboring under a mistake which is both operative and reasonable*”. In the present matter, Henria must show that the belief under which it was laboring, namely that a valid claim by Changing Tides on behalf of the SAHL Trust subsequent to a

cession from Banner to Granite existed, was a mistaken belief. There was however no “mistake”. The facts have never changed and neither has Changing Tides’ cause of action. Henria, represented by attorneys and counsel, reliant on the (correct) facts, irrespective of how imperfect it may have been formulated in the particulars of claim, acquiesced to the settlement order. In fact, it attempted to perform in respect thereof for more than two years. I find, on the facts before me, that Henria had not succeeded in showing that there was in fact any “error” which had to be justified. I make this finding well aware of the fact that, in a rescission application, an applicant need not actually prove its case, but merely put forward the elements of such a defence which, if it could be proven at trial, would be an actual defence. See: *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W). In this matter, Henria has not even established this.

[7] The business rescue/winding-up issues:

- 7.1 Once the rescission application fails, as I find it must, it should follow that the resolution whereby Henria had been placed in business rescue, should also be set aside. In her founding affidavit in the rescission application, this was advanced by Ms Wynbergen the only reason why the members resorted to business rescue.
- 7.2 Which brings me to a question the Court asked repeatedly during the hearing of argument on these matters, namely why the route of business rescue was followed and why did Henria, if it had a genuine belief in the merits of its rescission application, not launched it itself. It had no business, no employees, no “going concern” which could be operated by a business rescue practitioner in order to “rescue” the business. The answer

Adv Wagener SC gave eventually, was that it was the “safest way” in which Henria could “protect” itself.

- 7.3 Changing Tides (in my view correctly so) saw this as purely an attempt at delaying the inevitable execution of the bonded property and therefore promptly launched the application to have the business rescue proceedings converted into winding-up proceedings.
- 7.4 It was in opposition to the application for winding-up that Ms Wynbergen vainly alleged that the business rescue proceedings “were under way” and that the reasons why Henria believed there were reasonable prospects of a successful rescue were that *“the company will be able to settle the amount owing to its creditors if it’s afforded time and opportunity to shed costs, restructure the business to maximize the potential in the property and recover money from debtors”*. These were also reasons formulated in the resolution whereby Henria was placed into business rescue. It was further alleged that *“an investor has made a commitment to make funds available to improve the property to sell or rent out”*.
- 7.5 The facts as already described above, indicate that these contentions are not only devoid of a factual basis, but are patently untrue. Henria is purely a property holding corporation, it has no business to “restructure”, it has no employees nor any “costs” which it could “shed”. The business rescue practitioner has confirmed that Changing Tides constitutes “99%” of Henria’s creditors, the remaining being SARS and the local authority in respect of rates, taxes and amenities. At the time the resolution was taken, the property had been vacant for six weeks. The facts set out in the answering affidavit are in conflict with the dilapidated state of the property earlier portrayed by the Wynbergens. While it might be that an “investor” might buy the property or invest money to have it refurbished and rented

out, none of the previous efforts in this regard have been successful and neither has this mystery investor been identified. No business plan has been proposed, neither by Henria, its members or at a creditors meeting. The business rescue practitioner stated that he had put any possible “plans” on ice, pending finalization of the winding-up application. This is hardly proceedings which are “under way”. These facts also indicate that the members of Henria tailor their conduct and, even more so, their affidavits as the exigencies of the situation at the time require.

7.6 In *Firststrand Bank Ltd v Normandie Restaurant Investments and Another* (189/2016)[2016] ZASCA (25 November 2016), the court held, in respect of an application to place a corporation in business rescue, it “... *had to prove to the court in order to succeed in the application, that it was just and equitable, for financial reasons, to grant the order and that there was a reasonable prospect for rescuing the business ... a ‘reasonable prospect’ requires more than a prima facie case, an arguable possibility or mere suggestive speculation. It must be a prospect based on reasonable grounds*”. In appropriate circumstances further, the interest of creditors, as opposed to those of the company or its shareholders, should carry more weight See: *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kayalami) (Pty) Ltd* 2012 (3) SA 273 (GP) at 288G – H.

7.7 In *Griesel and another v Lizemore and others* 2016 (6) SA 236 (GP) the aims of business rescue were considered to be this: the primary aim was to “rescue” the company and to “rehabilitate” it. Should this not be possible, the permissible secondary aim could be to realise a better return for creditors. In adjudicating the validity of a resolution, the element of good faith was also a requirement.

- 7.8 In the present matter the element of good faith is under suspicion. Henria itself could have launched the rescission application, had it genuinely believed in the merits thereof. The resolution to do so while under business rescue was not taken with any genuine belief life in a “rehabilitation” of the corporation or in the rescue of its “business”. It was merely a convenient mechanism employed to halt execution.
- 7.9 One can appreciate that, had the rescission application been successful, it might have staved off Changing Tides’ judgment, but only temporarily and only until a next trial date. All the time, the uncontroverted fact of Henria’s outstanding liability and unpaid debt to Granite would remain. There was never any “plan” whereby Henria would pay off its debt. Henria’s attempt to avoid the judgment (only) by way of business rescue was a sham and an abuse of the purpose for which business rescue proceedings were incorporated into the Companies Act 71 of 2008. See *Alderbaran (Pty) Ltd v Bouwer and others* 2018 (5) SA 215 (WCC) dealing with similar circumstances.
- 7.10 In terms of section 130 (5)(a), a court considering an application for the setting aside a resolution to place a corporation in business rescue, may set aside such a resolution, with reference to section 130(1)(a), on the grounds that there is no reasonable prospect for rescuing the company or, with reference to section 130(5)(a)(ii), “*if, having regard to all of the evidence, the court considers it is otherwise just and equitable to do so*”.
- 7.11 Having regard to the factors mentioned above, I find that no reasonable prospect for the rescue of Henria by way of business rescue had been proven and, having regard to the abuse of this process, I find that it would be just and equitable to set aside the resolution. Even if the business rescue proceedings had not been resorted to as an abusive process, I find that, once

the rescission application was unsuccessful, that it would still be just and equitable to set aside the resolution. Having reached this conclusion, I need not consider whether the resolution had not in any event lapsed due to non-compliance with the time periods referred to in sections 128 and 133 of the Companies Act.

7.12 It is common cause that Henria is “commercially” insolvent and all indications are that it is also factually insolvent.

[8] Conclusion

In summary then, I find that:

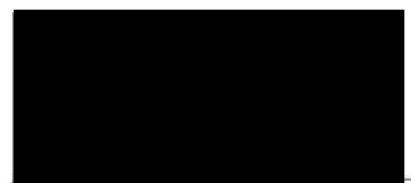
- 8.1 No common law grounds for rescission of the judgment in case no 5412/2008 dated 31 July 2014 have been established.
- 8.2 There was no “common error” as contemplated in Rule 42(1)(c) upon which the aforesaid judgment should be rescinded.
- 8.3 Henria’s objections against the *locus standi* of Changing Tides, representing the SAHL Trust as creditor, are unfounded.
- 8.4 The resolution to place Henria in business rescue should be set aside.
- 8.5 This is a proper case where a final winding-up order should be granted.

[9] Order

- 9.1 The rescission application in case no 5412/2008 is refused with costs.
- 9.2 The resolution in terms whereof Henria Beleggings CC was placed in business rescue, is set aside.

9.3 In terms of section 130 (5)(c) of the Companies Act 71 of 2008, Henria Beleggings CC is placed in final liquidation in the hands of the Master of this Court.

9.4 The costs in case no 43912/2016 shall be costs in the winding-up.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 27 January 2022

Judgment delivered: 1 June 2022

APPEARANCES:

For Applicant:	Adv S D Wagener SC
Attorney for Applicant:	Velile Tinto & Associates Inc., Pretoria
For Respondents:	Adv P I Oosthuizen SC
Attorneys for Respondents:	Machonane Kriel Incorporated, Pretoria

In case no: 43912/2016

For Applicant:

Adv S D Wagener SC

Attorney for Applicant:

Velile Tinto & Associates Inc.,
Pretoria

For 2nd, 4th & 5th Respondents:

Adv P I Oosthuizen SC

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