



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 3334 / 2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

23 March 2022

DATE

SIGNATURE

In the matter between:

MDUDUZI KHULEKANI SIBIYA

FIRST APPLICANT

MK DUBE CONSULTING (PTY) LTD

SECOND APPLICANT

And

**PERI FORMWORK SCAFFOLDING
ENGINEERING (PTY) LTD**

RESPONDENT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 23 March 2022.

- [1] This is an application for the rescission or setting aside of a final liquidation order granted by this court in respect of the Second Applicant on 28 May 2021. The Second Applicant was under provisional liquidation from 11 May 2021. Following the court order placing it under provisional liquidation, the Master of the High Court proceeded to appoint Mr. Cassim and Mr. Van Staden as joint liquidators. The First Applicant is the sole Director of the Second Applicant. Both the provisional and the final orders were granted in default as they were unopposed.
- [2] The application is brought in terms of section 354 of Companies Act, no. 61 of 1973 (the Act) which provides,

“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.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.”

[3] The rescission application is opposed by the Respondent on various grounds. Amongst these is the ground of non-joinder in that the Second Applicant (or the joint liquidators currently in charge) and other creditors such as Nedbank and the South African Revenue Services (SARS) were not cited as the Respondent. It was submitted as such that the Second Applicant was not actually before the court as the founding affidavit in support of the application by the Second Applicant, was deposed to by the First Applicant who at the time, lacked the mandate to act on its behalf.

[3] The First Applicant does not dispute that there are joint liquidators appointed to liquidate and manage the Second Applicant’s affairs. He avers though that they were notified of this application, and that any further action taken by them would be at their own risk given the fact that they now know of this application. As for SARS and Nedbank being the creditors to the Second Applicant, this too is admitted by the First Applicant who regards it as irrelevant since there are agreements reached with them regarding the repayments of debts due to them.

[4] The court’s discretion to grant a rescission of a final liquidation order was considered in *Ward and Another v Smit- and Another: In re Gurr v Zambia Airways Corp Ltd*¹ where the court held,

“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

¹ 1998 (3) SA 175 (SCA) at 180G-181E.

events. (*Meskin Henochsberg* on the Companies Act at 747; see also Joubert (ed) *The Law of South Africa* vol 4 first re-issue para 185 (M S Blackman).) 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. This has been emphasised by the Courts of various Provincial and Local Divisions not only in relation to s 354 and its predecessor (s 120 of Act 46 of 1926) but also in relation to s 149(2) of the Insolvency Act 24 of 1936 which affords a similar discretion to a Court to rescind or vary a sequestration order. (See *Herbst v Hessels NO en Andere* 1978 (2) SA 105 (T); *Aubrey M Cramer Ltd v Wells NO* 1965 (4) SA 304 (W); *Abdurahman v Estate Abdurahman* 1959 (1) SA 872 (C).) There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission. However, in the *Herbst* case *supra*, Eloff J expressed the view (at 109F--G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle of *ut sit finis litium*'. (*Abdurahman v Estate Abdurahman* (*supra* at 875G--H).) 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 appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed. (Compare *Aubrey M Cramer Ltd v Wells NO* (*supra* at 305H).)"

- [5] From the above, it appears the court's discretion is premised on two prerequisites in the alternative of each other, being the winding-up order

ought not to have been granted at all, or it falls to be set aside by reason of subsequent events after the it was granted. Far from suggesting that the order ought not to have been granted at all, the First Applicant submits in his founding affidavit that the fact that the application papers were not served on him or did not reach his attention, then the judgment that was granted thereafter was in error. He also argues that the Second Respondent was solvent. The First Applicant does not suggest that there could be exceptional circumstances warranting a consideration of an application on the basis that the order ought not to have been granted.

[6] The argument to the effect that a judgment granted in default following a non-personal service of motion papers was granted in error is misplaced and has no legal basis. As long as the service of motion papers is in accordance with the Uniform Rules, the order is valid and not granted in error. A judgment is granted in error if certain facts are disclosed to the court which were unknown at the time of the order, provided the court would not have granted the order had those facts been brought to its attention at the time of the order.² In order to succeed to have a final winding up order set aside for reason that it ought not to have been granted requires therefore more than proving that the order was granted in error, but exceptional circumstances, both of which are lacking in this application.

[7] The only leg on which the application can remain standing is the second prerequisite that deals with the developments from the date of the winding-up order. In *Klaas v Contract Interiors*³ this prerequisite was

² *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 166–9.

³ 2010 (5) SA 40 (W) at para 65.

expanded to integrate four requirements that should be met before the rescission order could be granted:

- “1. The court's discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties in interest, such as the liquidator, creditors and members.
2. The court should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims.
3. Where the claims of the liquidator and all creditors have been satisfied, the court should have regard to the wishes of the members, unless those members have bound themselves not to object to the setting-aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.
4. In deciding whether or not to grant a setting-aside order, the court should, where appropriate, have regard to issues of 'commercial morality', 'the public interest' and whether the continuation of the winding-up proceedings would be a 'contrivance' or render the winding-up 'the instrument of injustice'”

[8] Counsel for the First Applicant must have had the above in mind when he submitted that the provisions in section 354 of the Act certainly allow, if not require, the court to have regard to events subsequent to the winding up of the company.⁴ After all, section 354(2) of the Act expressly provides for the views and wishes of the creditors and members to be taken into consideration. It is on this aspect that the non-joinder of the person whose views has to be considered by the court becomes a hindrance to the court from exercising its full mandate. The progress or developments since the winding up order of the Second Applicant can only be gleaned from the liquidators, whose views are not before the court. I am inclined to agree with the submissions to the effect that the Second Applicant is not before court

⁴ See para 5 of the Applicant's heads of argument.

as the affidavit on its behalf was deposed to by a person who lacked the company mandate and was not authorised by the liquidators.

[9] As for the creditors, the First Applicant alluded to the fact that there are agreements entered into with Nedbank and SARS and that some amounts have been paid already. The said creditors are not parties to this litigation so they can confirm or deny these allegations. The First Applicant also failed to attach confirmatory affidavits from them regarding this arrangement. Whatever the position may be, there is no doubt that the Second Applicant has not paid all its debts, even though it was claimed that it is solvent. In the absence of the liquidators appointed to manage the Second Applicant affairs, the court is unable to evaluate the progress made so far from the date of the liquidation order. Equally, failure to join in the creditors in these proceedings denies the court of an opportunity to hear their voice. For these reasons, the application is bound to fail without considering further grounds.

[10] Consequently, the following order is made:

[12.1] The application for setting aside of the final winding up order is dismissed with costs.


TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPLICANT	: ADV. FOURIE
INSTRUCTED BY	: PJ LOURENS ATTORNEYS
	NELSPRUIT
FOR THE RESPONDENT	: ADV KLOPPER
	: INNES R STEENKAMP
	ATTORNEYS
	C/O KRUGER & PARTNERS INC
	NELSPRUIT
DATE HEARD	: 08 FEBRUARY 2022
JUDGMENT DELIVERED	: 23 MARCH 2022