



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

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

22 August 2022

DATE

.....
SIGNATURE

CASE NO: 2709 / 2019

In the matter between:

**STANDARD BANK OF SOUTH
AFRICA LIMITED**

(Registration no. 1962/00738/06)

INTERVENING CREDITOR

And

PIT DOG TRADING CC

(Registration no. 2008/192907/23)

FIRST RESPONDENT

**LIKWETI HOME OWNERS
ASSOCIATION**

SECOND RESPONDENT

IN RE:

PIT DOG TRADING CC
(Registration no. 2008/192907/23

APPLICANT

LIKWETI HOME OWNERS
ASSOCIATION

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 22 August 2022.

[1] This matter incorporates two applications that were heard simultaneously. The first application is for rescission of judgment by Pit Dog CC (the Applicant). This application follows an order granted by this court on 02 December 2019 placing the Applicant under final liquidation. The application for liquidation was brought by Likweti Home Owners Association (the Respondent), the Applicant's creditor at the time. The second application is by Standard Bank of South Africa Limited (the Intervening Party). The Intervening Party wishes to be joined as a party in the application brought by the Applicant as an interested party because it is its Creditor in the amount exceeding R4.4 million. In the founding affidavit, the Intervening Party also opposes the application for rescission by the Applicant.

[2] The intervening application.

In *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd and Others*¹ the Constitutional Court held that the test for joinder at common law is governed by the following principles; first, there must be a legal interest in the proceedings and not merely a financial interest. Secondly, a party has a right to ask that someone be joined as a party “if such a person has a joint proprietary interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the Court’s order and to avoid a multiplicity of actions and . . . a waste of costs”

[3] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No. 2)*² it was held that the test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court.

[4] The Intervening Party avers that it is the Applicant’s creditor in a substantial amount, a fact that remains undisputed. The Applicant was placed under final liquidation, something that was not brought to the attention of the Intervening Party, despite the requirements for all the creditors to be notified when a company is liquidated. The Respondent, being the party who sought and acquired the liquidation order, has strangely chosen not to participate in this application, notwithstanding that it was cited as such. The rescission application was launched in August 2020 and was not prosecuted until the Intervening Party got involved. This background establishes the nature and extent of the interest the Intervening Party has in this application. The

¹ [2014] ZACC 35; 2015 (2) BCLR 182 (CC); (2015) 36 ILJ 363 (CC) at para 186. See also *Harding v Basson and Another* 1995 (4) SA 499 (C) at 501C.

² (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) at para 56.

Applicant does not dispute that the Intervening Party has a substantial interest in the application. It however opposes the application on the basis that there is no valid affidavit filed in support of the intervening application.

[5] Dispute over the validity of an affidavit.

The Applicant submits that this application should proceed as unopposed and that the Intervening Party's application should be struck from the roll as it is not supported by a valid affidavit. The reason for this submission is that on the face value, the Intervening Party's founding affidavit was commissioned in Johannesburg by a commissioner of oath (an attorney) who also affixed the stamp of practice that reflects the office address in Menlo Park. This, the Applicant argues, suggests that the affidavit was not signed in the presence of the commissioner of oath who operates from Menlo Park office.

[6] It is my respectful view that this suggestion is not evinced by the affidavit in question. It seems as though the Applicant is equating the office or position of an attorney to that of police officers who operate from police stations. Generally, police officers are appointed to serve at a particular police stations that have their area of jurisdiction clearly demarcated,³ whereas legal practitioners (attorneys and advocates) are admitted to practice anywhere in the Republic of South Africa.⁴ In order to have affidavits commissioned by police officers, one would have to visit a police station, except in limited instances such as when the investigating officers visit witnesses at their locations to acquire statements. Thus if an affidavit has a police stamp reflecting Pretoria Police Station, it can be presumed in the absence of any other explanation that the deponent had to visit that police station in order to have the statement commissioned.

³ See section 12 of the South African Police Services Act no. 65 of 1995.

⁴ See section 25(1) of the Legal Practice Act no. 28 of 2014.

[7] The approach would be different to legal practitioners who visit the courts in various provinces, following their cases and clients. A legal practitioner is not limited to practice from his/her registered office. A registered office is necessary for administrative purposes not directly linked to performing the duties, serving the public as a lawyer. If legal practitioners had to work only from their offices, there would be no one to represent the litigants in courts. As a result, an official stamp by a commissioner of oath who happens to be a legal practitioner, does not evince where the statement was signed, but the registered address of his/her practice. As to the place where the affidavit was signed, one would have to look elsewhere in the statement as it is required to reflect that too. After all, when this query was raised, the Intervening Party filed a further statement to the effect that the founding affidavit was indeed signed and commissioned in Johannesburg as it reflects.

[8] I am therefore satisfied that there is a valid affidavit on behalf of the Intervening Party, signed before a commissioner of oath in Johannesburg and that the registered address of the commissioner of oath is in Menlo Park. I am also satisfied that the Intervening Party has a substantial and compelling interest in the outcome of this application. The request to be joined in the proceedings is therefore allowed.

[9] The rescission application.

The basis for the rescission application is that the application was erroneously granted in that the papers that served before the court were not in order and as such, could not justify the order granted. The Applicant submitted that whereas section 346(3) of the Companies Act no. 61 of 1973 provides that an application for liquidation shall be accompanied by a certificate by the Master of the High Court, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment

of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed; no such certificate was attached to the application.

[10] It is common cause though that on the date of the hearing, the said certificate was in the file and that the court did have sight thereof. It is also common cause that in the founding affidavit, the Respondent had made it clear that the certificate was not attached but would be made available on the date of the hearing, which was ultimately done. The question is rather whether the lodging of the application should have been accompanied by the certificate and if its later filing can be condoned. Perhaps the question should rather be whether the court was conscious of the fact that the certificate was not attached and if it was, whether it was within its discretion to allow the liquidation without the filing of the said certificate.

[11] The application is opposed by the Intervening Party on various fronts. Amongst them, the Intervening Party claims that the Applicant failed to serve the notice of this application as required by Rule 42, and on that reason alone, the application should not be allowed. It was further submitted that the application should be dismissed because there is no good cause shown.⁵ It was submitted in this regard that the application lacked prospects of success as the Applicant did not put forward evidence to suggest that it was not insolvent. Lastly, the Intervening Party submitted that there is nothing suggesting that the court was not aware that the certificate was not attached. It was argued that the court merely exercised its discretion and authorised the liquidation based on papers that were filed before it.

⁵ As for what good cause entails, see *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I - 228F.

[12] Rule 42 of the Uniform Rules provides,

“(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.”

[13] The Applicant does not dispute that the Intervening Party is an interested Party or that its interests may be affected by the order it seeks in this application. It however denies that the Applicant had a duty to notify the Intervening Party of the rescission application. It further claims that the application was brought against the Respondent and the liquidator who represents all the creditors. I need to pause to indicate that I do not understand what the Applicant means when it alleges that the application was brought against the liquidator. This is because in this application, the liquidator has not been cited or joined as a party nor was it served with the notice of this application.

[14] Had there been notification on the liquidator, perhaps the question would be whether it is necessary to also serve all the creditors. For reason that the said liquidator was not served, or if it was, no proof was availed to the court, that question does not arise in the circumstances of this case. As highlighted above,

the Intervening Party has a direct and substantial interest in this application.⁶ Notification of this application to the Intervening Party as an interested party was as such peremptory. Failure to do so is fatal to the application.

[15] Suppose I am wrong in reaching the conclusion above; the application for rescission would still fail for reason that the Applicant failed to show that the order made on 02 December 2019 was erroneously sought or erroneously granted or that there is an ambiguity, or a patent error or omission or that it was granted as the result of a mistake common to the parties. A judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant it.⁷ Equally, the order is erroneously granted if material facts were not disclosed to the court, which if disclosed, the judgment would not have been granted.⁸ This would cover instances where there was a deliberate misrepresentation of facts to the court.

[16] The Respondent had not misrepresented the facts surrounding the security certificate as it disclosed that same was not yet issued at the time the application was lodged. It disclosed that it will be available on the date of hearing. As these papers served before the court, there is no basis to presume that the court was not aware of the facts contained therein. The Applicant submitted that “had the Honourable Court been made aware of the issues [above], it would not have granted the winding up order.”⁹ This statement ignores the fact that the papers served before the court with full disclosure of the facts. To suggest that over and above the file serving before the court, a litigant had to point out what is

⁶ See para 3 above.

⁷ *Nyingwa v Moolman NO 1993 (2) SA 508 (TK)* at p.510F-G

⁸ See *Naidoo v Matlala NO 2012 (1) SA 143 (GNP)* at 153C–E.

⁹ See para 31 of the founding affidavit on p. 68 of the paginated bundle.

in the papers suggests that a judicial officer may not be conscious of the contents of the papers unless his/her attention is drawn thereto.

[17] Upon closer reading of Rule 42, it is clear that if the error is due to non-disclosure of certain facts (deliberate or *bona fide*) or misrepresentations to the court, rescission will be available once these facts are brought to the attention of the court. However, when the error is on failure to exercise the discretion judiciously as when facts were disclosed, but the court still took a wrong decision, rescission would not be available, but appeal would be the proper avenue to pursue.

[18] To demonstrate the above principle, the court noted that the founding affidavit by Mr. Mokoena, a director of the Applicant, does not contain a full date on which it was signed before a commissioner of oaths.¹⁰ The Applicant has always argued that an error like this, means there is no affidavit before the court. Nobody raised this aspect with the court in this application. Whatever the outcome of this application, it would be amiss for any party in the future to argue that “had it been brought to the court’s attention that the founding affidavit was undated...” because as long as the affidavit is before the court, it should be presumed that the court had sight of it and decided to deal with the matter cognisant of defects therein if any. To approach this differently, the application would no longer be a rescission but a judgment review.

[19] This understanding should be able to extinguish the belated argument raised only in the Applicant’s heads of arguments to the effect that the Respondent’s affidavit filed in the liquidation application could have been defective. As long as it served before the court, it can be presumed that the court had sight of the said affidavit and took a decision taken, conscious of the

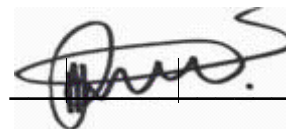
¹⁰ See the Applicant’s founding affidavit on p. 61-69 of the paginated bundle reflecting that it was commissioned on “05 August___”.

contents therein. I therefore conclude that the circumstances that define the erroneous seeking and granting of a judgment as provided in Rule 42 exclude the alleged or possible defects contained in papers that served before the court in an application. The mere fact that a litigant did not bring it to the attention of the court that there could be non-compliance in the application itself or defects in the affidavit cannot, without more, translate to erroneous granting of a judgment.

[20] For the aforesaid reasons, I make the following order:

[20.1] The application for intervention by the Intervening Party (Standard Bank of South Africa) in a rescission application is granted with costs.

[20.2] The application for rescission of judgment is dismissed with costs.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION
MBOMBELA

FOR THE APPLICANT : ADV TS NGWENYA

INSTRUCTED BY : MT SILINDA & ASSOCIATES INC
MBOMBELA

FOR THE RESPONDENT : ADV B GEDEDGER

INSTRUCTED BY : VEZI & DE BEER INC

**C/O: CHRISTO SMITH
ATTORNEYS**

: NELSPRUIT

DATE HEARD : 19 JULY 2022

JUDGMENT DELIVERED : 22 AUGUST 2022