

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 3540/2023

Reportable	No
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In the matter between:

**KETS GROUP PROPRIETARY
(REGISTRATION NO.: 2019/68747/07)**

Appellant

and

**BUSINESS PARTNERS LIMITED
(REGISTRATION NO.: 1981/000918/06)**

Respondent

JUDGMENT

DUNYWA AJ

[1] This court granted the order for the provisional winding up of the applicant on 28 November 2023 and the order for final winding up on 5 March 2024. The applicant is seeking rescission, as well as a stay or suspension of the final liquidation.

[2] The applications above were premised on the understanding that the applicant is insolvent. The first application was for the issue of Rule Nisi, which was served to the applicant at its place of business in the form of personal service to Mrs Ketsesile. The latter is the deponent of the founding affidavit in this application. The service was also done to her attorneys. The provisional liquidation was granted as an unopposed application.

[3] The next order was for the final liquidation granted at 09h45 also as unopposed application on 5 March 2024. At 11:00 on the same day, the applicant's attorney informed the respondent's local legal representative that they had instructions to oppose the second application for the *Rule Nisi*.

[4] On 6 March 2024, the applicant purportedly issued application papers which were served on the respondent' 18 March 2024. Respondent contended that the papers were defective since they were unissued and not signed. This led to the exchange of correspondence between the parties.

[5] On 26 March 2024, another application by Notice of Motion was served on the respondent. The application before this court is for the rescission of the liquidation order and the suspension of the final liquidation order pending the rescission. The application is divided into Part A and Part B. Part A deals with Rule 45A which must resolved first as directed by the applicant and Part B the rescission shall be considered later.

[6] The respondent in opposing the application, submits that the application suffers from fatal procedural and substantive defects. The first procedural defect is that the application is not urgent, but only premised on self-created urgency. Alternatively, the application must be removed from the roll to be re-enrolled for hearing on the opposed roll in the normal course.

[7] It contends that the applicant decided to dump their application which was purportedly issued on 6 March 2024 because of its defectiveness and launched the urgent application on 26 March 2024. The applicant has chosen to insist that the matter be heard on 2 days' notice, thereby prejudicing the respondent in its ability properly to answer and prepare for the application.

[8] The respondent insists that the founding affidavit is devoid of any factual allegations which address what is required of an applicant in an urgent application. There are no facts, whatsoever, which are advanced to justify the contention that the application is urgent. The degree of relaxation of the rules and truncation of time frames, as determined by the applicant, is not justified

[9] The certificate of urgency is criticised by the respondent, in that it does not provide the grounds of urgency, with sufficient particularity for the question of urgency to be determined solely therefrom, without perusing the application papers as required in Practice Directives of this Division.

[10] It argues that affidavits filed in support of the relief sought under headings Part A & B are not properly deposed nor are they properly commissioned. The matter was heard on two days' notice. The litigation to the fact that the matter is urgent is an abuse of power. The matter should be dismissed with costs.

[11] It is a fact that the applicant must demonstrate *inter alia* that it will suffer real loss or damage were it to rely on normal procedure. The attractiveness of finally disposing of the litigation should not be allowed to govern. The approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a case or not¹.

[12] I agree with respondent's submissions that they were prejudiced. In *Voigt NO and Another v EGH IP (Pty) Ltd and Others*² my brother Lowe J had this to say about prejudice, at paras 32 and 33;

"This is clearly such a case and more especially that Respondents, whilst no doubt working night and day putting up a well-drafted response, nevertheless and understandably complained of prejudice. It must be accepted that matters factual and legal usually require thought and careful consideration by clients and the legal team. In this matter this was substantially denied Respondents and their legal team for absolutely no good reason, Applicants having afforded themselves a considerable period to consider and draft and having had the luxury thereof".

¹ *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE).

² *Voigt NO and Another v EGH IP (Pty) Ltd and Others* (1076/2021) [2021] ZAECHGHC 40 (4 May 2021).

[13] The respondent submits that the substantive defect lies in Part A of the application for the suspension and staying of executions of the final liquidation granted on 5 March 2024. The relief sought is in terms of the court's general powers to stay enforcement proceedings, alternatively in terms of Rule 45A of the Uniform Rules of Court.

[14] The argument put forward is that according to Rule 45A, the court must be satisfied that the requirements for an interlocutory interdict have been established when exercising its discretion³. It is trite that where a stay is sought in terms of Rule 45A, in the exercise of its discretion the Court will borrow from the requirements for the granting of an interlocutory interdict, namely that the applicant must show:

(a) that the right which is the subject of the main action and which he seeks to protect by reason of the interim relief is clear, or if not clear, is *prima facie* established though open to some doubt and

(b) if the right is *prima facie* established, there is a well-grounded apprehension of irreparable harm⁴.

[15] The respondent has submitted that no case is made out in the affidavit filed in support of the Part A relief. This court shall not make any determination in relation to Part B of this application, but it is ineluctable not to refer to Part B when dealing with Part A of the same application. As a result, it is submitted that to succeed in terms of Rule 45A the applicant was required to demonstrate at least a *prima facie* prospect of success in the rescission relief which forms the subject of Part B. It is also required to have demonstrated facts which support the contention of a well-grounded apprehension of irreparable harm.

³ Gois t/a Shakespeare's Pub v Van Zyl 2011(1) SA 148 LC at 155 H-156B.

⁴ Erasmus, *Superior Court Practice*, Service 21, 2023 at D1 – 604A.

[16] The court's power to stay or suspend the winding up of the company is discretionary⁵. The applicant has the onus to prove the existence of circumstances warranting the stay or suspension of the winding up⁶. The principles that the court must consider in exercising its discretion in staying the proceedings for the winding up of a corporation were discussed in *Klaas v Contract Interiors CC and others*⁷.

[17] I agree that the applicant must prove that he has a *prima facie* prospect of success in the rescission relief which forms part of Part B and that there was good cause for not appearing in court. The respondent's argument is valid in that prospects of success concerning the rescission relief are not addressed at all in the applicant's affidavit. The basis on which the rescission is to be sought is not even touched on. The respondent opines that when one considers the affidavit purportedly filed in respect of the Part B relief it becomes evident that what the applicant intends in this regard, is to rely on section 354 of the Companies Act 61 of 1973 (*"the 1973 Companies Act"*).⁸

[18] The apparent route to be followed by the respondent in its application for rescission is one in section 354 of the 1973 Companies Act. It is significant to examine what the section requires. Section 354 of the 1973 Companies Act read as follows:

"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."

⁵ *Aubrey M Cramer Ltd v Wells* NO 1965 (4) SA 304 (W) at 305.

⁶ *Herbst v Hessels* NO 1978 (2) SA 105 (T).

⁷ 2010 (5) SA 40 (WLD) at paras 65-66.

⁸ Despite the new Companies Act of 2008 the provisions of the (*"the 1973 Companies Act"*) in relation to insolvency and liquidation is still applicable and has not been repealed.

[19] In *Ward & Another v Smith & Others: in re Gurr v Zambia Airways Corporation*⁹ the Supreme Court of Appeal considered the provisions of section 354 (1) and explained its application as follows:

“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 events. 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.”

And,

“The object of the section is not to provide for a re-hearing of the winding-up proceedings or for the court to sit in appeal upon the merits of the judgment in respect of those proceedings. 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 appeal against the order.”

[20] Again in *Storti v Nugent*¹⁰ the Court found that where:

“...a party wishes to set aside winding-up proceedings on the ground that the winding-up order should never have been granted due to a defect in the procedure or the merits of the application must bring his claim under section 149(2) of the Insolvency Act, or as a rescission at common law.

On either basis, he must at least establish “sufficient cause” which in turn involves two essential elements: (1) the party seeking relief must present a reasonable and acceptable explanation for his default, and (2) such party must on the merits have a bona fide defence that prima facie has some prospect of success which, in the context of winding-up, means that the applicant must show prima facie that the company is solvent.”

⁹ 1998 (3) SA 175 (SCA).

¹⁰ 2001 (3) SA 783 (W) at 805I to 809D

[21] A court should take note of the surrounding circumstances, and the wishes of all the parties concerned, including the liquidators, and should never set aside the winding-up order if all the creditors will not be paid from the residue of the estate¹¹. It is clear that the applicant has to show exceptional circumstances and that the rescission application is not an opportunity to simply re-argue the factual evidence that was before the court when the original liquidation order was sought.

[22] An applicant in a common law rescission application must show good cause for the granting of the rescission application¹². A good cause must be illustrated in clear terms in the founding affidavit.¹³ Although the phrase “*good cause*” defies comprehensive definition it has been held that it ordinarily includes at least two requirements which an applicant is generally expected to establish to succeed in a rescission application, being a reasonable explanation by the applicant for the default; and a *bona fide* defence which reflect some prospects of success¹⁴.

[23] It is common cause that, despite not opposing the liquidation proceedings, the applicant was aware of them and sent a representative to court on 5 March 2024. As a result, despite proper service and despite being aware of the liquidation proceedings, the applicant provides no explanation at all for its default.

[24] In my view, the respondent’s argument is valid and acceptable that the applicant has failed to show that exceptional circumstances exist for setting aside the winding-up order. The applicant has denied liability to the respondent without showing that the company is *prima facie* solvent. Lastly, it has not provided a reasonable and acceptable explanation for its default in opposing the liquidation proceedings. The application itself is not urgent considering all the submissions made by the respondent and as reflected in the papers.

¹¹ *Klass v Contract Interiors* 2010 (5) SA 40 (W) at para 65

¹² *Ferris & Another v FirstRand Bank* 2014 (3) SA 39 (SCA)

¹³ *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 70 (D).

¹⁴ *Scholtz v Marry Weather* 2014 (6) SA 90 (WCC).

[25] I further agree with the respondent that the conduct of the applicant who changed from the enrolment in the ordinary course to an urgent application was not justified and merely abused the court process. The applicant had not filed the replication papers when the matter was heard, and failed to comply even with Practice Directives of this Division. The fact that the applicant's counsel was from another High Court Division is no excuse. I am persuaded, for all the reasons given above that the applicant be given punitive costs.

[26] As a result,

1. The application in Part A is hereby dismissed with costs.
2. The costs shall be at attorney and client scale.

MS DUNYWA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv. Ntila
Instructed by	:	Luxolo Fodi Inc. c/o Mabentsela & Associates 110 High Street MAKHANDA
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 Date Heard	 :	 02 April 2024
Date Delivered	:	07 May 2024