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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 3575/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

18/07/2024

In the matter between:

WH CIVIL ENGINEERING (PTY) LTD

First Applicant

WHISKY HENDRICK MATWALANE

Second Applicant

and

VANDER DIAMONDS (PTY) LTD

First Respondent

DANIESE ELAINE STEYN N.O.

Second Respondent

IZAK JOHANNES BOSHOFF

Third Respondent

THE MASTER OF THE HIGH COURT: MBOMBELA

Fourth Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 July 2024 at 10:00.

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is a rescission of judgment application. On 8 February 2021 and following an application in terms of Section 344 as read with Section 345 of the Companies Act, 63 of 1973 and with Schedule 5 (item 9) of the Companies Act of 2008, this Court granted a winding-up order in favour of the First Respondent (“Vander Diamonds” and against the First Applicant (“WH Civil Engineering”). WH Civil Engineering now seeks to rescind and set aside the aforesaid order on the grounds of the provisions of Section 354(1) of the Companies Act 61 of 1973 and has substantiated by adding the following:

1.1 The service of the application was defective because it was served at an address that had been changed on 28 June 2018.

1.2 The amount of **R502 455.00**, initially thought to be owed to Vander Diamonds was incorrectly calculated and was reduced to **R203 550.00** for which an invoice was sent on 14 April 2018.

1.3 When the application was launched, WH Civil Engineering was commercially solvent, and it could pay its debts as and when they arose.

1.4 Matwalane and Vander Diamonds reached a settlement of their dispute during October 2022.

1.5 Vander Diamonds is utilising liquidation process to enforce a debt against WH Civil Engineering when it has a judgment against the latter.

1.6 In terms of the acknowledgment of debt, Vander Diamonds holds security for the debt.

1.7 Vander Diamonds deliberately withheld information from this Court to obtain the final winding – up order.

FACTUAL MATRIX

[2] It is necessary to state right on the onset that the facts that led to the winding-up order are substantially common cause. That said, it remains necessary to describe them to give the context against which the facts were analysed. On 15 April 2017, Vander Diamonds and WH Civil Engineering concluded a verbal agreement in terms of which the former let certain Plant and earth moving equipment to WH Civil Engineering for construction purposes on a project involving a third party. WH Civil Engineering undertook to effect payment of the invoices of Vander Diamonds within thirty days of date of receipt of statement setting out the services rendered, and Plant hired on the project.

[3] Having complied with the terms of the agreement, Vander Diamonds invoiced WH Civil Engineering for the period commencing on 20 May 2017 culminating on 26 February 2018 for the hire of the Plant and earth moving equipment. In consequence of the above, an amount of **R502 455.00** became due and payable to Vander Diamonds. That said and as will be seen later, the amount due was by agreement between the parties revised down to **R203 550.00**.

[4] Vander Diamonds demanded payment of the amount of **R502 455.00** from WH Civil Engineering, but the latter ignored to effect payment as per the demand. On 8 January 2018, WH Civil Engineering, represented by Matwalane, acknowledged that

WH Civil Engineering was indebted to Vander Diamonds in the amount of **R502 455.00**. Matwalane then also stood surety for WH Civil Engineering for the amount that it owed to Vander Diamonds.

[5] In terms of the acknowledgment of debt, WH Civil Engineering was to, among others, liquidate the amount of **R502 455.00** as follows:

5.1 Thirty percent of **R502 455.00** on or before 31 January 2018.

5.2 The parties would decide within 7 days after date of first payment regarding the full payment of the balance.

5.3 Should WH Civil Engineering fail to effect payment timeously, the full outstanding balance together with interest component at the rate of **10.25 %** per annum *a tempore morae* would immediately become due and payable.

[6] It is common cause that WH Civil Engineering has, the acknowledgment of debt notwithstanding, failed to make any payments to Vander Diamonds. When payments were not forthcoming, Vander Diamonds sent a letter demanding payment of the outstanding amount as envisaged in Section 345 of the Companies Act, 61 of 1973 in august 2020. Vander Diamonds regarded the failure of WH Civil Engineering to make payment as per the letter of demand, as inability to settle its debts as when they fall due. In other words, WH Civil Engineering was commercially insolvent, and this Court agreed on 8 February 2021 when it granted an order liquidating WH Civil Engineering.

[7] To go back to the reduction of the initially acknowledged amount of **R502 455.00** as the amount due by WH Civil Engineering. It is common cause between the parties that they reduced the amount to **R203 550.00** because of error in calculation. In response to a letter dated 20 February 2021 pointing out the mistake, Vander diamonds sent a corrected version of the invoice in the amount of **R203 550.00** on 14 April 2021. Vander Diamonds, however, avers that the reduction does not assist WH Civil

Engineering as the reduction affected one of several invoices such that the amount remains higher than the **R203 550.00**.

[8] Matwalane states that he discovered that WH Civil Engineering was under liquidation for the first time on 29 March 2021 when he attempted to withdraw funds from the bank account of WH Civil Engineering with Nedbank. The fact of the liquidation of WH Civil Engineering was later confirmed by his attorneys on 10 April 2021. They further advised him that, in fact, liquidators have been appointed to administer the liquidation of WH Civil Engineering. It was now that he also understood that the order liquidating WH Civil Engineering was granted on 8 February 2021.

[9] Matwalane avers that at the time when WH Civil Engineering was wound-up, its bank account had funds well above the amount of **R502 455.00**. As proof of this, Matwalane annexes a bank statement of WH Civil Engineering for the period of 7 December 2020 to 7 January 2021, meaning to say, 2021. For this reason, Matwalane believes that WH Civil had sufficient funds in its bank account with which to discharge its liability to Vander Diamonds. WH Civil Engineering was therefore liquid as contemplated in the Insolvency Act, 24 of 1936. The only reason for its failure to pay, it maintains, was due to invoices being incorrect and contrary to acceptable accounting practices.

ASSERTIONS OF THE PARTIES

[10] The Applicants in this application, WH Civil Engineering and Matwalane, assert that they could not have been in willful default when they failed to oppose the winding-up application. They argue that they neither received the demand nor the application as they were not served at the address that they had provided for the purpose. Had they received the papers they certainly would have opposed because WH Civil Engineering was, at the time of the liquidation, solvent. If they were solvent at the time, it means that they would have had a *bona fide* defence to the application.

[11] Conversely, Vander Diamonds states that the issue is straightforward in the sense that one should enquire whether WH Civil Engineering was indebted to it at the time when the order was granted. According to Vander Diamonds, WH Civil Engineering was indeed indebted to Vander Diamonds whether in the amount stated in the acknowledgment of debt or the lesser amount of **R203 550.00**.

[12] If it is correct that the error in calculation was rectified as early as 14 April 2018, remarks Vander Diamonds, why then did WH Civil Engineering not pay the amount due at the time? WH Civil Engineering has since 20 February 2018, known that the amount was wrongly calculated, and it was corrected on 14 April 2018, yet it did not make payment. As far as the address of service of the application is concerned, Vander Diamonds states that it served the application at the registered address of WH Civil Engineering.

ISSUES

[13] There are two issues for determination by this Court. They emanate from the fact that WH Civil Engineering must show good cause. The elements that WH Civil Engineering ought to show are that to render a reasonable and satisfactory explanation for the delay and that it has a *bona fide* defence that has some measure of prospects of success. These two issues, however, cannot be independently decided without the following ancillary matters:

13.1 Could Vander Diamonds have obtained a winding-up order, as it did, regardless of the revision of the amount from **R502 455.00** to **R203 550.00**?

13.2 Was the service of the application at the registered address of WH Civil Engineering defective?

13.3 What influence, if any, should the factual solvency of WH Civil Engineering have on whether the order should be rescinded?

13.4 Did Matwalane and Vander diamond conclude a settlement agreement on 13 October 2022?

13.5 Is Vander Diamonds using the liquidation process to enforce a debt that is legitimately contested?

13.6 What are the implications of the judgment that Vander Diamonds has obtained against WH Civil Engineering and that it had security for the debt in terms of the acknowledgment of debt?

13.7 Did Vander Diamonds deliberately withhold information from this Court to obtain the final winding – up order?

LEGAL FRAMEWORK

[14] To the extent that this application concerns a rescission in terms of Section 354(1) of the Companies Act, 61 of 1973, it could be instructive to cite the Section in full:

“A Court may stay or set aside winding up.

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.”

[15] Section 344 is concerned with those circumstances in which a company may be wound-up by a Court. Of relevance to this matter are sub-paragraphs (f) and (g). These

sub-paragraphs respectively provide that a Court will be entitled to wind-up a company if it is unable to pay its debts as contemplated in Section 345 and where it appears just and equitable.

[16] Section 345 deals with circumstances in which a company will be deemed to be unable to pay its debts and it provides as follows:

“A company or body corporate shall be deemed to be unable to pay its debts if-

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due –

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any Body Corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.”

[17] Turning to case authority pertaining to the rescission of winding-up orders. It is trite that, in appropriate circumstances, winding-up orders may be rescinded and set aside. This can be achieved at common law and under Section 354 (1) of the Companies Act, 61 of 1973, to which I have already referred above. The Section is particularly involved with the setting aside or the stay of proceedings when supervening events demand that such measures be adopted. A company has the right to rescind or appeal a winding – up order, or to oppose an application for winding up. In terms of Section 354 a company is expressly excluded from seeking relief that the proceedings be stayed or set aside based on supervening events.¹

[18] The Court has the power (under the section) to suspend or stay the proceedings, or to set them aside. This would mean that the entire proceeding, including the application for winding – up, would be set aside. Where an order has been incorrectly granted, the Court ordinarily would simply rescind the order and leave the application for winding up intact². Having traversed through several case authorities, the Court in the *Storti v Nugent*³ case stated the following:

“The principles to be gleaned from the authorities, often not harmonious, are in my view the following:

(1) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.

(2) Unusual or special or exceptional circumstances must exist to justify such relief.

(3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.

¹ *Storti v Nugent* 2001 (3) SA 783 (W) at 796E – F

² Note 1 *supra*

³ Note 1 *supra*

(4) *Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission.*

(5) *Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.*

(6) *A Court will not exercise its discretion in favour of such an application if undesirable consequences would follow.”*

[19] Since the assertion of WH Civil Engineering is that the order should not have been granted, the facts should be such that they support a common law rescission. The requirement at common law is that WH Civil Engineering must demonstrate good cause. To show good cause, WH Civil Engineering ought to establish firstly, a reasonable and acceptable explanation for the default and secondly, that it has a *bona fide* defence with a *prima facie* prospect of success⁴.

ANALYSIS

GOOD CAUSE

REASONABLE AND ACCEPTABLE EXPLANATION FOR THE DELAY

[20] The explanation of the Applicants is that they did not know about the demand delivered at the registered address of WH Civil Engineering and the application for the latter's winding-up. They could not have received both these documents, they assert, because they had, by letter dated 28 June 2018, furnished Vander Diamonds with another address to use for sending correspondence. That said, Matwalane acknowledges that he learnt of the order on 29 March 2021. If this is correct, it means that he acquired knowledge of the order thirteen days after it was granted.

⁴ Storti *supra* at 807B – C

[21] On Matwalane's own version, the Applicants have been aware of the order 13 days following it having been granted by this Court. There is no explanation why it did not immediately embark on steps to have the order rescinded and set aside. This would have been a proper reaction especially because Matwalane would have been mindful at the time that the amount of **R502 455.00** for which he had signed an acknowledgment of debt had, by agreement between the parties, been corrected and adjusted down to **R203 550.00**. The invoice that was sent to the Applicants on 14 April 2018 is confirmation of the revision of the invoice.

[22] The Applicants did not liquidate their indebtedness with Vander Diamonds because they regarded the matter as settled. Vander Diamonds vigorously refutes that the matter became settled at any stage. To this end, this Court was referred to correspondence between the parties. It is important to cite the exchange of WhatsApp messages to appreciate what then transpired on 13 October 2022. Matwalane had initiated a telephone call to Ms Van der Merwe of Vander Diamonds, which call elicited the following exchange:

"Good morning, Whisky I'll call you in half an hour. I can't sign that settlement I'm going to wait too long for my money then. If you are waiting for maruleng to pay. What I can do for now is to settle for R550 000. Then I'll forgive the R380 000 balance that is left because of the cost and interest. That is the only option and safest for me. This is carrying on for too long now. If you can agree on that it will be ok for me to write off the rest of that amount and we stop everything right now."

[23] Responding to the message above, Matwalane wrote back stating that:

"I don't have R550 000 to pay now."

I can only commit on something we have at the moment of which that can be

paid to you urgently

But we are ready to proceed with the matter and file our witnesses to the court”

[24] Describing herself as a businessperson, Ms Mothokwa, deposed to an affidavit wherein she confirms that she spoke to Ms Ven der Merwe of Vander Diamonds in the afternoon of 13 October 2022 during which the latter stated that Vander Diamonds had in principle concluded a settlement agreement with the Applicants. Ms Mothokwa’s affidavit is at variance with the exchange of the correspondence that I have mentioned in the preceding paragraph. The contents of the exchange of messages between Ms Van der Merwe and Matwalane are unequivocal – no agreement was reached. Any allegation to the contrary by Ms Mothokwa ought to be rejected as being at odds with what transpired between the parties.

[25] The Applicants and Ms Mothokwa referred to a settlement agreement signed by Matwalane following the agreement with Ms Van der Merwe of Vander Diamonds. Although there are instances where signature of an agreement is not necessary to bring into life an agreement between parties, this is not such an instance. In the light of the exchange of messages between the parties pointing to the opposite, the production and exhibition of an agreement signed by both parties was necessary. The Applicants’ failure to produce such a document fortifies this Court’s approach that their version is contrived and should be rejected as false.

[26] It is now opportune to examine the impact that the incorrect amount of the indebtedness of WH Civil would have made to the Court granting the order. This issue is crisp and requires an upfront answer. It would have been of no moment that the Applicants were indebted to Vander Diamonds in the amount of **R502 455.00** or **R203 550.00**. In either case, the Applicants admit being indebted to Vander Diamonds the extent of such indebtedness, on the facts of this matter, being insignificant.

[27] The provisions of Section 345 of the Companies Act, 61 of 1973 are plain - a

party to whom another is indebted in a sum not less than **R100.00** then due must have served a demand at the registered office of the debtor calling upon the debtor to settle the amount so stipulated. The Applicants were indebted to Vander Diamonds in the amount of not less than **R100.00** and have to date failed to settle the sum owed. If the Applicants believed that they owed **R203 550.00** then for them to succeed, they ought to show that at the time of its liquidation the amount was either not due and payable or they had settled it. Neither instance pertained on 8 February 2021 consequently, the Court granted the order liquidating WH Civil Engineering.

[28] The Applicants have argued that the service of the application at the registered address of WH Civil Engineering was defective because on 28 June 2018 they had notified Vander Diamonds of the new address at which it ought to send correspondence. It is important to cite the letter in full and it reads:

“Dear Sir

Refer to the matter above.

Kindly refer this matter to the following addresses. Our engineering offices has moved from Rock Fig Life Centre to Polokwane

Mphela Motimela Attorneys

1[...] K[...] Street

Morgloed

Postnet Suite 111, Private Bag X9307

Email: m[...]

Tel: 0[...]

Or

Mlenaar & Olivier Attorneys

P.O Box 805

Phalaborwa

1[...]

Email: Louiselibenberg. L[...]

Limpopo Province

Please receive the attached new company addresses for KSS Investors'. And the name KSS Investors been changed to WH Civil Engineering

Refer to the attached letter

Best regards

Whisky Matwalane ...”

[29] Section 345 of the Companies Act, 61 of 1973 is specific in that it refers to the registered address of the company as the address at which the demand must be delivered. I understand Vander Diamonds to be saying that when it served the demand, the registered address of WH Civil Engineering was the Roma Church Street in Hluvukani. There is no indication on the addresses mentioned in the letter cited above that the two addresses therein are the registered addresses of WH Civil Engineering. That said, the addresses might well have been the business addresses of WH Civil Engineering. I cannot falter Vander Diamonds for having served the demand at the registered address of WH Civil Engineering lest it would have been in default of the provision of Section 345. The service of the demand was accordingly in order.

[30] Section 346(4A) (a)(iv) of the Companies Act, 61 of 1973 provides that:

*“When an application is presented to the court in terms of this section, the applicant must **furnish** a copy of the application-.....**to the company**, unless the application is made by the company, or the court, at its discretion, dispenses with*

the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.”

[31] The Applicants, it would seem, are also arguing that they did not receive the application and that such might have been occasioned by service at the wrong address. Section 346 of the Companies Act, 61 of 1973 refers to ‘furnishing a copy to the company’. It is difficult from the reading of Section 346(4A) (a) of the Companies Act, 61 of 1973 why parties tend to associate service of applications with the Section when it unambiguously uses the word, ‘furnish’. From the use of the word, it can safely be inferred that the Legislature deliberately employed it to indicate that service at the registered address is not required as in the case of the demand. Were the converse true, the Legislature would have expressed itself in a more explicit manner as it did with Section 345.

[32] Insofar as the use of the word, ‘furnish’, is concerned, see the case of *Eb Steam Company (Pty) Ltd V Eskom Holdings Soc Ltd*⁵. From the reading of Matwalane’s affidavit, it is undeniable that both he and WH Civil Engineering were aware of the application and the order as early as 29 March 2021. They cannot rely on a settlement that was obviously, as per the correspondence between the parties, not reached. The conclusion on this issue should be that the Applicants were aware or should have been, as the service of the demand and the application is unimpeachable. Accordingly, compliance with Section 346(4A) (a) has occurred as Matwalane’s knowledge is imputed to WH Civil Engineering.

[33] The next issue for consideration is what influence or impact, if any at all, should the factual solvency of WH Civil Engineering have on whether the order should have been granted or not. It is significant to bear in mind that the claim of Vander Diamonds is founded on the provisions of Section 345. The Section is merely concerned with a debtor’s inability to settle its debts as and when they fall due for payment. Accordingly, the question to be asked is, was WH Civil Engineering able to pay when Vander

⁵ [2014] 1 ALL SA 294 (SCA)

Diamonds demanded payment. The simple answer is that it was not and to date it has not shown that it could. All it did is, in a rather vain manner, shown that it was factually solvent insofar as it claims that there were sufficient funds to cover the claim of Vander Diamonds in its account.

[34] Commercial insolvency is not concerned with whether a party's assets exceed its liabilities. It involves the ability or inability of a debtor to pay its debts as and when they fall due. Thus, WH Civil Engineering was commercially insolvent in that it failed to liquidate its indebtedness with Vander Diamonds when it was called upon to do so. The Applicants cannot hide behind the settlement agreement because the evidence does not support the contention that a settlement agreement was concluded. Additionally, the Applicants do not have a valid defence because they admit that they were indebted to Vander Diamonds, whether in the sum of **R502 455.00** or **R203 550.00**, being way off base.

[35] Is there room to say that, on the facts of this case, Vander Diamonds is using the liquidation process to enforce a debt that is legitimately contested? WH Civil Engineering was served with a legitimate demand, and it failed to settle the debt. Confronted with the inability of WH Civil Engineering to pay and there being no apparent defence, Vander Diamonds was entitled to launch the winding-up application. I am constrained to find that Vander Diamonds is not using the winding-up process to recover a debt that is validly contested.

[36] Another assertion by the Applicants is that notwithstanding that Vander Diamonds had obtained judgment against them on 5 January 2021, it has proceeded to launch the winding-up application without showing that it has attempted to execute on the judgment. It is evident from the provisions of Section 345 of the Companies Act, 61 of 1973 that subparagraphs (a), (b) and (c) are not conjunctive. As such, it is adequate that Vander Diamonds has demonstrated that WH Civil Engineering was unable to pay as and when Vander Diamonds made a demand to that effect. It is therefore immaterial that it brought the application without exhausting the execution measures against the

Applicants.

[37] The Applicants have also contended that Vander Diamonds withheld information from this Court when it was applying for the winding-up so that this Court could grant the order oblivious of certain pertinent facts. This is too general. I am in the dark on what relevant information was withheld. I understand this to mean that had the Court been conscious of such facts, it would have refused to grant the order. If my reading of the Applicants is correct, it is startling that they did not choose to bring the rescission under Uniform Rule of Court 42. In any event, the problem of this Court is rather that the alleged concealed information is not disclosed consequently, it is difficult to guess.

BONA FIDE DEFENCE

[38] This leg of the good cause should not detain this Court for long. The admission of the indebtedness to Vander Diamonds and inability to settle it when demanded to do so necessarily mean that the latter was entitled to the liquidation order. If WH Civil Engineering did not have a defence then, what possible defence will it suddenly have now if it were to be granted the rescission? It might well be that WH Civil Engineering did not defend because it did not receive the papers, but the point is, would service have turned its fortunes around? The answer must be in the negative because until now this Court has not been told what the defence would have been or what the defence would be where the rescission to be granted. In short, this whole application is a red herring whose objective is to avoid confronting the reality of the liquidation.

[39] In the result, the application fails, and I make the following order.

The application for the rescission of the order liquidating WH Civil Engineering is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

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Date of Judgment: **18 July**
2024