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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judge: YES/NO

Circulate to Magistrates: YES/NO

Case No. 4374/2023

In the matter between:

**MOEMEDI ENTERPRISES(PTY) LTD
 AND ALL OCCUPIERS OF ERF 21 BLOEMDAL
 SMALL HOLDINGS, DISTRICT BLOEMFONTEIN,
 FREE STATE PROVINCE, MANGAUNG
 METROPOLITAN MUNICIPALITY**

APPLICANT

And

CHARL MAURITZ HARTZENBERG N.O.
 (In his capacity as the joint liquidator in the
 insolvent Estate of Moemedi Enterprises (Pty)
 Ltd with registration Number 2019[...])
 and Master's reference number: G 00[...])

1ST RESPONDENT

ANA PAULA DE OLIVIERA
 (In her capacity as the joint liquidator in
 the insolvent Estate of Moemedi Enterprises
 (Pty)Ltd with registration Number 2019[...])
 and Master's reference number: G 00[...])

2ND RESPONDENT

In Re:

CHARL MAURITZ HARTZENBERG N.O.

1st APPLICANT

(In his capacity as the joint liquidator in
the insolvent Estate of Moemedi Enterprises
(Pty)Ltd with registration Number 2019[...])
and Master's reference number: G 001[...])

ANA PAULA DE OLIVIERA

2nd APPLICANT

(In her capacity as the joint liquidator in
the insolvent Estate of Moemedi Enterprises
(Pty)Ltd with registration Number 2019[...])
and Master's reference number: G 00[...])

AND

**MOEMEDI ENTERPRISES(PTY) LTD
AND ALL OCCUPIERS OF ERF 21 BLOEMDAL
SMALL HOLDINGS, DISTRICT BLOEMFONTEIN,
FREE STATE PROVINCE, MANGAUNG
METROPOLITAN MUNICIPALITY**

1st RESPONDENT

MANGAUNG MUNICIPALITY

2nd RESPONDENT

CORAM:

MAJOSI, AJ

HEARD ON:

02 MAY 2024

DELIVERED ON:

31 MAY 2024

I INTRODUCTION

[1] The applicant herein seeks rescission of an eviction order which was granted

by default by a judge of this division on the 23 of November 2023. The application is opposed and the applicant's locus standi is contested.

II PARTIES

[2] Mr. Moemedi is an adult male businessman and director of the applicant currently residing in Gordon's Bay, Cape Town, Western Cape Province.

[3] The first and second respondents are joint liquidators in the insolvent estate Moemedi Enterprises (Pty) Ltd, a private company which was placed in final liquidation on the 10th of March 2022. Their certificates of appointment reflect that they were appointed the 14th of March 2023.

III BACKGROUND

[4] In the main application which was filed in August 2023, the now respondents in their official capacities as joint liquidators of the insolvent estate, approached this court for an order for eviction of Moemedi Enterprises and all unlawful occupiers of Erf 21, Bloemdal Small Holdings, District Bloemfontein and cited the relevant local authority, Mangaung Municipality in its application.

[5] Prior to the hearing of the matter, a court order was obtained which authorized service of a notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) as prescribed. An order for eviction was granted by default on the 23rd of November 2023 as there was no appearance by the private company, the unlawful occupiers of the property or the local authority.

[6] Mr. Moemedi, his official capacity as the director of Moemedi Enterprises, deposed to an affidavit wherein he alleged that the order for eviction was provided to his attorneys of record on the 23 of November 2023 and once it came to his attention, he gave an instruction to launch a rescission of judgment application. A

resolution of the company¹ was passed to that effect and same was filed annexed to the founding affidavit.

[7] He further alleged that the application for eviction was indeed served via sheriff. Although the said property is owned by the company, it is occupied by Mr. Kotu who informed him of the court date of the 23 November 2023. He stated that he is aware of the liquidation order which was granted by Johannesburg High Court under case number 20942/2022 and that he has also filed a rescission of judgment application in that regard and such application is still pending.

[8] As he was dealing with two separate rescission applications in different divisions of the High Court, his notice of intention to oppose was to be filed on the 30th of October 2023 in casu and there was a delay of 1 - 2 days in filing an opposing affidavit. When an indulgence was sought from the respondents to condone late filing of his affidavit, it was refused. He was then surprised and shocked how that matter was then enrolled after a notice to oppose was filed. In the same breath, he blamed his instructing attorney for not actually serving and filing the notice of intention to defend with Free State High Court.²

[9] He further alleged that the judgment must be rescinded as he has a reasonable prospect of success and that he must be granted an opportunity to place his issues and submissions before the court makes a final ruling. Also, the property is not vacant as the current occupants (Kotu) of the property are paying money towards his bonded property.³

[10] The first and second respondents allege that the Mr. Moemedi does not have the necessary capacity to act on behalf of the applicant. This was primarily based on the fact a final winding up order was granted on 10th November 2022 by the Gauteng Division of the High Court under the case number 20942/2022 and the applicant was placed under final liquidation and its affairs was placed in the hands of the Master of the High Court, who in turn, appointed them as joint liquidators of the

¹ Indexed bundle p 19, Annexure Resolution of Moemedi Enterprise Propriety limited.

² Ibid, paragraph 6.

³ Ibid, paragraph 7.

insolvent estate.⁴

[11] The respondents further alleged that the special resolution attached to the founding affidavit which was passed on the 18 of December 2023 has no force or effect as Mr. Moemedi ceased to be a director once the company went into final liquidation and is no longer in control of the affairs of the company. To that end, a rule 7 notice was filed on the attorneys of the applicant challenging their mandate on that basis.

[12] The respondents also averred that after their appointments as joint final liquidators of the applicant, their earlier investigation led them to the encumbered property mortgaged with ABSA bank. On the 15th of February 2023, a letter was sent to Mr. Moemedi informing him of the court order and that the property would be sold in order to settle debts of all creditors claims in the insolvent estate. In his response ,he indicated that he was unaware of the final court order and at that stage already disclosed that the house was being occupied by Kotu.

[13] After further communication, Moemedi was informed that the property would be sold and an eviction order would be obtained for the unlawful occupiers to vacate the property. In March 2023 a letter was directed at Kotu that he is to vacate the property or, a formal eviction order would be sought from court.

[14] In the very same month, a response was received from Kotu refusing to vacate and indicated that they will oppose an application for eviction an application to rescind the final winding up order would be brought. The respondents received correspondence from Morwasehla Attorneys that they hold instructions echoing that all proceedings should be held in abeyance in that regard.

[15] Parties continued to exchange written correspondence with the firm of attorneys from the month of March 2023 until June 2023 *in lieu* of settlement but same failed. On the 23rd of June 2023, another notice to vacate the property was served on Moemedi and all occupants of the immovable property and same was

⁴ Respondents answering affidavit, Annexure **RM4**, Respondents Rule 7 notice.

appropriately served via sheriff.

[16] Moemedi and the occupants of the property refused to vacate, and the main application for eviction was then launched in August 2023 and the appropriate section 4(2) PIE notice served leading to the order being granted by default no real notice to oppose or no answering affidavit was filed in opposition of the application at the requisite date.

IV DISCUSSION

Contentions of the parties

[17] The now applicant contents that a miscarriage of justice has occurred and he ought to be given an opportunity to place his grounds for opposition before court and that he does have a reasonable prospect of success in the main action and a rescission of the final winding up of the company is likely to be set aside which will having a direct bearing on this case.

[18] It was advanced by their in their heads of argument that the respondents failed to set down the matter as required by rule 6(5) (f) (i) of the Uniform Rules of Court in that the respondents ought to have waited a period of 5 days after opposition was filed and only on the expiry date thereof, apply to the registrar for the allocation of a date.

[19] Moemedi also states that whilst the rescission application of the final liquidation order is pending, he is within his rights to bring an application to rescind the eviction order as he still has the requisite authority to act on behalf of the company and also, he can be considered to be an interested party as envisioned in Rule 42. To that end, I was referred to *HR Computek (Pty) Ltd v Dr WWA Gouws (Pty)(Johannesburg) Ltd and Others*⁵ - a case wherein rescission of judgment was granted of a provisional liquidation order after it was found that the application could be brought without the co-operation of the liquidators.

⁵ 2023 (6) SA 268 (GJ).

[20] The respondents contended that the final winding up order automatically terminated Mr. Moemedi director's power to conduct any proceedings on behalf of the company ⁶ and that the resolution passed on the 18 of December 2023 as no effect as he cannot represent Moemedi Enterprises as he is functus officio. I was referred to several cases namely, Attorney - General v Blumenthal,⁷ Venbor (Pty) Ltd v Vendaland Development Co (Pty) Ltd t/a Camp Store⁸ and Timana Properties (Pty) Ltd v Nedbank Limited and Another 9683/20 [2021] ZAGPPHC 274(18 March 2021).

[21] Furthermore, that an application for rescission of a liquidation order does not automatically suspend the order and his application Gauteng is not in accordance with Rule 45A for a suspension of the court's order. Accordingly, they contended that the applicant has not made out a case for rescission in terms of rule 31 or rule 42 as he did not provide a reasonable explanation or show good cause why he was not in wilful default. It was also indicated that even if the court should consider the Gauteng application and the applicant's current reliance on s354(1) of the Companies Act is misguided as the said section not even mentioned in that rescission application.

[22] For the purpose of rule 42 they indicated that the application should also fail as though the judgment was granted in his absence, he was given notice of the application and was aware that the matter would be on the court roll on the 23rd of November 2023 and he opted not to file any answering affidavit, appear in court or have his attorneys of record appear and request an indulgence nor has he shown that there was an error in the seeking of the order.⁹ They thus requested that the application be dismissed with costs.

Rescission of judgments - Rule 31 and Rule 42 of the Uniform Rules of Court

[23] Rule 31(2)(b) states that in any action a defendant may¹⁰ within 20 days of obtaining knowledge of such a judgment apply to court to set aside such a judgment and the court may, on good cause shown, set aside the default judgment on such

⁶ First and Second respondents' heads of argument, paragraph 6 -11

⁷ 1961(4) SA 313 (T) at 315.

⁸ 1989 (2) SA 619 (V) at 624.

⁹ Ibid paragraph 26 -45.

¹⁰ My own emphasis.

terms as it deems fit.

[24] For an applicant to succeed with an application for rescission he must as stated by Brink Jin the case of *Grant v Plumbers* do the following,¹¹

- (a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[25] An applicant must in an affidavit, fully explain the reason for the default. The explanation must enable the court to understand how the default came about to properly evaluate the conduct and motives of the applicant. If the explanation provided is wilful, negligent or otherwise, it may give rise to the probable inference that there is no bona fide defence to the claim, and may be considered as a factor in the overall determination if good cause has been shown to rescind the judgment.

[26] Rule 42 Variation and rescission of orders states as follows:

- (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;

¹¹ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0) at 476

(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.

Evaluation

[27] The crisp issue to be determined is if Mr. Moemedi as sole director of the company, has the necessary locus standi to act on behalf of the applicant and has he has shown good cause to rescind the judgment and that he has a bona fide defence to be ventilated at trial. Though the notice of motion is not really clear if the court is approached in terms of rule 31, rule 42 or the common law, it is apparent from the heads of argument that he wants to the court to consider his application under rule 42. He asserted that he gave his attorneys an instruction to oppose the application and they simply never filed the notice to defend and his opposing affidavit and that the attorney's in the main application provided an explanation wherein the court can conclude that he has shown good cause, he was not in wilful default.

[28] Mr. Moemedi makes mention of the fact that he only became aware of the judgment by default in this case on the 23rd of November 2023 after being informed by his attorneys of record and that is when he gave an instruction for a rescission application to be launched. Now this may give the impression that he was not at all

aware of the eviction application or the date on which it will be placed on the roll or in fact what timelines would ensue. This assertion cannot be accepted for the following reasons.

[29] Firstly, he does not state on which date he was contacted by Kotu after the eviction application was served at the Bloemdal Small Holdings property he just states that he asked Kotu to pick up the application from the sheriff's office.¹² Now this can only said to be an untruth in light of the fact that the return of service in the main application indicates that the eviction application was served on him personally on the 17th of October 2023 at the said property. He was nowhere near Cape Town on the said date as alleged in his founding affidavit.

[30] Though it was submitted during argument that the notice of motion of the main application did not comply with rule 6(5) and it was prescriptive as did not give the now applicant sufficient time to oppose and file its answering affidavit. This is incorrect. The notice of motion clearly indicated that he had 10 days from service to file his notice to oppose and 15 days thereafter to file his answering affidavit failure which, an application will be made to court on the 23rd of November 2023 and an appropriate notice of set down was filed.

[31] The application was served personally on the 17th of October 2023 and the applicant thus had more than enough time to file his opposing papers. In my view, he was thus aware of the relevant dates and when the application would be enrolled as the sheriff served it on him personally in Bloemfontein. In the absence of opposing papers being filed, the absence of Mr. Moemedi and his legal representatives, the court was justified in granting an order by default and there was no error on its part.

[32] Secondly Mr. Moemedi fails to mention in his founding affidavit that the issue of eviction has long been on the horizon. The respondents herein elucidated this fact with various written corresponded annexed to their affidavit that already in March 2023, Kotu was contacted and informed of the liquidators' intention to sell the property and that he should vacate but, he refused on the basis that proper channels

¹² Founding affidavit paragraph 8-9.

must be followed in that regard and that is when the applicant's current attorneys of record came on to the scene, exchanges of correspondence took place and negotiations commenced and stalled in June 2023.

[33] I find it hard to believe that Kotu did not, contact him at that stage as, how else would the current attorneys of record have entered into the fray and try to settle this in an amicable manner, which eventually was abandoned in favour of an eviction application which was then launched in August 2023. Though he mentions that a decision was taken to rescind the eviction order once it came to his knowledge, it is clear from the resolution that this was only done on the 18th of December 2023, almost a month after the default order came to his attention.

[34] Now this resolution is intrinsically linked to his locus standi to bring the application for rescission. Now the said resolution makes it clear that he is bringing this application for rescission in his capacity as director of the applicant and this is his actual interest in the matter. Ordinarily this would be sufficient to launch such an application as he would be considered to be a person affected by the judgement, but it will not suffice in light of the final liquidation order conferring power to the respondents to handle all the affairs of the company. In my view, this entails that until the final liquidation order is rescinded or the execution thereof suspended, the liquidators will retain their legal power to represent the company as the director powers has long ceased.

[35] The rescission of the final liquidation is still pending in another province but Mr. Moemedi states that this is a factor that the court may consider for the rescission in *casu* and same speaks to the existence bona fide defence. For the reasons already alluded to herein above, this cannot be accepted. Now although Mr. Moemedi has mentioned that he must be granted an opportunity to properly oppose the matter, he has not provided a bona fide defence which may be considered as a factor in the overall determination of good cause. In the absence thereof, his application must fail. It is trite that costs follow the result and there is no reason to deviate from this established practice.

V ORDER

Accordingly, the following order is made;

1. The application is dismissed with costs.

MAJOSI O.R, AJ

Appearances

On behalf of the Applicant

Adv. D. Masia

Instructed by:

C/O Chauke Attorneys

Bloemfontein

On behalf of the Respondents

Adv. C. Swanepoel

Instructed by:

C/O Symington De Kok Attorneys

Bloemfontein