

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 030058/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 23/10/24

SIGNATURE

In the matter between:

**IDUBE PROJECTS GROUP (PTY) LTD
(REG: 2020/457513/07)**

Applicant

and

IDUBE PROJECTS AND MAINTENANCE CC

First Respondent

NATIONAL LIQUIDATORS SA (PTY) LTD

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

THE SOUTH AFRICAN REVENUE SERVICE

Forth Respondent

JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is an urgent application for the setting aside (rescission) of a liquidation judgment granted against the Applicant in its absence, provisionally on 18 June 2024 and finally on 15 August 2024. The Application is brought in terms of section 354 of the Companies Act 51 of 1973, or alternatively Rule 42(1)(a) of the uniform rules or alternatively the common law. The basis of the urgency is that the Applicant will

suffer irreparable harm not only to the applicant's commercial interest but to the employees. Therefore, the application is heard on an urgent basis.

[2] The application for the liquidations were served at the registered address of the company in compliance with the Companies Act and it was valid. However, the applicant contends that it was not effective because the service did not come to the knowledge of the applicant. Therefore, the *audi alteram partem* principle was not satisfied. The Applicant further contends that the first respondent was mala fides since they were clearly aware that the Applicant was no longer physically at the registered business address.

[3] In this regard, applicant relies on the matter of **Thomani and Another v Seboka N.O and Others** 2017 (1) SA 51 (GP), where there had not been proper service of the notice. The court held in para 35 that:

"... Nonetheless, if the bank knew that the applicants no longer resided at this address (which it did, according to the fourth respondent's records) it would amount to *mala fides* to serve the summons on an erstwhile residential address."

[4] It was common cause between the parties that the applicant was not present in the premises of its registered address and has not operated its business from that address since the 1st of April 2023. It is further common cause that the registered address of the applicant and that of the first respondent are exactly the same. The applicant submits that the first respondent's only member, Norman Keith Clark, was fully aware that the Applicant was not physically present at the registered address. Despite this knowledge the first respondent proceeded to serve all notices there, knowing very well that none of the documents and Orders will come to the knowledge of the Applicant.

[5] These facts are demonstrative of an intent to deceive and is dishonest. When legal proceedings and commercial interactions become devoid of human values and business ethics by engaging in dishonest, intentional conduct this results in defeating the administration of justice. The applicant provides an explanation for its failure to

oppose the winding-up proceedings as they did not receive effected notice of the proceedings. They contend that they are not in willful default and have a bona fide defence and had they been aware of the liquidation applications they would have defended it.

[6] In respect of section 354 of the Companies Act, 61 of 1973, the court has a wide discretion to determine whether special circumstances exist for the setting aside of the winding-up Orders on the facts of the matter. This was set out in ***Klass v Contract Interiors CC (in liquidation) and Others*** 2010 (5) SA 40 (W) at paras 65-66 where the court may consider the commercial morality, public interests and whether the continuation of the winding-up proceedings would be a contrivance or render the winding-up an instrument of injustice.

[7] The applicant proceeds to oppose the winding up application on the basis that it has a *bona fide* defence. It is equally important for the applicant to demonstrate a bona fide defence. To prove exceptional circumstances, or to indicate that it is solvent and that it is just and equitable that the order of the winding-up is set aside.

[8] It is common cause that the applicant has not proved that it is solvent. The applicant fails to render complete, readable and clear bank statements. Various unpaid items are reflected on the bank statements during February - August 2024. There are no audited financial statements. There is no evidence that its assets exceed its liabilities.

[9] The applicant has not provided an explanation as to why the outstanding amount of R2, 598,833.76 is not owing. The first respondent contends further that the applicant is in arrears and has failed to pay its rent. It was pointed out that the applicant is in breach of its payment obligations towards Wesbank resulting in those finance agreements being cancelled rendering the entire outstanding balance immediately due and payable. A bare denial of indebtedness without factual basis is insufficient.

[10] Although, there was no effective service of the process on the applicant, the court granting the final liquidation order was mindful that the notice did not come to

the knowledge of the applicant as the return of service set out that the applicant was no longer at the address. The court considering the winding-up order therefore did not detract from the legal effectiveness of the service on the registered address and granted the final order. In ***Praetor and Another v Aqua Earth Consulting CC (162/2016)*** [2017] ZAWCHC 8, the court considered that there was nothing irregular about an order being issued consequent upon an ineffective service, for the reason that the Companies Act places the onus on the Company to ensure that notice at its registered office is effective. In the present matter the parties concede that there remains recourse to an appeal for a different court to find differently on the facts.

[11] The court in ***Hardroad (PTY) LTD v Oribi Motors (PTY) LTD*** 1977 (2) SA 576 (W), referring to Rule 42 explains that the rule does not specifically require "good cause" or "sufficient cause" (as in certain earlier Rules) to be shown before a judgment can be rescinded or varied, it however requires that the judgment must have been "erroneously sought" or "erroneously granted". The court granting the final winding-up order considered the merits and therefore, it was not erroneously granted.

[12] Having considered the service of the notices at the registered address, complied with the requirements of the Act, I find it lacks effectiveness making it a defective service in the circumstances of these facts. The applicant has, however, not succeeded in demonstrating a defence to the winding up order. For these reasons the application fails. Given the dismissal of the application the points on the striking out and joinder of the individual liquidators have become moot and are not considered further.

[13] In the result, the following order is made:

1. The Application is dismissed with costs in the liquidation.

R. FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT PRETORIA

APPEARANCES:

For the Applicant: Adv. T Steyn

Instructed By: Diemieniet Attorneys

For the Respondent: Adv. GJ Lotter

Instructed By: Serfontein Viljoen & Swart Attorneys

For the Intervening Party: Adv. JA Steyn

HEARD ON: 15 October 2024

JUDGMENT DELIVERED ON: 23 October 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **23 OCTOBER 2024.**