



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

CASE NO: 2024/013591

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 05 May 2025

Signature: _



In the matter between:

TABRAZ ENTERPRISES (PTY) LIMITED T/A COPPER CHIMNEY

Applicant

[Registration Number: 2015/366142/07]

And

KITTY NAICKER PROPERTY HOLDINGS CC T/A WATERFALL

Respondent

CENTRE

[Registration Number: 1998/010558/32]

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] This is an urgent application for the rescission of a provisional liquidation order granted on 3 February 2025, alternatively, for the suspension of the said order pending its return date.
- [2] The application is opposed both on the basis of urgency and on the merits.
- [3] The applicant contends that the matter is urgent because there is a pending action before the Randburg Magistrate between the same parties over the payment of fees. The respondent has approached the court prematurely before the Magistrate's court makes a determination on the indebtedness of the applicant or otherwise.
- [4] Furthermore, if the applicant were to wait for the return date, it would be tantamount to acquiescence to the granting of the provisional liquidation order and render its eventual withdrawal academic in nature.
- [5] In opposition to the application, Mr. Van Schalkwyk submitted that:

- 5.1 The respondent does not take issue with urgency. The submission is made based on the lack of merit in both the main relief as well as the alternative relief.
- 5.2 That the rescission cannot succeed. The applicant's reliance on Rue 42 of the Uniform Rules of Court is misplaced.
- 5.3 the alternative relief can also not succeed for the following reasons:
 - 5.3.1 First, the applicant does not have the requisite *locus standi*.
 - 5.3.2 Second, the applicant has not cited the Master. The property of the applicant vests in the Master until such time as a provisional liquidator is appointed.
 - 5.3.3 Third, even if it is found that the applicant has the requisite *locus standi* and that the applicant has joined the relevant and necessary parties (and given notice to the relevant parties), the applicant has no right to seek the relief it seeks.
 - 5.3.4 Fourth, the applicant has not satisfied the requirements for interim relief.
- 5.4 It is submitted that the applicant has launched a hopeless case. In circumstances where a hopeless case is pursued, the legal practitioners ought to be held accountable. This consideration is amplified by the fact that the applicant is litigating with money belonging to the concursus (and which currently vests in the Master as aforesaid).

B. MAIN RELIEF

- [6] The applicant's main relief is a rescission based on the provisions of Uniform Rule 42(1)(a). Rule 42(1)(a) reads as follows:

"42 Variation and rescission of orders

(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;**" [emphasis added]*

- [7] For the applicant to become entitled to the relief it seeks, it must therefore prove that (a) an order was granted in its absence and (b) an error was committed by the court. In this regard the Constitutional Court decision of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*¹ is instructive on the meaning of the **absence** requirement:

The words "**granted in the absence of any party affected thereby**", as they exist in rule 42(1)(a), exist **to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.**

- [8] In the instant case, the applicant was aware that the matter had been set down for 3 February 2025. Moreover, the applicant's legal representatives had the

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC):

contact details of the respondent's legal representatives and could easily have made contact with Madam Justice Khumalo's secretary.²

[9] Additionally, the applicant failed to file heads of argument and chose not to participate further in the matter.

[10] Quite importantly, the applicant's defence was considered before the order was granted.

[11] As regards the second requirement, it was submitted that the applicant's entire defence was premised on the allegation that its legal representatives had limited/restricted access to the Caselines filing system. This has been substantively denied by the respondent.

[12] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E), Justice Erasmus held at 371E-F that:

"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings."

[13] On the facts of this matter, the applicant has not made out a case for the main relief sought.

C. ALTERNATIVE RELIEF

Locus standi

² Submissions on behalf of the respondent and annexures attached.

[14] It is the respondent's contention that the applicant does not have the requisite *locus standi* to seek the alternative relief.

[15] Upon a winding-up order being granted against a company, whether provisional or final, a director's duties cease to exist, save for special residuary powers. The residual powers are limited and include (a) the right to anticipate a provisional order in terms of Section 11(3) of the Insolvency Act, 24 of 1936, (b) the right to appeal and the right to launch a rescission application.

[16] Section 354 of the Companies Act, 61 of 1973 ("the 1973 Act") states:

"354. Court may stay or set aside winding-up –

(1) 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.

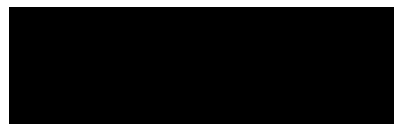
(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."

[17] If regard is had to the founding affidavit, it is apparent that the application is launched by the applicant company, i.e. its board of directors. It is submitted that the board does not have the requisite *locus standi* to launch the proceedings for the alternative relief.

[18] The founding affidavit is by the applicant's legal representative, Mr Busani Lucky Nkuna, no confirmatory affidavit is filed. A Rule 7 challenge regarding authority to litigate remains unanswered as at the hearing date.

- [19] The omission or failure to cite the Master as a party is massively problematic to the applicant's case. The applicant's property vests in the Master "*until a provisional liquidator has been appointed and has assumed office.*"³
- [20] Concerning the right which the applicant seeks to protect, that right does not exist by virtue of the effect of the provisional order of winding-up. The director's duties have ceased to exist.
- [21] As regards irreparable harm, the applicant will not suffer this because it will have an opportunity to oppose the proceedings on the return date of 02 June 2025.
- [22] A further alternative and adequate legal remedy is that the applicant may anticipate the return date under section 11(4) of the Insolvency Act, 24 of 1936.
- [23] On the issue of costs of this application, which is premised to fail having regard to the foregoing reasons, costs generally follow the results. Punitive costs may be granted in view of the established principles where the application was pursued unnecessarily at the court's discretion, judicially exercised.
- [24] The following order is made:

The application is dismissed. The applicant to pay the costs of the application to be taxed at scale B.



J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

³ Section 361 of the 1973 Act.

Date of hearing: 18/02/2025

Date of Judgment: 05 May 2025

On behalf of the Applicant: Adv. R. Baloyi

Instructed by: BL Nkuna Attorneys, Pretoria

On behalf of the Defendants: Adv. R. Van Schalkwyk

Instructed by: Kally & Co Inc., Pretoria

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 05 May 2025.