



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED |

10 May 2025



CASE NO: 59894/2021

MATLHATSE TRADING ENTERPRISE CC
REG No: 2002/086999/23

APPLICANT

And

THE BODY CORPORATE OF BATELEUR

FIRST RESPONDENT

THE MASTER OF THE HIGH COURT

SECOND RESPONDENT

ICON INSOLVENCY
PRACTITIONERS (PTY) LTD

THIRD RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 10 May 2025.

JUDGMENT

COLLIS J

INTRODUCTION

[1] This is an opposed application wherein the Applicant seeks a rescission of a final winding-up order granted by Phooko AJ on 7 March 2022¹. The application is opposed by the First Respondent, being the liquidating creditor at whose instance the winding-up order was granted.

[2] The application is brought in terms of Rule 42(1) of the Uniform Rules of Court, alternatively in terms of common law.

[3] The First Respondent served and filed its notice of intention to oppose this application on 12 December 2022² and served and filed its answering affidavit on 2 March 2023.³ Notwithstanding the service of the answering

¹ Notice of Motion, p 014-26 to 014-29.

² See Notice of Intention to Oppose, p 014-4 to 014-5.

³ See Filing Notice: Answering Affidavit, p 014-30 to 014-33.

affidavit, the applicant has failed to file any replying affidavit or to take any further steps to prosecute this matter and to bring this application to finality. To this end, it was the First Respondent who proceeded to enrol the application for hearing.

[4] In the absence of an Applicant having filed a replying affidavit, the case made out by the First Respondent in the answering affidavit, has not been disputed. In the matter of Standard Bank of SA Ltd v Sewpersadh and Another ⁴ the purpose of a replying affidavit was held to be the following:

“The primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in his answering affidavit.”

[5] In the context of a failure to deal with an allegation in an affidavit, the Supreme Court of Appeal held in Municipality of Mossel Bay v The Evangelical Lutheran Church and Another⁵ that:

“In this answer the drafter is remiss in his or her duty to meet any and all material averments in the founding affidavit by either admitting or denying, or confessing and avoiding, unless he or she has no knowledge of any one or more or all of them A proper

⁴ 2005 (4) SA 148 (C) at 159.

⁵[2013] JOL 30995 (SCA).

answer to material averments under reply requires, at the minimum, a separate and unequivocal traversal of each and every such allegation which the party seeks to contest.”

[6] In the case of *The Minister of Social Development v Mpayipheli*⁶ BR Tokota J held that:

“The respondent persisted that he did not receive any response from the Minister. Mr Dladla was not only in a position to deny this allegation he had a duty to do so if the decision had been taken. He decided not to do so but merely noted the allegations. If the appellants' affidavit failed to admit, deny or confess and avoid allegations contained in the respondent's founding affidavit the Court was entitled to accept that such allegations were not in dispute and were therefore correct.”

[7] Therefore, in circumstances where no replying affidavit has been filed, such as in the present matter, in order to refute the contents of the answering affidavit this Court must and will accept the uncontested evidence as presented by the respondent.

CONDONATION

⁶ 2018 JDR 0917 (ECM).

[8] In this application, the applicant further seek condonation for the late filling of the application.⁷ In this regard the applicant avers that it could not launch the application on time due to the unavailability of the written judgment from the court a quo, but nevertheless decided to proceed with the application in its form to avoid further delays.

[9] In this regard on behalf of the respondent the argument advanced, was that the order was obtained on an unopposed basis and as such no written judgment is available and would be forthcoming. Be that as it may, no challenge is made to the basis for the condonation being sought.

[10] Consequently, this Court is inclined to condone the late filing of the application.

GROUND IN OPPOSITION

[11] On behalf of the respondent several grounds in opposition was raised. It was firstly argued, that the applicant's reliance on Rule 42 is fundamentally flawed as the order sought to be rescinded is a liquidation order, which has significant effects once such an order is granted.

⁷ Applicant's founding affidavit, para 11 p 014-9.

[12] It is trite that the liquidation of a company's estate establishes a concursus creditorum whereafter nothing may be done by any of the creditors to alter the rights of other creditors.⁸

[13] Secondly, any application for the setting aside or rescission of a liquidation order can only be brought in terms of section 354 of the Companies Act. Support for this assertion is found in several decisions listed hereunder.

[14] This first thereof is the matter of *Ward v Smit & Others: In re Gurr v Zambia Corporation Ltd*⁹ where the SCA stated the following:

"In order to have the final winding-up order set aside the appellants were obliged to invoke the provisions of s 354(1) of the Act. I shall assume without deciding that they had locus standi to do so. The section reads:

`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

⁸ *Walker v Syfret* N.O. 1911 AD 141 at 160.

⁹ 1998 (2) SCA 175.

voluntary winding-up on such terms and conditions as the Court may deem fit.'

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. (Meskin Henochsberg on the Companies Act at 747; see also Joubert (ed) The Law of South Africa vol 4 first re-issue para 185 (M S Blackman)).

[15] The authority of Ward *supra* was again dealt with in the matter of Impac Prop Cc v THF Construction CC¹⁰ where Keightley J at paragraph 10 held as follows:

"It is clear from these authorities that insofar as the issue of the ambit of s354 is concerned, the decision in Storti is clearly wrong. Thus, I am not bound to follow Storti in this particular respect. On the contrary, the authorities are clear that the application for rescission ought to have been based on s354 of the Companies Act and not the common law."

[16] On the question of whether an applicant may apply for a rescission of a liquidation order in terms of Rule 42, Fabricius J, in the matter of Ragavan

¹⁰ (40906/16) [2019] ZAGPJHC 497 (5 December 2019).

and Another v Kal Tire Mining Services SA (Pty) Ltd and Others¹¹ in which matter the applicants also applied for the rescission of a final winding-up order in terms of the provisions of Rule 42, it was stated as follows:

“In my view, it is correct to say that s. 354 is the legislated basis to rescind winding-up orders, and that this would include orders that were allegedly erroneously sought or granted. Applicants did not bring the rescission application with reference to this section, and on behalf of the Respondents it was contended that this was fatal to the rescission application.

It is clear from the allegations made in the Founding Affidavit that Applicants rely both on procedural deficiencies at the time of the hearing of the liquidation application, relating to non-service of the application and/or notice thereof, and on allegations that the debt relied upon was in issue. On the facts of this case, I am therefore in agreement with Counsel for the Respondents that the provisions of s. 354 are of application.”

[17] It is for the above reasons that counsel for the First Respondent had argued that these authorities make it clear that the only basis upon which

¹¹ (40723/2018) [2019] ZAGPPHC 455 (12 August 2019).

a winding-up order may be rescinded is in terms of the provisions of section 354 and not on any other ground or any other basis.

[18] Having regard to the above authorities, it is clear that the Applicant's reliance on Rule 42 or the common law is therefore clearly misguided and incorrect and the application can therefore only proceed on the basis of section 354 of the Companies Act, which is not the basis upon which the Applicant has approached the Court.

[19] Consequently, I must conclude that the provisions of Rule 42 and the common law does not apply to rescission of a liquidation order.

[20] A further preliminary point raised by the First Respondent is the Applicants *lack of locus standi*.

[21] The applicant in *casu*, is the company which was liquidated by the Honourable Court on 7 March 2022. In terms of section 354(1) of the Companies Act only a certain class of individuals have the necessary locus standi to bring an application before a Court.

[22] Section 354(1) of the Companies Act provides the following:

"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.”

[23] The wording of the section makes it clear that the only persons which has the necessary locus standi to launch an application in terms of section 354 is a creditor, liquidator or a member of the company. The section makes it clear that the company itself does not have locus standi to launch this application.

[24] In *casu*, the company itself, which is under liquidation brought the rescission application and this is in clear violation of section 354(1) of the Companies Act. This much was conceded in the Heads of Argument filed on behalf of the Applicant.¹² As a result it must follow, that the Applicant lacks the necessary locus standi to have launched these proceedings.

[25] A company’s lack of locus standi, was specifically also confirmed by the court in the matter of *Storti v Nugent*¹³ where the court dealt with the question whether a company has locus standi. The Court therein stated the following:

¹² Applicant’s Heads of Argument para 7.4 p 020-9.

¹³ 2001 (3) SA 783 (W).

“Secondly, only the liquidator, a creditor or member may bring such an application. The company itself, as represented by its board of directors does not have locus standi in judicio under this section.”¹⁴

[26] The above position was also confirmed by the authors of Henochsberg which states:

“The persons who have locus standi to bring an application under the section are exclusively the liquidator of the company (including its provisional liquidator), a creditor or a member of the company.”¹⁵

[27] A company’s failure of *lack of locus standi* I am of the view, is dispositive of the entire application and consequently the application falls to be dismissed.

COSTS

[28] In its Heads of Argument the respondent requested of the Court to order costs in the event of the application being dismissed to be paid by the director, Mr Mmaselema Christopher Moakamedi and this on a punitive scale.

¹⁴ Storti v Nugent 2001 (3) SA 783 (W) at 794C.

¹⁵ Henochsberg on the Companies Act, 71 of 2008, volume 2 page APPI-108.

[29] In this regard counsel submitted that the costs should not be against the applicant, being the company under liquidation, as this will be prejudicial to the creditors and be prejudicial to the administration of the insolvent estate.

[30] The Applicant in its Heads of Argument on point held the view that notwithstanding the provisions of section 345, that it was entitled to have approached this Court in terms of Rule 42 to rescind the liquidation order.

[31] The Applicant has failed to refer this Court to any authorities in support of this view adopted by it and I am of the view it could not, as none existed.

[32] In granting cost orders the judicial officer always has a discretion and costs generally will follow the result.¹⁶ In exercising its discretion in awarding costs it is expected that a court will exercise this discretion within the parameters of certain well-established principles.¹⁷

[33] The most important of these principles is that where a party has been substantially successful in bringing or defending a claim, that party is

¹⁶ Ferreira v Levin, Vryenhoek v Powell 1996 (2) SA 621 (CC) at 624. See also President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 at para 15.

¹⁷ See A Cilliers The Law of Costs (2006) at § 14.04, citing Neugebauer & Co Ltd v Hermann 1923 AD 564, 575; Penny v Walker 936 AD 241, 260; Protea Assurance Co Ltd v Matinise 1978 (1) SA 963, 976 (a); Kilian v Geregsbode, Uitenhage 1980 (1) SA 808, 815-816 (a).

generally entitled to have a cost order made in its favour against the other party who was not successful.¹⁸

[34] As mentioned, the first respondent is seeking costs on an attorney and client scale against the applicant in the event of being the successful party.

[35] In support of this contention the first respondent relied on the sentiments expressed by the author A C Cilliers' in Law of Costs where the argument was advanced that the object of an award of costs on attorney and client scale is aimed at the reimbursement of the successful party and the disapproval of the conduct of the other party.¹⁹

[36] In *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*²⁰, the leading case regarding attorney and client costs in South Africa, Tindall JA held that:

“[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in

¹⁸ *Skotnes v SA Library* 1997 (2) SA 770 (SCA). In order to establish who is to be regarded as the successful party, the court must look at the substance of the judgment and not merely its form.

¹⁹ Law of Costs, par 4.04, page 4-6.

²⁰ 1946 AD 597, referred to as such in *Swartbooi v Brink* 2006 (1) SA 203 (CC) at 213.

a particular case considers it just, by means of such an order, to ensure more effectually than it can by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

[37] Based on these principles, counsel submitted that the Court should grant costs on an attorney and client scale.

[38] This Court is persuaded that given the facts of the matter at hand and the failure by the Applicant to address the issue of costs comprehensively in its heads of argument, that awarding costs on the scale sought by the first respondent would be merited under the circumstances and that such costs, is to be paid by the director of the applicant on a punitive scale given the stance adopted by the director.

ORDER

[39] Consequently the following order is made:

39.1 The applicant is granted condonation for the late launching of the application.

39.2 The application is dismissed.

39.3 The director of the Applicant, Mr Mmaselema Christopher Moakemedi, is ordered to pay the cost of the application on an attorney and client scale.



C. COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

Appearances

Legal Representative for the Applicant: Mr. M Modise

Instructed By: Modise Attorneys

Counsel for the First Respondent: Adv. R de Leeuw

Instructed By: EY Stuart Inc. Attorneys

Date of Hearing: 14 August 2024

Date of Judgment: 10 May 2025