

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: M620/2022

In the matter between:

**THE MASTER OF THE HIGH COURT
MAHIKENG**

APPLICANT

and

KOBUS VAN DER WESTHUIZEN N.O.

FIRST RESPONDENT

SONIA SOFFY N.O.

SECOND RESPONDENT

**(in their capacities as the duly appointed liquidators in the insolvent estate
of Harties Wine Club CC 2009/200032/23 with Master Reference M321/2019)**

THE CHIEF MASTER OF THE HIGH COURT

THIRD RESPONDENT

SOUTH AFRICAN RESTRUCTURING AND

**INSOLVENCY PRACTITIONERS' ASSOCIATION NPC
("SARIPA")**

FOURTH RESPONDENT

IN RE:

KOBUS VAN DER WESTHUIZEN N.O.

FIRST APPLICANT

SONIA SOFFY N.O.

SECOND APPLICANT

**(in their capacities as the duly appointed liquidators in the insolvent estate
of Harties Wine Club CC 2009/200032/23 with Master Reference M321/2019)**

and

**THE MASTER OF THE HIGH COURT
MAHIKENG**

FIRST RESPONDENT

THE CHIEF MASTER OF THE HIGH COURT

SECOND RESPONDENT

**SOUTH AFRICAN RESTRUCTURING AND
INSOLVENCY PRACTITIONERS' ASSOCIATION NPC
("SARIPA")**

THIRD RESPONDENT

CORAM: PETERSEN J

HEARD: 10 OCTOBER 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00am on **06 JANUARY 2025**.

ORDER

1. The declaratory order granted by this Honourable Court under case number M620/2022 on 26 January 2023 is hereby rescinded and set aside.
2. The First and Final Liquidation Account submitted to the Master on 19 February 2020 and approved by the Master on 10 March 2023 is set aside.
3. The main application of the first and second respondents, in which they seek a declaratory order, is otherwise postponed to a date to be determined by Registrar in conjunction with the Office of the Judge President.
4. The applicant shall pay the costs of the application on Scale C of Rule 67A.

JUDGMENT

PETERSEN J

Introduction

[1] This is an application for rescission of judgment in terms of Uniform Rule 42(1)(a) alternatively the common law. The applicant ('Master') seeks an order in the following terms:

"1. That the declaratory order granted by this Honourable Court under Case No M620/2022 on 26 January 2023 be and is hereby rescinded and set aside.

2. That the First and Final Liquidation Account submitted to the Master on 19 February 2020 be set aside.

3. That First and Second Respondents be given 7 days from the date of receipt of this order to deliver a First and Final Liquidation and Contribution Account which must reflect the contribution of the members of Harties Wine Club CC registration number 2009/200032/23, towards the assets and the Master's Fee of R250.00.

4. That the First and Second Respondents be ordered to pay the costs of the rescission application *de bonis propriis*.

5. Further and/or alternative relief."

- [2] The first and second respondents ('joint liquidators') of the Harties Wine Club CC were granted a declaratory order in their favour, in default of the Master on 26 January 2023 in the following terms:

"1. A declaratory order that:

1.1 in the case of a winding up of a close corporation (or a company) for its creditors by way of resolution adopted by the members (or shareholders in the case of a company, as contemplated in section 349 read with section 351(1) of the Companies Act, Number 16 of 1973, the members (shareholders/directors in the case of a company) are not liable to pay contribution by virtue of their membership and member interest or shareholding; and

1.2 in terms of the provisions of section 153 of the Insolvency Act, number 2 of 1936 ('the Insolvency Act'), read with the Third Schedule of the Insolvency Act, as amended by the Government Gazette – at present being government Gazette No 41224 dated 03 November 2017 – no fee is payable to the Master in terms of an insolvent estate under final sequestration/liquidation with a total gross value of the assets according to the liquidation and distribution account being less than R5000,00.

2. The costs of this application be costs in the insolvent estate."

- [3] Uniform Rule 42(1)(a) provides that 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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

- [4] At common law, an order may be rescinded, amongst others, where judgment has been granted by default, as in the present matter.

Background to the granting of the declaratory order of 26 January 2023

- [5] The joint liquidators issued their application on 21 November 2022 and served same on even date at 12h24 at the Office of the Master in Mmabatho; and 28 November 2022 at the Office of the Chief Master. The third respondent ('SARIPA') was served by way of email. The respondents were required to notify the joint liquidators of their intention to oppose the application, within ten (10) days of receipt of the application; and in the event of opposition to serve and file their answering affidavits, if any, within fifteen (15) days of the notice of opposition.
- [6] No opposition was noted and resultantly the order of 26 January 2023 was issued. Notably, a notice of set down of the application for 26 January 2023 dated 19 January 2023 was not served on any of the respondents but filed with the Registrar.
- [7] The Master attributes the failure to oppose the application to a bona fide administrative oversight. To this end, he explains that the application which was duly served was forwarded to a Ms Elzana Allers, a Senior Legal Administration Officer in Legal Services, on 2 December 2022, with an instruction from the Chief Master, Mr Mafojane, to oppose the application.

- [8] Ms Allers confirms the allegations in the founding affidavit, attributed to her. Ms Allers is said to have received the instruction to oppose the application whilst she was on en route home. When she arrived home, she checked her emails. As routine, she leaves emails that require her attention as unread, which serves as a reminder to attend to same. For some inexplicable reason, the email relevant to this matter was marked as read and she consequently gave no further attention to it.
- [9] The Office of the Chief Master was informed of the order by SARIPA, by way of an email dated 23 February 2023, sent to the new Chief Master Ms Roberts, who was appointed in that capacity during February 2023.
- [10] Ms Allers explanation was to when she became aware of the order is confusingly narrated in the founding affidavit. It is first explained that she became aware of the order of 26 January 2023, which was granted in the absence of the Master, on 19 April 2023, when she received an email from the Office of the Chief Master. This implies that she was informed by the Chief Master of the order nearly two months later.
- [11] According to a different explanation from Ms Allers, the Master is said to have become aware of the order in March 2023 when she (Ms Allers) received the order from the High Court which was dated 28 February 2023 and bearing a date stamp of 7 March 2023.
- [12] The Master being unaware that the application was unopposed, pursuant to the order of 26 January 2023, confirmed the First and Final

Liquidation account on 10 March 2023. The administrative oversight on the part of Ms Allers which resulted in the application being unopposed, was only brought to the attention of the Master on 19 April 2023.

[13] The Master therefore contends that he has bona fide reason for his absence and was not in wilful default. The Master with reference to the assertion by the joint liquidators in the main application, that the issue in this matter is of importance as it requires the correct interpretation of applicable laws as sought in the declarator by the joint liquidators. In essence therefore what the Master seeks is an opportunity through the rescission of the order to be afforded a right of reply through the principle of audi alteram partem; and the right evinced in section 34 of the Constitution of the Republic of South Africa, 1996, which affords anyone the right to have any dispute resolved by the application of law to be decided in a fair public hearing before a court.

The opposition by the joint liquidators

[14] The joint liquidators oppose the rescission application. They contend that Rule 42(1)(a) finds no application in this matter since the order was not erroneously sought or erroneously granted in the absence of the Master. A judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.

[15] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), the SCA, in an analogous explanation as proffered by the Master for Ms Allers conduct, said:

“...The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him.”

(own emphasis)

[16] The facts on which the Master relies for seeking rescission of judgment does in terms of Rule 42(1)(a) therefore does not avail the Master. The Master does, however, cast his net wide by seeking rescission in terms of the common law. Before turning to the common law question, it is apposite to address another arrow in the bow of the joint liquidators. They assert that the court order of 26 January 2023 has been fully implemented through the approval by the Master of the First and Fial Liquidation account; and that the Master has therefore ‘perempted’ the right to challenge the order. The joint liquidators on this score seek dismissal of the rescission application based on the doctrine of peremption.

[17] In terms of the common law doctrine of peremption, not to be confused with the right of pre-emption, a party must make up its mind: it cannot equivocate by acquiescing in a judgment and later on deciding to appeal. In *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* (2014/14286) [2015] ZAGPJHC 176; 2016 (1) SA 78 (GJ) (3 August 2015), Peter AJ, made the following observations regarding the doctrine of peremption:

“[25] The first consideration of the prospects of success is whether or not Venmop has perempted its right to set aside the award. An unsuccessful litigant who has acquiesced in a judgment cannot appeal against it. The onus of proof rests on the person alleging acquiescence and in doubtful cases it must be held not to be proven. Although peremption has its origin in policy considerations similar to those of waiver and estoppel, the question of acquiescence does not involve an enquiry into the subject of state of mind of the person alleged to have acquiesced in the judgment. Rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom; *Dabner v South African Railways and Harbours* 1920 AD 583 at 594; *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A – D; *Natal Rugby Union v Gould* [1998] ZASCA 62; 1999 (1) SA 432 (SCA) at 443F – G; *Samancor Group Pension Fund v Samancor Chrome and Others* 2010 (4) SA 540 (SCA) at 546 para 25 and *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at 318.

[26] Although the doctrine of peremption has its genesis in relation to appeals, it has been extended to applications for rescission of default

judgment. *Hlatshwayo v Mare & Deas*, 1912 AD 232; *Sparks v David Polliack & Co (Pty) Ltd* 1963 (2) SA 491 (T) at 496 D – F and *Nkata v Firstrand Bank Ltd and Others* 2014 (2) SA 412 (WCC) at 421,…”

(own emphasis)

[18] The joint liquidators bear the onus of proving acquiescence by the Master in the order of 26 January 2023. From trite law in this regard, it is clear from the objective conduct of the Master that he was not aware of the true circumstances which resulted in the order being granted when he complied with the order. The peremption argument advanced by the joint liquidators is therefore without merit. See too: *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) at paragraph [101] and the cases there referred to.

[19] It is trite that a judgment may be rescinded in terms of the common law, amongst others, where judgment had been granted by default. The requirement germane to an application for rescission in terms of Rule 42(1)(a) or the common law is good cause. Good cause embraces two enquiries, a reasonable and acceptable explanation for the applicant’s default (otherwise stated as an absence of wilful default) and a *bona fide* defence to the claim on the merits with *prima facie* prospects of success. See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A and *Colyn supra*.

[20] In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476–7, Brink J formulated the approach to an application for rescission as follows:

- “(a) He [the applicant] 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. (*Brown v Chapman* (1938 TPD 320 at p. 325).)”

[21] The joint liquidators do not explicitly deal with rescission in terms of the common law, save to address their submissions on the absence of a reasonable and acceptable explanation for the default of the Master. They contend that, save for the Master blaming his default on Ms Allers, he fails to explain what positive steps were taken to ensure the application was opposed. They further contend that the founding affidavit is silent on the steps taken by the Chief Master after forwarding the application by email to Ms Allers.

[22] In *Colyn*, the SCA in similar circumstances to the present expressed itself as follows, at paragraph 12:

“I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not

brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a *reasonable* explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (*Saloojee and Another NNO v Minister of Community Development*). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success (*Melane v Santam Insurance Co Ltd*)."

(own emphasis)

- [23] The terse reasons put forward by the Master, by apportioning blame for the woes now faced, solely on the administrative bungle of Ms Allers, without stating what steps the Chief Master or the Master for that matter took in pursuing the prosecution of its intended opposition, falls woefully shy of the authorities adumbrated above. This poor explanation may very well justify a refusal of rescission as in *Colyn*. The enquiry does not end there, however. In the *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC), the majority and minority referred with approval to the dictum of Moseneke J (as he then was) in *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at paras 10-11 where he said:

“10 A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. ‘Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole.’ *De Witts Auto Body Repairs (Pty) Limited v Fedgen Insurance Co. Limited* at 711D.

11 In amplifying the nature of the preferable approach in an application for rescission of judgment. I can do no better than quote Jones J with whose dicta I am respectfully in agreement:

‘An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties ... He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a

party's absence without evidence and without his defence having been raised and heard."

(own emphasis)

[24] The following sentiments expressed about the role of the court in a rescission application in *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* (768/2012) [2013] ZASCA 150 (01/11/2013) at para 20 are equally apt:

"In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in *R v Hepworth* 1928 AD 265 at 277 to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality."

Discussion

[25] The Master contends that he has good prospects of success on the merits of the main application. It is undeniable that the joint liquidators approached the court with an application seeking a declarator of the interpretation of the law relevant to section 349 read with section 351(1) of the Companies Act 16 of 1973; and section 153 of the Insolvency Act 2 of 1936 read with the Third Schedule of the Insolvency Act. The issue is undoubtedly novel. The correct interpretation of the aforesaid provisions relevant to the law of

insolvency, should the settle two pertinent questions relevant to the law of insolvency. Firstly, whether in the case of a winding up of a close corporation (or a company) for its creditors by way of resolution adopted by the members (or shareholders in the case of a company), as contemplated in section 349 read with section 351(1) of the Companies Act 16 of 1973, the members (shareholders/directors in the case of a company) are liable to pay a contribution by virtue of their membership and member interest or shareholding. Secondly, whether in terms of section 153 of the Insolvency Act 2 of 1936 ('the Insolvency Act'), read with the Third Schedule of the Insolvency Act, as amended by Government Gazette No 41224 of 03 November 2017, no fee is payable to the Master in terms of an insolvent estate under final sequestration/liquidation with a total gross value of the assets being less than R5000,00, according to the liquidation and distribution account.

[26] These important questions were answered on a default basis. The Master in this application seeks an opportunity to ventilate the interpretation of these provisions before an open court, by having an opportunity to state his case on the interpretation on this novel issue. The parties have embarked on a detailed exposition of their respective opinions of the interpretation to be given to the implicated provisions. It is not for this Court to consider the merits or demerits of the interpretation of the relevant provisions. At most, this Court is required to satisfy itself that the Master has put up a "*bona fide* defence which has not merely some prospect, but a good prospect of success."

[27] The interpretation of laws, particularly those related to the law of insolvency have proven to be an unruly horse. This is adequately evidenced in *FirstRand Bank Limited v Master of the High Court (Pretoria) and Others* (1120/19) [2021] ZASCA 33; 2021 (4) SA 115 (SCA) (7 April 2021), which dealt with the interpretation of section 106 read with sections 89(2) and 14(3) of the Insolvency Act, where the question turned on the liability for costs of sequestration when there is no free residue or free residue is insufficient; whether secured creditors relying solely on their security are liable to contribute and whether the petitioning creditor was solely liable. In that matter, the SCA observed that the issue had been a subject of controversy for a while within the insolvency law academic circles. Given the importance of the matter in the administration of insolvent estates, the SCA requested the appointment of an *amicus curiae* to assist the Court.

[28] I do not propose to conflate this judgment with the submissions on the interpretation of the disputed legislative provisions. As indicated, the adjudication of that issue is not what this Court is called upon to adjudicate.

[29] I am satisfied, however, that on a reading of the submissions advanced by both sides, that the Master has a bona defence to the declarator sought by the joint liquidators which is arguable and has good prospects of success.

[30] The poor explanation for the failure to oppose the application which resulted in the order of 26 January 2023 being granted by default, is therefore trumped by the prospects of success in the main application.

[31] In the exercise of my discretion, I therefore find good cause to grant the application for rescission, to allow for the ventilation of the matter by way of opposition from the Master.

Costs

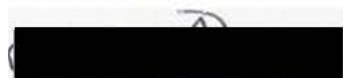
[32] The Master seeks a cost order *de bonis propriis* against the joint liquidators. There is no basis for the grant of such an order. As indicated above, save for the good cause found to grant rescission of the order of 26 January 2023, the application by the Master was doomed for failure. A value judgment was to be made by this Court in that regard.

[33] The awarding of costs remains within the discretion of the Court. The Master approached this Court seeking an indulgence from this Court to set aside an order of the Court, which was final in nature. Fairness in my view dictates that the Master, notwithstanding the opposition from the joint liquidators, be held liable for the costs occasioned in this matter, in accordance with Scale C as envisaged by Uniform Rule 67A.

Order

[34] The following order is accordingly made:

1. The declaratory order granted by this Honourable Court under case number M620/2022 on 26 January 2023 is hereby rescinded and set aside.
2. The First and Final Liquidation Account submitted to the Master on 19 February 2020 and approved by the Master on 10 March 2023 is set aside.
3. The main application of the first and second respondents, in which they seek a declaratory order, is otherwise postponed to a date to be determined by Registrar in conjunction with the Office of the Judge President.
4. The applicant shall pay the costs of the application on Scale C of Rule 67A.



A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Appearances

For the Applicant : Adv Z Williams
Instructed by : The State Attorney
First Floor, East Wing
MEGA CITY COMPLEX
MMABATHO
EMAIL: isekgota@justice.gov.za
Reference: 0615/23/P12

For the First and Second
Respondents : Adv S N Davis
Instructed by : Tintingers Inc
c/o Smith Neethling Inc
29 Warren Street
MAHIKENG
EMAIL: stingtinger@tingtingers.co.za
lecinda@tingtingers.co.za
Reference: NJ/KOB9/0001/2022/lvjr