

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: D3640/2023

In the matter between:

KERANI BTW CC

APPLICANT

and

**BIDVEST BANK LIMITED
(REGISTRATION NUMBER: 2000/006478/06)**

FIRST RESPONDENT

NTANGANEDZENI FRANK NEMAKWARANI N.O.
(in his capacity as liquidator of Kerani BTW CC)

SECOND RESPONDENT

JUDGMENT

Olsen J:

[1] Kerani BTW CC (“Kerani”) was finally wound up by order of this court granted on 15 September 2023. Kerani now applies to rescind that final order. Its application is supported by a founding affidavit attested to by Mr G M Cooke, who is the sole member of Kerani.

[2] The first respondent is Bidvest Bank Limited (“Bidvest”). It sought and was granted the winding up order. It opposes this application to rescind that order. The second respondent is Mr F N Nemakwarani N.O., who is the appointed liquidator of Kerani. He has taken no part in these proceedings.

[3] The founding affidavit in the application for the winding up of Kerani established that a company known as ZAR X (Pty) Limited (“ZAR X”) had borrowed a

capital sum of some R27 million from Bidvest. Kerani executed a written guarantee (i.e. a deed of suretyship) in terms of which it guaranteed the due and punctual performance of the obligation of ZAR X to repay the capital advanced and interest thereon in accordance with the agreement between that company and Bidvest. Kerani's guarantee was limited to an amount of R4 million together with interest thereon. ZAR X defaulted as a result of which Kerani was obliged to meet its obligations as guarantor, and had not done so. In fact the High Court in Gauteng had granted default judgment in favour of Bidvest against each of ZAR X and Kerani as to their respective obligations. That order was granted on 4 August 2022.

[4] The founding affidavit established that the registered office of Kerani was 1[...] I[...] W[...], Zimbithi Eco Estate, Shaka's Rock, KwaZulu-Natal. A statutory demand contemplated by s 345(1) of the Companies Act, 61 of 1973 (and also s 69(1)(a) of the Close Corporations Act, 69 of 1984) was served upon Kerani at its registered address on 21 February 2023. Kerani had failed to comply with the demand.

[5] The deponent to the founding affidavit explained that prior to delivering the statutory demand, Bidvest had attempted to levy execution on the judgment against Kerani in the former's favour. In September 2022 a writ of execution against movable property was served at Kerani's registered address and was there handed to Mr Cooke who informed the sheriff that the goods that the sheriff was attaching did not belong to Kerani, which only owned an immovable property and shares. Interpleader affidavits attested to on 19 September 2022 by Mr Cooke, his wife and his daughter were subsequently delivered claiming that the latter two parties were the owners of the movable property. Mr Cooke explained in his affidavit that Kerani was what he called "an investment holding company that is a passive investor."

[6] Bidvest also attempted to execute against Kerani's immovable property, a unit in a sectional title scheme known as East Point, situated at [...] S[...] Road, Timeball Boulevard, Durban. Kerani had mortgaged the property as security for its obligations to Bidvest. The sale in execution of the property was scheduled to take place on 9 February 2023, but on 8 February 2023 Kerani brought an application before the High Court in Gauteng to stay the sale. Although the application was dismissed with costs, the sale did not proceed.

[7] The deponent to the founding affidavit recorded that the decision to deliver a statutory demand and proceed with an application for winding up was made following these unsuccessful attempts at execution.

[8] Bidvest launched its winding up application on 5 April 2023. It was served at Kerani's registered office on 19 April and a provisional winding up order was made on 14 June 2023. It was also served at the registered office. The final order which Kerani seeks to have rescinded was granted on 15 September 2023.

[9] The application for rescission of the final winding up order is based on or springs from events which post-date the money judgment granted in favour of Bidvest against Kerani. The court file in the present matter has been inundated with papers presented or filed by Kerani in support of the present application. Most of them relate to events which followed the grant of judgment in favour of Bidvest. In furnishing an account of the events in question I will confine myself to matters which appear to me to be relevant to the adjudication of Kerani's claim to be entitled to rescind the final winding up order.

[10] On 16th November 2022 (two months after the warrant of execution against movables had been served) Mr Cooke delivered by email to Bidvest's attorneys an application to rescind Bidvest's judgment. Kerani was not the applicant. Mr Cooke was the applicant. He acted in person; i.e. no attorney was identified as representing Mr Cooke. Bidvest's attorneys responded by pointing out that the notice of motion did not comply with the provisions of Rule 6, and would be ignored. That application was in effect abandoned by Mr Cooke.

[11] On or about 3 February 2023 a second application for rescission of the judgment was served on Bidvest. This application was also brought not by Kerani, but by Mr Cooke. Again he represented himself, but apparently with the consent of the Gauteng firm known as Dentons, he gave their address for service. (The notice of motion also recorded that Mr Cooke would accept service by email at his stated email address.)

[12] On 8 February 2023 Bidvest's attorneys delivered a notice to oppose the second rescission application (which opposition subsisted at the time papers were

delivered in the present application) based, unsurprisingly, *inter alia* upon the proposition that Mr Cooke had no *locus standi* to ask the court to rescind the judgment which had been granted against Kerani. On the same day (i.e. 8 February 2023) Kerani itself launched its application to stay execution against its immovable property, and the papers were served upon the attorneys for Bidvest that evening. In regard to that application Kerani engaged the services of ZI Attorneys Incorporated as its attorneys of record.

[13] On or about 14 April 2023 Mr Cooke delivered a notice of his intention to amend his notice of motion and his founding affidavit in his second rescission application, in effect to substitute Kerani for himself as the applicant. A notice of objection to the proposed amendment was delivered on or about 20 April 2023 by Bidvest's attorneys. The notice was addressed both to Mr Cooke and to Dentons pointing out that the founding affidavit could not be amended, and objecting to the proposition that Mr Cooke could rescue himself from the predicament of having launched proceedings without any *locus standi*, by substituting a party (i.e. Kerani) which would have had *locus standi* had it been the applicant in the first place.

[14] Further relevant details concerning the present application to rescind the winding up order, and also the papers in the application for the winding up order, will emerge below. Before turning to the merits of the application I deem it appropriate to say something about the manner in which Kerani, through Mr Cooke, presented its case in this application. Its papers reflect scant regard for the legal principles engaged by the case which Kerani seeks to make. Kerani's papers are littered with extravagant claims of what Mr Cooke regards as misconduct on the part of Bidvest and the attorneys representing Bidvest. These are repeated *ad nauseam*. Scant recognition is accorded by Mr Cooke to the implications of Kerani's separate legal personality, and to the duties he bore as the sole member of Kerani, to look to the protection of its interests if indeed there was any basis at all upon which Kerani could avoid enforcement of the obligations it owed to Bidvest. Instead, in a case in which the facts are relatively simple, the court is presented with a set of founding papers so prolix that the answering affidavit only commences on page 458. (Admittedly, just over 50 of those pages is an unnecessary copy of the founding papers in the application for the winding up of Kerani.) On the other hand, scant attention is paid in

the papers delivered on behalf of Kerani to things which one would have thought would matter, such as whether it in fact had any defence to the claim of the liquidating creditor; or why the application to rescind the winding up order was delayed. It is difficult to resist the conclusion that these papers presented by Kerani were drawn to obfuscate rather than elucidate. They certainly have that effect. Why they were presented in that fashion is a matter upon which one can only speculate.

[15] The founding papers do not expressly identify the legal basis upon which the court is called upon to consider rescinding the final winding up order. It does appear clearly enough that there is reliance on Rule 42(1)(a) as it is averred that the final order was erroneously granted in the absence of Kerani. However, no mention is made of s 354(1) of the Companies Act, 1973. That provision, as a basis for putting a stop to the winding up, can be discarded.

Rule 42(1)(a)

[16] In relevant part Rule 42 provides 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”.

If the requirements of the rule are not met rescission cannot be granted under the rule. If they are met the court has a discretion to grant rescission, signified by the use of the word “may” in the rule. Whilst I do not believe that the point arises in this case, prominent considerations in the exercise of that discretion would be the avoidance of injustice as between the parties to the litigation, and the public interest in the finality of litigation.

[17] The basis upon which it is contended that the final winding up order was erroneously granted is as follows.

(a) At the time when the court heard the final winding up order (and indeed at the time when the court considered the question of the provisional winding up order) Mr Cooke's second application for

rescission of the judgment against Kerani had been issued and was pending.

- (b) The existence of that application to rescind the judgment was not disclosed to the court. That was a material omission.
- (c) The judgment which was the subject of Mr Cooke's second application for rescission "forms the basis of Bidvest's cause of action in the liquidation application".
- (d) If the presiding judge was aware of the foregoing he or she would have been induced not to grant the final winding up order.

[18] It is an element of the case presented by Kerani which is often repeated in its papers, presumably with the intention thereby to generate a sense that an injustice was perpetrated, that the existence of the application to rescind the judgment was deliberately hidden by Bidvest and its attorneys. Indeed, in the heads of argument delivered on behalf of the applicant I was urged to hold that the omission (or alleged omission, to put it more accurately in the light of what follows) is a breach on the part of Bidvest and its lawyers of the duty to "disclose all material facts to the court". As authority for this proposition I was referred to *Spartan SME Finance Pty Ltd In re Insurance Underwriting Managers (Pty) Ltd v Zululand Bus Services CC and Others* [2022] ZAGPPHC (7 December 2022) at paragraph 38. The principle there stated is entirely correct.

"It is trite that in *ex parte* proceedings, an applicant and its representatives are required to disclose all material facts."

That application was one brought *ex parte*. The present application was not. It was an application made on notice. The duty of Bidvest and its representatives was to state the facts upon the basis of which the relief was sought. They did that. The judgment which had been granted in favour of Bidvest was not its "cause of action in the liquidation application". The founding papers in the liquidation application set out the circumstances in which Kerani came to be indebted to Bidvest in the sum of R4 million together with interest thereon. That was the fact which afforded Bidvest *locus standi* to seek an order for the winding up of Kerani. The fact that default judgment had already been granted for payment of that debt did not advance Bidvest's right to seek the winding up of Kerani any further.

[19] Putting the foregoing observations to one side, there are two obstacles confronting the argument that Kerani can succeed under Rule 42, to which in my view there is no answer.

[20] The allegation that Bidvest deliberately hid the existence of the second application to rescind the judgment which had been made by Mr Cooke himself was factually incorrect. I mentioned earlier that in the founding papers Bidvest had given an account of its attempt to execute against the mortgaged property, and that Kerani had brought an application to interdict the sale in execution which was due to take place. Having mentioned that urgent application, the founding affidavit in the winding up application proceeded as follows.

“A copy of the notice of motion in the urgent application is annexed hereto marked “**FA9**”. I do not annex a copy of the respondents founding affidavit as being irrelevant to this application and unnecessarily prolix.”

The second sentence quoted above is in my view justified. The annexed notice of motion reflected the order sought in the application, which was the suspension of execution “pending the final outcome of the rescission application filed in this court on the 3rd February 2023 under same case number...”. The next paragraph in the order repeated the reference to the “final outcome of the rescission application”. Mr Cooke’s allegation that the existence of the second rescission application was hidden from the Judge granting the final winding up order, and indeed that this was deliberate, is simply false. When I asked counsel who argued the matter on behalf of Kerani whether, if I perceived any merit in the contention that the rescission application had to be disclosed in the application for the winding up of Kerani, I should proceed upon the assumption that the Judges involved never read the annexure, she was unable to make any submission on the subject. I must assume that the Judges who granted the provisional and final winding up orders read the annexure, and took the same view on this issue as I do; that the question as to whether the existence of an application to rescind the default judgment had any bearing on the existence of the debt which was the foundation of Bidvest’s right to approach the court was a matter to be raised by Kerani.

[21] The papers in the application for the winding up of Kerani were served at its registered office in accordance with the rules. So too was the *rule nisi* and

provisional order. This is not disputed by Kerani. However, by that time the registered office had become the former place of residence of Mr Cooke, who says that such services were not drawn to his attention by those in control of those premises when service was effected. But it is undisputed and indisputable that Bidvest's papers made out a case for the grant of both the provisional and final winding up orders. In *Lodhi 2 Properties Investments CC vs Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) it was held that

“... a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, ...”

(See paragraph 25). The learned Judge continued as follows in paragraph 27.

“Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”

[22] *Lodhi 2* was followed in *Freedom Stationery (Pty) Ltd and others vs Hassam and Others* 2019 (4) SA 459 (SCA), and approved and applied in *Zuma vs Secretary of the Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) at paragraph 63. In *Freedom Stationery* at paragraph 18 Van der Merwe JA put the matter succinctly as follows.

“Thus, a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party.”

[23] The application to rescind the order under Rule 42 must fail.

The Common Law

[24] The requirements for the rescission of a judgment at common law were stated by the Constitutional Court as follows in *Government of the Republic of Zimbabwe vs Fick and Others* 2013 (5) SA 325 (CC) para 85.

“... the requirements for rescission of a default judgment are twofold. First the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

[25] On the subject of its alleged defence to Bidvest’s claim, in its founding papers in the present application Kerani referred the court to paragraphs 6.3 to 7.3.6 of Mr Cooke’s founding affidavit in the rescission application, the whole of which was annexed to the founding affidavit in the present application. Some of the contents of those paragraphs are relevant only to an application for rescission of a default judgment (as opposed to the merits of the alleged defence to the claim), and some allegations therein contained are to my mind obscure and irrelevant. The essence of the so-called defence is said to lie in an agreement reached in October 2020 upon the occasion of an increase in the facilities allowed by Bidvest to ZAR X. With regard to that agreement Mr Cooke referred in his affidavit to a letter dated 27th October 2020 written by Bidvest to the directors of ZAR X. The purpose of the letter was to record a temporary increase in the facilities granted to ZAR X from some R17 million to some R24 million for a period of two months. The letter then set out a list of further security required by the bank, clearly in exchange for the increase of some R7 million in the amounts to be lent to ZAR X. Amongst these required extra securities was a guarantee from Mr Cooke in favour of the bank limited to R7 million, and a cession and pledge by Kerani of its shareholder’s loan in ZAR X, as well as its shares in ZAR X. The letter records at its end that the terms and conditions of the facility letters previously issued in July 2018 and May 2019 remained valid and binding save to the extent that they were contradicted by the terms stated in the letter. One assumes that the deed of suretyship or guarantee by Kerani, and the

mortgage of Kerani's property in favour of Bidvest, were referred to in those earlier facility letters. Counsel for Kerani conceded correctly that the letter does not record a release of Kerani from its obligation to Bidvest.

[26] Mr Cooke alleges that a Mr Rory Protheroe, an employee of Bidvest, advised him (Mr Cooke) that the latter's personal guarantee of R7 million would replace the guarantee (secured by a mortgage of immovable property) already provided by Kerani. Bidvest denies any such transaction. It is not recorded in the letter. The deed of suretyship is to the effect that Kerani's obligation would endure until it was released in writing by Bidvest. No such writing has been provided by Kerani. In my view the so-called defence is without any merit. It is not *bona fide* and does not even *prima facie* carry any prospect of success.

[27] In my view the failure of Kerani to establish a bona fide defence at the level required in order to justify rescission of the final winding up order at common law means that the application should be dismissed. There is nothing in the papers which persuades me that it would be in the interests of justice nevertheless to rescind the judgment. I will deal briefly with some considerations which bear upon this issue, including the question to whether there has been an adequate explanation both for Kerani's default, and for the delay in the institution of the present application.

[28] One of the often repeated allegations made in the founding papers, and in reply, is that Bidvest and its attorneys deliberately refrained from informing Mr Cooke of the liquidation proceedings. I accept that they could have done so, but do not accept they were obliged to do so.

[29] The statutory demand calling upon Kerani to pay that debt, upon pain of an application for winding up in the event of it not being paid, was served at the registered office of the company by the Sheriff. The return of service indicated that it had been delivered to someone who had no apparent connection to Kerani. This happened on 21st February 2023. As mentioned earlier, about two weeks before that the application to stay execution of the money judgment had been issued and served by ZI Attorneys Incorporated acting on behalf of Kerani. Accordingly, on 24th

February 2023 Bidvest's attorneys sent an email to ZI Attorneys Incorporated which read as follows.

"Pursuant to the dismissal of you client's urgent application and the order of Manoim J, handed down on 9 February 2023 and in light thereof that your client appears intent on evading execution, please be informed that we have received instructions to proceed with a liquidation application.

Enclosed is a copy of a section 345 notice for your urgent response, which we are informed was served on 21st February 2023 apparently on one Mr Oliver."

[30] Mr Cooke denied the allegations in the answering affidavit to the foregoing effect. His denial carried no significance whatsoever. Receipt of the email could only be denied by ZI Attorneys Incorporated. No affidavit from that firm was put up recording either that the email had not been received, or that they had omitted for some or other reason to advise their client of the content of the email. It is noteworthy, at the very least, that Mr Cooke's response to the relevant paragraph of the answering affidavit contains no express denial on his part of notification from his attorneys of the fact that the email had been received, and of what it stated. This circumstance serves only to undermine the credibility of Mr Cooke's assertion that he himself knew nothing of the winding up proceedings until he was advised in writing by the provisional liquidator, or his office, of the existence of a provisional order on or about 24th August 2023. That letter enclosed the second respondent's certificate of appointment.

[31] In my view Mr Cooke's response to this information received from the second respondent's office borders on the farcical. He sent an email to a Ms Meintjies, the person in the second respondent's office apparently charged with the administration of the liquidation, saying that he knew nothing of the purported liquidation, and that it brought into question the veracity of the documents which had been provided to him. Mr Cooke's email claimed that he had no knowledge of the party who had brought the application or who acted for that party, and he therefore asked for a copy of the court order and all documents filed in relation to the application. In his affidavit he suggested that this communication was motivated by

his suspicion that “this was a scam”. Ms Meintjies apparently had some difficulty in getting the documents as a result of which there were emails backwards and forwards between Mr Cooke and Ms Meintjies on progress until 18th October 2023, when in an email Mr Cooke acknowledged that he knew that Bidvest had sought the winding up order.

[32] Nowhere in his papers does Mr Cooke assert that Kerani owed money to any other creditor which might have launched the winding up proceedings. He does not explain why it did not enter his mind to contact either Bidvest or its attorneys to enquire as to whether the information he had received from the second respondent’s office was correct, and as to whether Bidvest was responsible for the application. In my view the only conclusion reasonably to be drawn from this set of circumstances is that if Mr Cooke did not know earlier than the first communication from the second respondent that liquidation proceedings were underway, he was indulging in ignorance.

[33] From when he decided that he would be leaving the Zimbithi Estate address which was the registered office of Kerani, Mr Cooke was under an obligation to implement a change of registered address for the corporation. That obligation subsisted throughout the period with which we are concerned. He did nothing about it. Having chosen not to do anything about it, he was under an obligation to make sure that whoever took over the premises which he was vacating was informed of the fact that it was the registered office of the company, and he should have made arrangements with that person to ensure that anything delivered there should be passed on to Mr Cooke. According to him he did not do that. As to this obligation, see *Arendsnes Sweefspoor CC vs Botha* 2013 (5) SA 399 (SCA) at paragraphs 16 and 30. In the latter paragraph Leach JA endorsed the view that a corporation

“which fails to ensure that there is a responsible person present at the premises appointed as its registered address, does so at its peril and should not be allowed to bemoan its lot should the process not come to its attention.”

[34] In all the circumstances it is Kerani, and not Bidvest, which must carry responsibility for the fact that the various services at Kerani’s registered office did not, according to Mr Cooke, come to his attention.

[35] The notice of motion in this application was dated 7th March 2024. That is about six and a half months after he received notice from the second respondent's office on 24th August 2023 that liquidation was underway. Mr Cooke acknowledges having received a copy of the final order on 18th October 2023. Measured from then the launch of the present application was delayed by some four and a half months. The explanation for that delay appears in this paragraph of the founding affidavit.

“When I had knowledge of the final winding up order, I immediately instructed my attorneys in the matter, who consulted with me and advised me that I am at liberty to launch this application. I then proceeded to obtain the necessary details and gather the documentation needed, which I have attached as annexures to this affidavit.”

In my view the explanation of Kerani's failure even to lodge a notice of intention to oppose the grant of a final winding up order, and the explanation for the delay in the launching of the present application, are inadequate, and the delay cannot be excused.

[36] For these reasons also the grant of the present application would not be in the interests of justice.

[37] There are other contentions and disputes which arise on the papers before me which I regard as inconsequential, and peripheral to the central issues which determine the outcome of this matter. I see no need to deal with these issues.

[38] I make the following order.

1. **The application is dismissed with costs.**
2. **Scale B may be applied to the taxation of counsel's fees.**

Case Information:

Date of Argument:	13 June 2025
Date of Judgment:	12 November 2025
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