

REPUBLIC OF SOUTH AFRICA



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

CASE NO: : 2025/150186

(1) REPORTABLE: **Yes**
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED: yes

19 May 2026

GB ROME

In the matter between:

SID (PTY) LTD

First Applicant

(previously known as S-IDENTITY HOLDINGS (PTY) LTD)

DAVID ISRAEL LIEBERMAN

Second Applicant

and

BCO CONSTRUCTION (PTY) LTD

First Respondent

JOHANN GAUTSCHI SC N.O

Second Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be on 19 MAY 2026

Introduction

[1]. This is an application under Rule 42(1)(a) for the setting aside of part of the order of this Court that was granted by Acting Justice Cilliers on 19 January

2026, in terms whereof an arbitration award by Advocate Johann Gautschi SC was made an order of court, the respondent in the arbitration SID (Pty) Ltd (“**SID**”) was declared indebted to BCO Construction (Pty) Ltd (“**BCO**”) in the sum of R21 164 328.29 plus interest¹, payment of that amount was ordered, and SID was wound up.

- [2]. Although the applicants’ papers² at an earlier stage appear to have sought wider relief, the present application was confined to the setting aside of only the winding-up part of the above order. In other words, the applicants do not in these proceedings seek any final determination concerning the correctness of the arbitration award or the monetary relief embodied in the prior order.
- [3]. The issue is accordingly a narrow but important one. It is whether the winding-up order was erroneously sought or granted in the absence of SID because the service on which that order rested was materially defective or unreliable.

Background

- [4]. It is common cause on the papers that an arbitration award was made by the second respondent, Johann Gautschi SC and that BCO thereafter approached this Court for relief including the making of that award an order of court, payment relief, and the winding-up of SID.
- [5]. It is further common cause that during January 2026 Acting Justice Cilliers granted an order in the absence of SID which, among other things, made the award an order of court, declared SID indebted to BCO in amounts arising from the award, directed payment, and wound up SID.

Locus standi

- [6]. BCO raised a point in limine that, SID having been placed in liquidation, only the liquidators were entitled to seek rescission or setting aside of the winding-up order, and that neither SID nor Mr Lieberman enjoyed the requisite

¹ This appears to be the same amount awarded as against SID in the arbitration

² I have in this judgment however retained the wording of who the applicants are as per the original notice of urgent application; ie. In in this the judgment the first applicant is reflected as SID and the second applicant is reflected as Mr Lieberman

standing.

- [7]. In my view that contention cannot be sustained.
- [8]. The starting point is section 354 of the Companies Act 61 of 1973, read with section 339, which expressly recognises that an application to stay or set aside winding-up proceedings may be brought not only by a liquidator, but also by a creditor or member. It follows that the right to seek relief affecting a winding-up order is not reserved exclusively to liquidators.
- [9]. Insofar as the second applicant is concerned, it is not in dispute on the papers that Mr Lieberman is the sole director of SID. On the authorities, a shareholder or member has standing under section 354 to seek appropriate relief in relation to a winding-up. To that extent at least, the submission that only the liquidators may approach the Court is bad in law.
- [10]. The position of SID as the first applicant requires separate consideration. It is of course so that, upon liquidation, the ordinary control of the company's affairs passes to the liquidators and the directors' powers are curtailed. But it does not follow that a company placed in winding-up is disabled from approaching the Court to challenge the very order by which that state of affairs was brought about.
- [11]. In Storti v Nugent and Others 2001 (3) SA 783 (W)ⁱ, the Court drew an important distinction between relief under section 354 and a rescission of an order that ought not to have been granted. Properly understood, that decision does not support the proposition that only liquidators may seek rescission. It recognises rather that, whilst section 354 names the categories entitled to invoke that statutory remedy, rescission on common law grounds remains available where the complaint is that the order should never have been granted in the first place.
- [12]. That approach has since been endorsed and clarified. In Blue Bulls Company (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltdⁱⁱ, whilst finding on the authority of Impac Prop CC v THF Construction CC that a rescission application can only be brought under the aegis of section 354, the Court

nevertheless held that directors retain residual powers to act on behalf of a company in liquidation for the purpose of challenging the winding-up order itself. The reasoning is compelling. If directors may oppose a winding-up application, and may in appropriate cases appeal against a winding-up order, there is no principled basis to deny them standing to seek rescission.

[13]. The position is now put beyond doubt by Dr WAA Gouws (Johannesburg) (Pty) Ltd v HR Computek Pty Ltd and Others 2025 (6) SA 89 (SCA)ⁱⁱⁱ. There the SCA made clear that section 354 does not exclude a company in liquidation, acting through its directors' residual powers, from seeking rescission under the common law or Rule 42. The Court further made clear that the right to challenge a winding-up order is not confined to the liquidators, and that the narrower approach adopted in Impac Prop CC v THE Construction CC 2019 JDR 2633 (GJ)^{iv} cannot stand against that reasoning.

[14]. In the present matter, the second applicant, in his capacity as member and as the person through whom SID acts for purposes of challenging the order, has standing to pursue the relief sought. So too does the first applicant, acting through the residual powers that survive for the limited purpose of impugning the winding-up order itself. The point in limine accordingly falls to be dismissed.

Section 354

[15]. Mr Theron SC, who appeared for the first respondent, submitted that the application suffered from a fundamental misconception. He contended that the rescission application was defective because it was by design silent on the merits of the winding-up order. It did not attempt to show why, in substance, the winding-up ought not to have been granted.

[16]. That, so he argued, was fatal because section 354 of the Companies Act 61 of 1973 requires an applicant seeking to stay or set aside winding-up proceedings to establish that those proceedings ought to be stayed or set aside, a standard which, on his argument, necessarily entails engagement with the substantive basis of the winding-up and not merely with an alleged procedural flaw.

[17]. The applicants' riposte, as advanced by Mr Antonie SC who appeared for both applicants, was to the following effect.

[18]. If Rule 42 is indeed applicable, the applicants' decision to eschew engagement with the substantive merits of the winding-up, or to refrain from attempting to establish a bona fide defence in that sense, is hardly surprising. On that approach, the decisive question is not whether the applicants can demonstrate that the winding-up ought never on the merits to have been granted, but whether there was a procedural irregularity of such a kind that the judgment or order sought to be rescinded was defective at its inception.

[19]. Section 354(1) provides that:

"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."

[20]. Section 354(2) provides that:

"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."

[21]. The learned authors of Blackman on the Companies Act 61 of 1973 provide assistance on this question. In their discussion of section 354^v, they explain that the section confers a broad discretionary power upon the Court, after the commencement of winding-up, to stay or set aside proceedings on the application of a liquidator, creditor or member, where it is shown to the satisfaction of the Court that the proceedings ought to be stayed or set aside. They also discuss the debate in the authorities as to whether the section is directed only at cases where supervening events make it necessary or desirable to stay or set aside winding-up proceedings, or whether it also extends to the rescission of an order that ought never to have been granted.

- [22]. The above commentary is helpful because it identifies the distinction between two analytically different situations. The first is where a winding-up order is unobjectionable when granted, but later events, or wider discretionary considerations, make it appropriate that the winding-up proceedings be stayed or set aside. The second is where the order is assailable because it should never have been granted at all. In discussing Storti v Nugent, the learned authors record [A] *Gautschi* AJ's view that section 354 is directed to the former situation, and not the latter, and that where a winding-up order is assailable, rescission may be sought under the common law.
- [23]. It is true that the learned authors of Blackman note the tension between *Gautschi* AJ's reasoning and the SCA's judgment in Ward v Smith and observe that the latter represented the law. Their discussion of course predated the decision in Gouws. Nonetheless, the discussion and analysis in Henochsberg remains instructive. That analysis highlights that section 354 is ordinarily concerned with the Court's discretionary intervention in winding-up proceedings as such, that is to say, where the proceedings have been regularly set in motion and the Court is asked, on wider considerations, to stay or set them aside.
- [24]. That understanding is borne out by the matters identified by the learned authors of Blackman as relevant to the exercise of the discretion under section 354. They include the interests and wishes of creditors and members, whether creditors have been paid or provided for, the safeguarding of the liquidator's remuneration and expenses, the progress already made in the winding-up, and whether there are circumstances connected with the formation, affairs or failure of the company which require investigation. Those are all considerations directed to whether an otherwise operative winding-up process ought, in the Court's discretion, to continue.
- [25]. In my view, that is why the first respondent's submission cannot be accepted in unqualified form. To say that every challenge to a winding-up order must necessarily be funneled through s. 354, with the consequence that the applicant must always engage the substantive merits and show "good cause" in that broader sense, is to elide two distinct enquiries.

- [26]. Where the complaint is that the order was regularly granted but should now be stayed or set aside for discretionary reasons, the considerations ordinarily associated with section 354 may well assume central importance. But where the complaint is anterior to that, namely that the Court was never furnished with a procedurally reliable basis to grant the order in the absence of the affected party, the enquiry is different in kind.
- [27]. Section 354 is concerned, in its ordinary operation, with the stay or setting aside of winding-up proceedings where the Court is asked, in the exercise of its discretion, to interfere with an order or process otherwise regularly obtained. By contrast, where the order is challenged on the footing that it was granted upon a procedurally defective foundation, whether under Rule 42(1)(a) or under the common law, the first question is whether the Court was procedurally entitled to grant the order at all. If it was not, then the defect lies not in the later undesirability of maintaining a regularly obtained winding-up, but in the validity of the process by which the order was procured.
- [28]. Mr Theron SC submitted further that any reference in Gouws to rescission under Rule 42 or the common law is merely obiter and should not be treated as dispositive of the present debate. I do not agree.
- [29]. In Gouws the relationship between section 354 and ordinary rescission remedies was one of the central issues before the Supreme Court of Appeal. The Court was required to decide whether rescission of a winding-up order had, as a matter of law, to proceed under section 354, or whether the company, acting through residual powers, could invoke rescission outside the section. In answering that question in favour of the latter position, the Court necessarily rejected the proposition that section 354 exhausts the field. To that extent, the reasoning cannot be dismissed as merely incidental.
- [30]. Mr Antonie SC strongly emphasised that in Gouws the SCA held specifically that section 354 is not the exclusive route by which a winding-up order may be impugned, and that rescission may in an appropriate case be sought under Rule 42 or the common law. I did not however understand him to go so far as to contend that Gouws directly decided every question that may arise

thereafter, including whether “good cause” in some broader sense must be shown in every case. What Gouws does decide is the anterior and more fundamental proposition that section 354 is not invariably the exclusive pathway by which a winding-up order may be impugned. Once that is so, the first respondent’s submission, that the applicants were necessarily obliged to engage the substantive merits of the winding-up under section 354 before any procedural complaint could be entertained, cannot be sustained in the wide form in which it was advanced.

Rule 42(1)(a)

- [31]. Rule 42(1)(a) empowers a court to rescind or vary an order erroneously sought or erroneously granted in the absence of a party affected thereby.
- [32]. The ambit of the Rule is narrow. It is not a mechanism for a general rehearing, nor does it provide an open ended equitable jurisdiction to revisit an order merely because a party later contends that it was unfairly obtained.
- [33]. The cases of First National Bank of SA Ltd v Jurgens and Others and Bakoven Ltd v G J Howes (Pty) Ltd illustrate both the purpose of Rule 42 and the nature of the error capable of founding relief under it.
- [34]. In Bakoven Ltd v G J Howes (Pty) Ltd^{vi}, the Court explained 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’ ... 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.”
- [35]. Likewise, in First National Bank of SA Ltd v Jurgens and Others^{vii} 1993 (1), Leveson J emphasised that Rule 42 is not engaged merely because a party later characterises something as an omission or irregularity. The Rule operates where the order granted is not one to which the applicant was entitled on the case properly before the court.
- [36]. Properly understood, those authorities do not narrow the applicants’ case.

They support it. This is not a matter in which the applicants seek to rely on material extraneous to the original proceedings in order to convert Rule 42 into a broad reconsideration on fairness grounds. Nor is this a case founded on some omission lying outside the Rule. The error relied upon here appears from the record itself. On the papers before the Court when the winding-up order was granted, the evidential basis for service was internally contradictory.

- [37]. The question in the present matter is therefore not whether SID ought ultimately to be wound up on a properly constituted case after proper notice. It is whether the Court was procedurally entitled, on the record then before it, to grant final winding-up relief in SID's absence. If the record before that Court disclosed mutually destructive returns as to service, the order was erroneously sought or granted within the narrow but established meaning of Rule 42(1)(a).

The parties' contentions on service

- [38]. The applicants contend that the winding-up order was granted on the strength of service returns that did not establish proper service on SID, and that at least one of the returns placed before the Court was materially inaccurate on its face. They submit that service in winding-up proceedings is foundational, and that absent proper and reliable notice the order was erroneously granted within the meaning of Rule 42(1)(a).
- [39]. BCO resisted that conclusion. It relied on the sheriff's returns and later confirmatory affidavits, and submits that proper service was effected. It further contended any inaccuracy in one return was later explained, that the applicants' evidence concerning employees and access at the premises does not displace the sheriff's proof, and that broader considerations of commercial justice and SID's alleged insolvency should weigh against rescission.
- [40]. In the view I take of the matter, the central question is whether the winding-up order was granted in SID's absence on materially reliable proof of service.

Service

- [41]. It is against that understanding of Rule 42 that the service issue must be

assessed.

- [42]. The papers reflect three material steps of service relied upon by BCO in the winding-up process. They are the section 345 demand, the service of the main application, and the service of the notice of set down. All three were, on BCO's version, effected at SID's address by affixing the relevant documents to the principal door after the premises were found locked and after diligent search and enquiry.
- [43]. BCO placed considerable reliance on the principle that a sheriff's return constitutes prima facie proof of the facts stated therein. That is so. But prima facie proof is not conclusive proof. As was explained in Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466^{viii}, prima facie proof, in the absence of rebuttal, means clear proof leaving no doubt.
- [44]. The difficulty for BCO is that, on the applicants' case, the rebuttal was not merely assembled later in these rescission proceedings. It was inherent in the material before the Court when the winding-up order was granted. The Court had before it two returns of service reflecting that on 24 November 2025 the deputy sheriff effected service of the notice of set down of the application at SID's premises at the Wanderers Office Park at 09h19 and, at precisely the same hour and minute, also effected service at Maisels Chambers on the arbitrator Johann Gautshci SC .
- [45]. Those two returns could not both be correct. They were mutually destructive on their face. The deputy sheriff could not have been in two different places at the same hour and minute on the same day.
- [46]. In those circumstances, the return relied upon to establish service on SID could not simply be accepted as clear proof leaving no doubt. The contradiction apparent from the documentary record itself deprived the return of the ordinary evidential force on which BCO sought to rely in order to justify the granting of final winding-up relief in SID's absence.
- [47]. In my view, that is the decisive point. It is therefore unnecessary to determine the wider factual disputes raised in the affidavits concerning employee

movements, biometric access records, CCTV footage, or the correctness of the deputy sheriff's subsequent explanation for the discrepancy in the returns. Those disputes arise only at the level of later rebuttal and later attempted rehabilitation. The anterior difficulty is that, at the moment the winding-up order was granted, the Court already had before it two returns which could not stand together.

- [48]. Once it is accepted that the return relied upon at the time was materially compromised by a patent contradiction in the contemporaneous record, the evidential foundation upon which the Court was asked to proceed against SID in its absence was compromised as well. In my view that is sufficient to render the winding-up order one that was erroneously sought or granted for purposes of Rule 42(1)(a).

Whether the later explanation cures the defect

- [49]. I do not accept BCO's submission that the deputy sheriff's later confirmatory affidavit cures the problem retrospectively. Jurisdictional or foundational procedural facts must exist when the order is granted. A litigant who seeks final relief in the absence of the opposing party must do so on procedurally sound and reliable material at the time.
- [50]. The later affidavit may explain how the error came about. It does not alter the fact that the return placed before the Court was materially undermined by the contradiction then apparent on the record, nor does it change the reality that the Court granted a final winding-up order in SID's absence on that footing.

Discretion and the respondent's broader submissions

- [51]. BCO urged the Court to have regard to SID's alleged commercial insolvency, the absence of any review of the arbitration award, and broader considerations of what it described as commercial morality. I am not persuaded by those submissions.
- [52]. Those considerations are pitched at a level of abstraction removed from the issue presently before the Court. The question is not whether SID should, as a

matter of commercial justice, ultimately be wound up. It is whether the Court was procedurally entitled to grant final winding-up relief in SID's absence on the material then before it. If the proof of service foundational to that order was materially compromised, considerations of commercial morality cannot repair the defect.

- [53]. I should add this. The order granted by Cilliers AJ appears, at least on its face, to have combined in a single application three forms of relief of a materially different character. First, the making of a private arbitration award an order of court. Second, coercive payment relief in terms of that award. Third, final winding-up relief. It is trite that, until made an order of court, an arbitration award remains a private determination between the parties.
- [54]. Ordinarily, one would expect the award first to be made an order of court and only thereafter to be enforced as such, including in respect of amounts payable under it. I do not decide that point, and I say so expressly. It is unnecessary to do so. But the unusual conjunction of relief sought and granted in the prior proceedings makes the first respondent's invocation of commercial inevitability or moral necessity all the less persuasive. At the very least, it reinforces the need for procedural exactitude where relief of such breadth is sought in the absence of the affected party.
- [55]. I also do not accept the first respondent's submission that the discretion under Rule 42(1)(a) is sufficiently broad to justify preserving the order notwithstanding a fundamental defect in the proof of notice. The discretion is a judicial one, exercised in furtherance of the purpose of the Rule. Where an order has been granted in the absence of an affected party on a materially defective procedural foundation, the discretion is not properly exercised by refusing rescission simply because the respondent contends that the outcome may ultimately have been justified on the merits.
- [56]. Finally I should note that this judgment in no way determines that SID is factually or commercially solvent. It determines only that the winding-up order presently under challenge cannot stand because the procedural basis upon which it was granted has been shown to be materially defective. This

judgment and order is directed only at paragraphs 4 and 5 of the above order of Cilliers AJ.

Costs

[57]. The applicants have succeeded in establishing that the winding-up order was erroneously granted in their absence on materially unreliable proof of service. In those circumstances, the ordinary result should follow. There is no reason on the papers before me to depart from that approach.

[58]. Order

The following order is made:

1. Paragraphs 4 and 5 of the order granted by Cilliers AJ dated 19 January 2026 under case number 2025/150186 placing **SID (PTY) LTD** under “winding up” and ordering that “the cost of the application is costs in the winding up” are rescinded and set aside.
2. The first respondent is directed to pay the costs of this application, such costs to include the costs of two counsel on High Court scale C as provided for by Rule 67A of the Uniform Rules of Court.

GB ROME
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS M ANTONIE SC
M COOKE

Instructed by **FOURIE VAN PLETZEN INCORPORATED**

COUNSEL FOR FIRST RESPONDENT **E THERON SC**

Instructed by **KERN AND PARTNERS**

DATE OF HEARING
DATE OF JUDGMENT

8 MAY 2026
19 MAY 2026

ⁱ Storti v Nugent and Others 2001 (3) SA 783 (W) see especially the discussion at 794G to 795D (rescission of an order that ought never to have been granted, and the contrast with common-law rescission.) 795E to 806C: for the two-situation discussion , (an assailable order as opposed to supervening events rendering a stay or setting aside desirable and 807A to 807B (as to when applicant attacking the order must at least bring itself within rescission at common law and show “sufficient cause)”

ⁱⁱ Blue Bulls Company (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd 2022 JDR 1215 (GJ) paragraphs 15 and 16

ⁱⁱⁱ Dr WAA Gouws (Johannesburg) (Pty) Ltd v HR Computek Pty Ltd and Others 2025 (6) SA 89 (SCA) see paras 20 to 23

^{iv} Impac Prop CC v THF Construction CC 2019 JDR 2633 (GJ) at paragraphs 6-10

^v Blackman I: Commentary on the Companies Act 1973, (Authors: Blackman MS, Jooste RD, Everingham GK, Yeats JL, Cassim FHI, De la Harpe RA, Larkin M and Rademeyer CH) The discussion commences at ch14-p221 and continues till the fourth paragraph at ch14-p225

^{vi} Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471F

^{vii} First National Bank of SA Ltd v Jurgens and Others 1993 (1) SA 245 (W) at 247D to E

^{viii} Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466