

SOUTH AFRICA / JUDGMENT

Mokasule N.O v Botha N.O and Others (M283/20) [2023] ZANWHC 54 (17 May 2023) [2023] ZANWHC 54

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

M283/20

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

CASE NO: M283/20

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NO

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Magistrates: NO

In

the matter between:

BN
MOKASULE N.O
APPLICANT
And
DEON
MARIUS BOTHA N.O
1ST RESPONDENT
CLIFFORD
THABANG MARENDI N.O
2ND RESPONDENT
DEON
BOTHA MARIUS N.O
3RD RESPONDENT
MOTSWANE
MERRIAM KUTUMELA N.O
4TH RESPONDENT
JOHN
WALKER
5TH RESPONDENT
In

RE:

DEON
MARIUS BOTHA N.O
1ST APPLICANT
CLIFFORD
THABANG MARENDI N.O
2ND
APPLICANT
DEON
MARIUS BOTHA N.O
3RD APPLICANT
MOTSWANE
MERRIAM KUTUMELA N.O
4TH APPLICANT
PAUL-SER
(PTY) LTD
RESPONDENT

JUDGMENT

REDDY AJ

Introduction

- [1] For purposes of succinctness, I propose to refer to the parties as cited in this application. A final winding-up order was granted against Paul-Ser (Pty) Ltd on 20 May 2021. On 8 July 2021, an application in terms Rule 42 of the Uniform Rules of Court followed. The application is opposed. This application was argued in 21 October 2022, on a point in limine, that being locus standi in iudicio. Supplementary heads were then filed. I then held the view that the

main application also be argued and that a singular judgment be then produced. This was accordingly done on 7 November 2022.

[2] Collectively a number of legal points were raised. This in broad are inter alia:

(i) Non- compliance with Rule 41A of the Rules of Court;

(ii) Condonation;

(iii) Non-joinder;

(iv) Non- Service;

(v) Locus Standi.

[3] Given the ultimate conclusion that I have arrived at, it serves no moment to dissect each of the legal points raised. I propose to deal with the salient issue which may be dispositive of the entire application.

Locus Standi

[4] In order to get out the starting blocks, I hold the view that if locus standi of the applicant is not established, all other relief in this particular application will not cut the mustard. Resultantly, the pursued relief will be inconsequential. I accordingly pen this judgment from this premise.

[5] In the founding affidavit the applicant is described as –

[2]. ..an adult female businesswoman, and sole director to Paul-Ser (PTY) LTD (the applicant hereunder), and currently residing at 1[...] A[...] Road Klerksdorp, Northwest Province...

[3] At all relevant times and stages hereto, I have acted as a director of the applicant and I am duly authorized to depose of this affidavit for the rescission and condonation and to oppose any application thereof on behalf of the applicant.

[6] The applicant's entire locus standi is predicated on the basis of being the sole director of the applicant.

[7] The principle of locus standi in judicio essentially relates to the right or legal capacity of a party to sue or be sued; see *United Watch and Diamond (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415 A where the court outlined the test for determining this right or legal capacity, stating that:

"To establish that one has locus standi in judicio, one must show... that he has an interest in the subject matter of the judgment or order sufficiently direct or substantial..."

[8] In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 631 at 637 it was elucidated that:

"If a party has a direct and substantial interest in the order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party he is a necessary party and should be joined in the proceedings"

[9] Section 354(1) of the Companies Act is the empowering provision on which locus standi is provided, conferring legal standing on three categories. It reads as follows:

"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."

[10] An ordinary reading of this section delineates three groupings of persons that are clothed with locus standi to move an application for an order staying or setting aside of the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the court may deem fit. A director does not fall within the preordained classes. It inevitably follows that the applicant would not have the necessary locus standi to pursue the sought after relief.

[11] At this juncture, the point in limine should be upheld and the application be dismissed.

[12] For purposes of completeness, I deal with the application for rescission from a legal procedural standpoint.

[13] The application for rescission of the final winding up order as per the founding affidavit is based on Rule 42 of the Uniform Rules of Court.

[14] Rule 42 provides as follows:

Variation and rescission of orders

- (1) The court may, in addition to any powers it may have, mero motu or upon the application of any affected party, rescind or vary:
 - (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity error or omission;
 - (c) an order or judgment granted as the result of a mistake common to both parties.
- (2) Any party desiring any relief under this rule shall make an application therefor upon notice to all parties whose interests may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

[15] The founding affidavit, then attempts to make a cause for relief in terms of Rule 42 (1) (a). The relevant portions of the founding affidavit reads as follows:

Rule 42

37. I am informed that rule 42 of the Uniform Rules provides for rescission of an order where granted in the absence of the affected party.
38. Further, that I have to satisfy the test set by Honourable Court of the circumstances giving rise to this application. The test being:
 - 38.1. Good cause;
 - 38.2. Explanation for the default;
 - 38.3. Bona fides and
 - 38.4. A bona fide defence on the merits with prospects of success.
39. i submit with respect that the above submission regarding the respondents non-compliance with the Rules and non-joinder speak to the above points good cause and are a sufficient explanation of my default, as it were.
40. I submit to the above Court that I bring this application bona fides and do not have ulterior motives of prejudicing the Respondents in the execution of their duties, should they go about getting an order in a proper manner.
41. I am the sole director of the Applicant and as such have direct and substantial interest in the success of the company. A company I would not like to see get liquidated, especially on falsified grounds.
42. I believe there are reasonable prospects of success in the Application in the main. The Respondents have missed various procedural steps in their Application relating to the debt which they allege is owed by the Applicant to the insolvent estate of either Mr Mokusule (the insolvent) or TP Mokusule and Sons Trading CC or the Municipality.
43. The Respondents further base their allegations on evidence and material which is vehemently denied and disputed. An issue which should be for the court to deal with in the Application in the Main.
44. The Applicant submits that the above combined with the fact that the Applicant has not committed any act of Insolvency, as such was not alleged in the Respondents papers, then the Applicant ought to be heard in a proper ventilation of the

issues.

[16] There is no underscoring that the rescission application is based on an incorrect legal principle. The vehicle to be used is section 354 of the Companies Act.

[17] In *Ward v Smit & Others: In re Gurr v Zambia Corporation Ltd* 1998 (3) SCA 175 at 180F-181E the following was postulated.

"In order to have the final winding-up order set aside the appellants were obliged to invoke the provisions of s354 (1) of the Act. ... 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). In the case of the former, the onus on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances. This has been emphasised by the Courts of various Provincial and Local Divisions not only in relation to s354 and its predecessor (s 120 of Act 46 of 1926) but also in relation to s 149(2) of the Insolvency Act of 1936 which affords a similar discretion to a Court to rescind or vary a sequestration order. (See *Herbst v Hessels NO en Andere* 1978(2) SA 105 (T); *Aubrey M Cramer Ltd v Wells* NO 1965 (4) SA 304 *Abdurahman v Estate Abdourahman* 1959(1) SA 872 (C). There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common law grounds for rescission. However, in the *Herbst* case, *supra*, Eloff J expressed the view (at 109 F-G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think it must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle of *ut sit finis litium*'. (*Abdourahman v Estate Abdurahman* (*supra* at 875G-H). It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish in addition a satisfactory explanation for not having opposed the granting of the final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding up had progressed.'

[18] In *Ragavan & Another v Kal Tire Mining Services SA (Pty) Ltd & Others*

[2019] ZAGPPHC 455 (12 August 2019) "...it is correct to say that s354 is the legislated basis to rescind winding-up orders, and that this would include orders that were allegedly erroneously sought or granted." See: *Impact Prop CC v THF Construction CC* 2019 ZAGPJHC 497.

[19] To make short shift of this point, the application for the rescission of the winding up order is framed incorrectly and was destined for failure.

Costs

[20] I hold the view that there is no reason to deviate from the usual order, in applications of this nature, that costs should be costs in the liquidation.

[21] Resultantly, I make the following order;

Order

(i) The respondents point, in limine is upheld.

(ii) The application is dismissed.

(iii) Costs, are to be costs in the liquidation.

A REDDY

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances:

Date of Hearing: 7 November 2022 Date of Judgment: (Revised) 17 MAY 2023 Counsel for the Applicant: Adv Moloi Attorney for Applicant: Maleshane attorneys 3590 Wildevy Street Danville Ext 34 Mahikeng Tell: 018 381 0757 Counsel for Respondent: Adv S J Van Rensburg Attorney for Respondent: John Walker Attorneys C/O Steenkamp Inc 20 cooke Street Mahikeng Tel: 018 381 8383

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