

SOUTH AFRICA / JUDGMENT

## Shivanand and Another v Krugkor Franchise (Pty) Ltd and Others (A2023/034940) [2024] ZAGPJHC 389 (18 April 2024) [2024] ZAGPJHC 389

COURT

South Gauteng High Court, Johannesburg

BEFORE

I Opperman

CASE / FILE NUMBER

A2023/034940

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case No: A2023-034940

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED

In

the matter between:

KAMALJID  
PREM SHIVANAND First  
Appellant  
SHIVCOM  
CC Second  
Appellant  
(REGISTRATION NO:  
2007/108318/23)  
and  
KRUGKOR  
FRANCHISE (PTY) LTD First  
Respondent  
DEON  
MARIUS  
BOTH A Second  
Respondent  
SUNE  
SMITH Third  
Respondent  
PRIME  
UNIVERSAL  
FOODS Fourth  
Respondent  
CUBISOL  
INVESTMENTS 3 (PTY) LIMITED Fifth  
Respondent  
SOUTH  
AFRICAN REVENUE SERVICES Sixth  
Respondent  
THE  
MASTER Seventh  
Respondent  
THE  
COMPANY AND INTELLECTUAL Eighth  
Respondent  
PROPERTY COMMISSION  
This  
judgment was handed down electronically by circulation to the  
parties’ legal representatives by email. The date and time  
for  
hand-down is deemed to be 14h00 on 18 April  
2024.

## JUDGMENT

INGRID OPPERMAN J

## Introduction

[1] The first respondent (Krugkor) owns all rights, title and interest in a restaurant franchise called “The Dros”. The second appellant is a close corporation,

Shivcom CC(Shivcom), which bought a Dros franchise from Krugkor in 2017. A payment dispute arose and Krugkor, alleging that it was owed a debt by its franchisee, served Shivcom with a notice in terms of Section 345 of the Companies Act 61 of 1973 (the Old Act). That section assists a creditor to prove that a debtor company which receives such a notice ought to be wound up.

[2] On 11 April 2019 Krugkor launched an application for the winding up of Shivcom. On 15 May 2019 Shivcom was finally liquidated in an application which was unopposed. On 12 July 2019 the second and third respondents were appointed as liquidators (the liquidators). The first appellant, the sole member of Shivcom, brought an application for the rescission of the winding-up order in terms of

rule 31(2)(b) of the Uniform Rules of Court, which application was opposed by Krugkor. Yacoob J dismissed the application. The

application for leave to appeal was refused whereafter the Supreme Court of Appeal (SCA) granted leave to the Full Court against the judgment of the High Court.

The manner in which the rescission application was presented

The notice of motion and founding affidavit

[3] The notice of motion included a prayer for condonation for the late filing of the application outside of the time-period of 20 days allowed in terms of Rule 31(2)(b) in as far as same is necessary, so it was said.

[4] In the founding affidavit the first appellant dealt with representations made by Mr Jordaan acting on behalf of Krugkor or in his personal capacity. It is noteworthy that Mr Jordaan was not cited in his personal capacity. The first appellant did not say on whose behalf Mr Jordaan was acting when he made the representations, although, in the first appellant’s further supplementary affidavits he did pin Mr Jordaan’s alleged misrepresentations squarely on Krugkor. The representations related to the set-up costs and to the failure to provide a VAT invoice.

[5] The first appellant contended that because of the misrepresentations, he cancelled the franchise agreement ‘hereby’ and intends to ‘reclaim payment of all amounts paid to the First Respondent [Shivcom]’ (the ability of the first appellant to cancel the franchise agreement of Shivcom in liquidation, is not explained which power would

normally only vest in the liquidators).

- [6] Various other breaches were also listed which, together with the misrepresentations, allegedly formed the basis for a damages claim against Krugkor (the damages claim). During August of 2018, the first appellant, acting on behalf of Shivcom, had contemplated damages but at the time of deposing to the founding affidavit, he had decided to limit the claim to cancellation of the franchise agreement and repayment of all amounts paid.
- [7] During April 2019, the first Appellant instructed his attorney to issue summons which was served on Krugkor on 5 June 2019. On 14 June 2019, his attorney was informed that Shivcom had been wound up.
- [8] First Appellant explained that the liquidation application had not come to either his or Shivcom's attention. Shivcom's registered address is at 5[...] M[...], P[...] S[...] Road, R[...], B[...], Gauteng. Maja place is a townhouse complex of 20 houses. It was submitted that ex facie the return of service, service was not effected on the registered address (5[...] M[...] P[...]) but on the outside communal gate which, it was argued, was not the main door of the registered address.
- [9] The concluding paragraph in the founding affidavit reads:

'It is submitted that the winding up application should never have been granted and constitutes a ploy to shut second applicant [Shivcom] up. It is further submitted that I have set out special circumstances in this affidavit for the winding up order to be set aside.'

The supplementary founding affidavit

- [10] The first appellant deposed to a supplementary founding affidavit in which he sought to deal with Krugkor's claim for payment in the liquidation application. He contended that it was an oversight not to have done so in the founding affidavit. He then quoted verbatim the claim as it appeared in the founding affidavit of the liquidation application. The indebtedness was for an amount of R132 521.38 for goods sold and delivered pursuant to the franchise agreement and the invoices were attached. The first appellant contended that the invoices were for set-up costs and that Shivcom was not liable by virtue of the fraudulent misrepresentations made by Krugkor represented by Mr Jordaan, to Shivcom.
- [11] Significantly, apart from this averment, no additional primary facts were presented.

The supplementary answering affidavit

- [12] Krugkor answered to the supplementary founding affidavit and demonstrated that neither 'trading stock' nor 'opening trading stock' forms part of set-up costs. Mr Jordaan explained that set-up costs included costs in respect of: building (wet works); electrical and plumbing; kitchen equipment; bar fridges and smalls (all kitchen tools, cutlery and crockery); front shop smalls (all bar tools and glass ware); computer hardware and software; TV and audio; front shop shopfitting (all tables, chairs, booths, water stations, benches and kiddies rooms); play gyms and games. He then proceeded to painstakingly work through the invoices and to

provide a detailed discussion of each invoice. He concluded that of the R132 521.38 debt, only R 77 492.91 formed part of the set-up costs. The rest is trading stock.

The finding of the court a quo

[13] The judgment of the court a quo contains some inaccurate factual findings[1] but in my view, not much turns on such inaccuracies in respect of the ultimate order made. The concluding paragraph reads:

16. Ultimately, the reason for the outcome of this matter is that Shivanand [the first appellant] simply has not made out a case for the relief sought. The papers are replete with hearsay and vague allegations not supported by evidence, and no finding can be made in his favour.’

[14] The reason for the outcome is not altogether clear. Although I agree with the order, my reasons are set out in what follows.

Legal requirements for a rescission of a liquidation order

[15] Section 354 of the Companies Act provides:

354. Court may stay or set aside winding-up.—(1) 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.

(2) 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.

[16] Generally speaking, the winding-up order will be set aside only in exceptional circumstances.[2] Eloff J expressed the view in *Herbst v Hessels NO en Andere*[3], 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. This section affords the Court a discretion to set aside a winding-up order. In *Klass v Contract Interiors CC (In Liquidation) and Others*[4], the court summarised the principles which apply to the exercise of the court’s discretion as follows:

‘[67.1] The court's discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties in interest, such as the liquidator, creditors and members.

[67.2] The court should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims.

[67.3] Where the claims of the liquidator and all creditors have been satisfied, the court should have regard to the wishes of the members, unless those members have bound themselves not to object to the setting-aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.

[67.4] In deciding whether or not to grant a setting-aside order, the court should, where appropriate, have regard to issues of 'commercial morality', 'the public interest' and whether the continuation of the winding-up proceedings would be a 'contrivance' or render the winding-up 'the instrument of injustice'.

[17] The judgment of the court a quo did not deal with the exercise of a discretion at all. This court is therefore at liberty to exercise the discretion the court a quo ought to have considered.

[18] There is no evidence before this court to suggest that Shivcom is solvent. It is undisputed that it does not trade and has no substratum. The restaurant stopped trading in December 2018, long before the winding-up application was served. On the 21st of December 2018 the first appellant wrote to Ms Jacqui Coetzee (the managing agent of the landlord) reminding her that she had been notified months before that Shivcom was not making money and that it would be closing. Mr Jordaan was copied in on the response in which Shivcom was told that they would be held liable in terms of the agreement of lease with the landlord. An invoice attached to Mr Jordaan's affidavit reflects an amount of R719 524.17 owing to the landlord as at July 2019. Mr Jordaan also attached a schedule he prepared detailing a list of suppliers that Shivcom had failed to pay. This schedule reflects an amount of R50 675.29

owing.

[19] It is clear from these papers that Shivcom is both factually and commercially insolvent, no longer trades, and is not capable of paying its debts.

[20] This court has not been told what is going to happen to the costs incurred by the liquidators if the winding-up order is to be rescinded. No attempt has been made by Shivcom or first appellant to explain how the landlord is going to be paid and how the list of suppliers will be paid? The general rule is that a court will not ordinarily set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims. In this case no provision at all has been made for the claims of the landlord or the suppliers and on this basis alone, the rescission application ought to have been dismissed. It is for the first appellant to have set out facts to enable the court to consider the deviation from the 'general rule'. No such facts were placed before the court.

- [21] But before even getting to the discretion, Eloff J held that an applicant should satisfy, at the bare minimum, the common law requirements. The first appellant erroneously sought condonation for non-compliance with the time periods laid down in Rule 31. Assuming Rule 31 had application one would have expected that the requirements for an application for rescission under such Rule to have been addressed starting with a reasonable explanation for the default which should exclude wilfulness or gross negligence.
- [22] Such an explanation should have started with the section 345 demand. The First Appellant failed to deal with the dispatch or receipt of the section 345 notice which was placed both in the post box for no 5 Maya Place and sent via registered mail. There is no explanation why the first appellant failed to check his post box and failed to collect registered mail if that is indeed what he failed to do. The first appellant was challenged to respond to this in the answering affidavit. He avoided in his replying affidavit to address this glaring omission. Why did he not take the registered slip attached to the answering affidavit and make enquiries at his post office and place such explanation before this court? All indications are that he did receive the section 345 notice which was sent by registered mail on 5 March 2019. On 16 April 2019 the winding-up application was served.
- [23] The first appellant instructed his attorney in April 2019 to issue summons – this was a year after he had first contemplated the damages action. Why did he instruct his attorney in April 2019? Might it have been that he had received the section 345 notice and wanted to scupper the winding up application? Did he even tell his attorney of record of the section 345 notice/letter? Perhaps not. Perhaps that would explain why the summons was only issued in June 2019? All these questions remain unanswered but under circumstances where the first appellant must show exceptional circumstances, these unanswered questions pose insurmountable hurdles.
- [24] I do not accept that the section 345 notice was not received and once it is accepted to have been received, the first appellant and Shivcom would have been alerted to a potential liquidation application. The first appellant knew he had chosen 5 Maya Place as the chosen domicilium et executandi and as the registered place of business for Shivcom. Insofar as he did not receive notice of the liquidation application which I do not accept, he only has himself to blame.

#### The defence unpacked

- [25] The first appellant essentially contends that Shivcom would be denied the right to pursue various damages claims against Krugkor if the winding-up order was not set aside. No reason was advanced why this is so and none is apparent.
- [26] The defence to the claim is a claim for unliquidated damages. That appears to have been the case advanced until the founding affidavit to this rescission application was filed. Then it changed to one where the franchise agreement was cancelled ('hereby') and restitution of monies paid was sought. If the liquidation is rescinded, it is unclear which one of these two contradictory positions would be advanced. Both those two positions accept that the

franchise agreement was concluded. These two positions in turn appear to be in conflict with the facts which suggest that had the set-up costs not 'deliberately' been inflated, Shivcom would not have contracted at all. It is unfortunate that the summons which had been issued against Krugkor was not attached to the papers. It is not at all clear what cause of action would be formulated if a rescission were granted which, where the bar

is 'exceptional circumstances', is missed by a yard.

[27] There is, finally, no reason why the liquidators cannot pursue whatever the claims are if Shivcom remains in liquidation.

#### Costs

[28] Krugkor's counsel argued for a punitive costs order against the first appellant and an order de bonis propriis against the appellants' attorneys.

[29] The order for de bonis costs was based on 2 difficulties: 1. Shivcom could not be represented in these proceedings by the first appellant and 2. the attorney had attached the franchise agreement to the appeal record as though it formed part of the papers from the outset when in truth, the franchise agreement had not been attached to the papers at all.

[30] The court a quo found that Shivcom could only have been represented by the liquidators. This finding was not challenged on appeal.

[31] The court a quo accepted that the first appellant as an 'affected party' could launch the application for rescission.

[32] Why the appeal and petition were pursued on behalf of Shivcom beyond the acceptance of this finding has not been explained.

[33] In the context of this case, not much turns on this as there were no extra costs incurred by virtue of this 'error' and I will take it no further.

[34] The attaching of the franchise agreement has not been explained at all, this despite a direct challenge to its inclusion in the appeal record. The first appellant's attorney inserted a copy of the franchise agreement concluded between Shivcom and Krugkor into the record as annexure "FA12". Significantly, the last annexure to the founding affidavit is annexure "FA11.5". The founding affidavit was commissioned by Constable Pabello Maleka on 8 August 2019. She signed each page of the founding affidavit, including the annexures, with a "P.M." in the bottom right corner. The signature of the Constable does not appear on the franchise agreement inserted as Annexure "FA12". In addition, the first appellant signed the franchise agreement on

behalf of Shivcom. His signature appears in the right-hand bottom corner of the franchise agreement. If the franchise agreement was annexed to the founding affidavit, two signatures of the first appellant would have appeared. The second signature would have been added when the affidavit was signed and commissioned by Constable Maleka. Only 1 signature appears on the inserted agreement. This, prima facie, seems a deliberate attempt to tamper with a court record.

[35] Mr Steyl left the employ of the appellant's attorneys. It is unclear how much of the conduct described herein is to be attributed to him. The individual responsible should be afforded an opportunity to explain and this did not occur in this instance. We will be referring this matter to the Legal Practice Council for investigation for tampering with an appeal record is a serious matter.

[36] We intend marking this court's displeasure at the first appellant's conduct in pursuing this seriously flawed rescission. A punitive costs order against the first appellant is warranted having regard to the haphazard way the case was presented, the manner in which it was supplemented as the case progressed and the deficiencies in the case which I have found to exist.

#### Order

[37] I accordingly grant the following order:

37.1. The appeal is dismissed.

37.2. The first appellant is to pay the costs of the appeal, on the scale as between attorney and client.

37.3. A copy of this judgment is to be sent to the Chairperson of the Legal Practice Council for investigation of the conduct of the legal practitioners responsible for the inclusion of annexure "FA12" into the appeal record.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

S WILSON

M NOKO

Counsel for the Appellants: Adv J Kaplan

Instructed by: Ian

Levitt Attorneys

Counsel for the First Respondent: Adv E van As

Instructed by: De

Kock and Associates

Date of hearing: 1

November 2023

Date of Judgment: 18

April 2024

[1] By way of example, the court found that the fraud was raised for the first time in the replying affidavit, when it was raised in the founding affidavit; The first appellant was criticized for not having provided proof that payments were made into Mr Jordaan's

personal bank account but this was admitted by Mr Jordaan on the papers.

[2] Ward and another v Smit and others: In re Gurr v Zambia Airways Corporation Ltd, 1998 (3) SA 175 (SCA) at 180H

[3] 1978

(2) SA 105 (T) at 109F-G and approved in Ward (supra) at 181A

[4] 2010

(5) SA 40 (W)

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