REPUBLIC OF SOUTH AFRICA

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

Case Number: 28809/2019
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES:
REVISED. NO
28 June 2022

In the matter between

SPECFEN (PTY) LIMITED	Applicant
And	
SPECIFIC FENCING (PTY) LTD (IN LIQUIDATION)	First Respondent
TERENCE ANDREW MORRISON NO	Second Respondent
MAREDA RITA BENNINGHOFF NO	Third Respondent
INGRID VOGEL (ID Number: [....])	Fourth Respondent
RYAN VOGEL (ID Number: [....])	Fifth Respondent
MARTIN ERIC SPEIER	Sixth Respondent
MARTIN SPEIER ATTORNEYS	Seventh Respondent

SEE THRU FENCING (PTY) LTD Eighth Respondent

JUDGMENT

SIWENDU J

Introduction

[1] This is an application for a rescission and setting aside of a court order granted on 4 February 2019 by Victor J, placing the first respondent (Specific Fencing (Pty) Ltd) in liquidation. In addition, the applicant seeks an order to declare Mrs Ingrid Vogel and Mr Ryan Vogel delinquent directors. The application is brought in terms of rule 42 of the Uniform Rules or common law.

[2] The applicant (Specfen (Pty) Ltd) is a registered company. Its founding affidavit was deposed to by Ms Kholofelo Leshalabe. Ms Leshalabe is married to Mr Thabang Sekhukhune and they, amongst other things, plough their trade in construction sector.

[3] The second and third respondents are the liquidators of Specific Fencing (Pty) Ltd, the company that is the subject of the rescission application. No relief is sought against them as liquidators. They have not opposed the application.

[4] The fourth respondent and the fifth respondent, are Mrs Ingrid Vogel and Mr Ryan Vogel respectively. They are related as mother and son. They are both directors and shareholders in the eighth respondent, See Thru Fencing (Pty) Ltd. It is their family business. Mrs Ingrid Vogel is married to Mr David Vogel.

[5] The sixth respondent (Martin Speier) is an attorney practising under Martin Speier Attorneys, also included as the seventh respondent. No relief is sought against him or the seventh respondent; save if they oppose the application and, in that event, a cost order is sought against them.

[6] See Thru Fencing (Pty) Ltd (eight respondent), is cited to the extent that it may have an interest in the outcome of this application. No relief is sought against the company, save in the event that it opposes the application.

[7] Ms Leshalabe states that she is the sole shareholder and director of the applicant. Even though there is a dispute between the parties about the true holder of the shares in the first respondent, (whether by the applicant or the deponent in her personal capacity): for now, I understand the commercial arrangements between the applicant, Ms Leshalabe, first respondent and Ingrid Vogel and Ryan Vogel to be as follows:

[7.1] The applicant is a 30% shareholder in the first respondent.

[7.2] The eight respondent held the remaining 70% in the first respondent.

[7.3] Ms Leshalabe, Mrs Ingrid Vogel and Mr Ryan Vogel are co-directors of the first respondent.

[8] Ms Leshalabe states that even though she and Ingrid Vogel were directors of the first respondent, they were not involved in the day-to-day operations of the first respondent. Their husbands, Messrs Thabang Sekhukhune and David Vogel, performed the required roles in the first respondent. The agreed division of the roles and responsibilities were that Mr Thabang Sekhukhune was responsible for sales and marketing and Mr David Vogel was the chief operating officer.

[9] Ms Leshalabe says their respective spouses met after her husband won a contract to provide fencing to the Babelegi Industrial Park and Herzogville police station in the Free State. He had approached Mr David Vogel to enquire whether he could supply the fence. Their business relationship was formed after that.

[10] Ms Leshalabe further alleges that her husband won additional contracts for the business. There was an agreement to increase the applicant's shareholding in the first respondent to reflect the increased contribution but this did not materialise.

There have been disagreements between the parties about the running of the business.

[11] There were negotiations to reach amicable terms but these did not bear fruit. The parties were unable to agree on the sale and re-acquisition of the shareholding in the first respondent. A copy of an offer to purchase the shares from Ms Leshalabe's erstwhile attorneys, JVR Attorneys, was annexed to the first respondent's papers. Ms Leshalabe required R1million for the 30% shareholding.

Application for Liquidation of Specific Fencing

[12] Ms Leshalabe alleges that Mrs Ingrid Vogel and Mr Ryan Vogel instituted the proceedings for the winding up of the first respondent on 3 August 2018 under case number 28809/2018. Mr David Vogel (husband and father to Mrs Ingrid Vogel and Mr Ryan Vogel respectively) deposed to the affidavit in support of the winding-up application. However, it is clear from the papers by the respondents that they had authorised Mr David Vogel by resolution to do so as a representative of the eight respondent.

[13] Ms Leshalabe alleges that Mrs Ingrid Vogel and Mr Ryan Vogel indicated that the application would be heard on 18 September 2018, if it was not opposed. The winding-up order is said to have been granted on 4 February 2019. This application for rescission is premised on the fact that the order was granted in the absence of the applicant and without any notice being served upon it. The contention is that the applicant, as a shareholder in the first respondent, is an affected party with a substantial legal-interest in the application. For this reason, the applicant claims that Victor J erroneously granted the order for the winding up of the first respondent.

[14] The application for winding-up of the first respondent was launched by Mrs Ingrid Vogel and Mr Ryan Vogel as first and second applicants. Ms Leshalabe was cited in that application as the second respondent and the eight respondent (in this rescission application) was cited as the third respondent. The winding-up application first came before Mohlala AJ on 18 September 2018. It was postponed to 30 October 2018. On 30 October 2018, it served before Lamont J.

[15] The transcript attached to the affidavit shows that Lamont J raised a number of questions which included, inter alia, (1) the standing of Mrs Ingrid Vogel and Mr Ryan Vogel to bring the application, (2) the non-joinder, and (3) the appropriateness of a winding-up order sought. The matter was postponed to 4 December to allow the applicants to supplement their papers. On 7 November 2018, Ms Dianne Van Rensburg, then the attorney representing Ms Leshalabe wrote the following:

> "With reference to the above, we received a call from the opposing attorneys today. Martin advised that the matter is before one of the most difficult Judges in Johannesburg. The judge saw our letter stating that we are not opposing the winding up application and has ordered that a shareholders' resolution consenting to the winding up be obtained. Martin will draw same and send for our signature. The judge will then grant the winding up order and a liquidator can be appointed. Martin has undertaken to provide us with the details as soon as possible."

[16] After the hearing on 30 October 2018, Martin Speier, sent Ms Leshalabe's then attorneys a draft resolution on 8 November 2018 to be signed by the directors of the first respondent. The resolution also authorised Mr David Vogel to represent the company in the proceedings. Ms Leshalabe states that she declined to sign the resolution. She is not aware of what happened on 4 December 2018 but the application was not determined on that date.

[17] She claims that there is no record that case number 28809/18 came before Victor J on 4 February 2019 and has attached a 'protocol report'' for proceedings before Victor J on the day. She alleges that the application is not amongst those called on the roll that day. She also claims that the order is dated 13 February 2019 not 4 February 2019. On inspection, the order reveals that it was initialled on 4 February 2019. However, it was stamped by the Registrar on 13 February 2019. In addition to the order finally winding up the first respondent, the order states that:

> "The Applicants are granted leave to bring the application for the winding up of the First Respondent, in their capacities as directors of the First

Respondent as contemplated by section 81(1)(d) of the Companies Act 71 of 2008."

[18] Ms Leshalabe claims that she only became aware, long after 4 February 2019, that a final order to liquidate the first respondent had been granted.. She alleges that the applicant itself was never informed of the order let alone the winding-up application.

[19] She instructed her new attorneys after the fact to oppose the liquidation application. They served Martin Speier Attorneys with a notice to oppose. Martin Speier Attorneys never replied to the notice. More importantly, Martin Speier Attorneys never informed her that the first respondent was liquidated on 4 February 2019. It came as a shock for her to learn that such an order had been granted.

[20] Ms Leshalabe claims that she was particularly surprised that the order had been granted when there was no resolution by the directors of the first respondent. This is material because 75% voting by way of a special resolution would be required in a winding-up order The attorney acting for the other shareholders then became the attorney to the liquidators.

[21] In opposition, in an affidavit deposed to by Mr David Vogel as authorised by the eight respondent, he denies that the applicant has the necessary standing to bring the application. He contends that the applicant only held Ms Leshalabe shares as a nominee shareholder. He contends that there is no proof from the applicant to show that it was the *de facto* shareholder in name and title in respect of the first respondent, as it now contends to be. The applicant never participated in any shareholders' meetings of the first respondent.

[22] He contends that Ms Leshalabe consented to the liquidation order in a letter from her attorneys in January 2019. Notably, the applicant cannot claim ignorance of the order being granted, as in the liquidation application, Ms Leshalabe was cited as a shareholder of the first respondent. Ms Leshalabe had explicitly stated in her attorney's letter that they should be appraised of the court order whenever it is granted.

[23] He alleges that it was only after the liquidators launched an urgent application out of the High Court in Pretoria, under case number 53101/19, on 24 July 2019, for the return of the first respondent's company vehicle, that Ms Leshalabe under the guise of the applicant, launched the rescission application.

[24] Mr David Vogel claims that Ms Leshalabe and her husband absconded from the business from January 2018 and Ms Leshalabe ceased to be a director of the First Respondent. However, on consideration of the papers, there is no indication that the removal was formalised. Mr David Vogel further contends that , the first respondent ceased trading as a result of the liquidation order granted in February 2019. There is no further business being conducted, or contracts being worked on. The fourth, fifth and eighth respondents have no desire to continue with the business of the first respondent.

[25] Mr David Vogel contends that the granting of a rescission will have no practical effect, save to protect Ms Leshalabe's unlawful possession and use of the first respondent's motor vehicle. The eighth respondent, as the majority shareholder, supports the winding up of the first respondent. As such a resolution of the company is not required in such circumstances.

Should the Winding-Up Order be Rescinded?

[26] The rescission application is premised on the fact that the liquidation order was granted in the applicant's absence and without any notice being served upon it. The contention is that the applicant is a shareholder in the company in liquidation and has a legal interest in the proceedings which required service on it specifically.

[27] It is common cause on the papers that the first application which was removed by Lamont J and scheduled for hearing on 4 December was served on Ms Leshalabe’s then attorneys (Jansen Van Rensburg Attorneys) on 21 August 2018. A letter from the attorneys indicates that she would not oppose the application. It is further common cause that despite first agreeing to the liquidation, after the removal of the application, Ms Leshalabe subsequently refused to sign the resolution presented the her in November 2018.

[28] Mr Nxumalo (counsel for the applicant) argued that there is sufficient cause to set aside the liquidation. There were shortcomings which were not trivial, pointed to by Lamont J. A shareholder resolution consenting to the winding-up was required. He contends that the respondents breached a directive by the court and an undertaking to supplement the papers. There was no substantial compliance. The application was not properly served on interested parties - which is evident from the fact that the application was not served on the applicant.

[29] Ms Leshalabe was cited as a respondent in the winding-up application in her personal capacity and/or as a director. A return of service dated 7 January 2019 shows that at 09:00, a notice of application was served on Ms Leshalabe personally. As I understand it, the complaint about service pertains to the narrow question of the failure to serve on the applicant, as a shareholder, a company whose shares were wholly held by Ms Leshalabe.

[30] A default judgment may be set aside in terms of Uniform Rule 31(2)(b), rule 42 or the common law. Rule 42(1)(a) on which the application is based provides that:

> "The court may, in addition to any 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 ..."(emphasis added)

[31] Mr Nxumalo argued that the applicant was excluded from participation in the application for the first respondent's winding-up. The respondents have moreover admitted that they wilfully and intentionally elected not to join the applicant in the winding-up application.

[32] He contends that the reliance on section 81 of the Companies Act 71 of 2008 (the Companies Act) by the respondents was a pretext to avoid the direction by the court. They had an obligation to cure the defects pointed by Lamont J. Mr Nxumalo finds support for his argument in *Freedom Stationary (Pty) Ltd and Others v Hassam*

and Others[1]*.* The shareholders and directors of these companies were exactly the same. The court posits the question thus:

> "when an affected party invokes rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. In my view it suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter.
> … .
> In circumstances such as these, a party who did not oppose or participate in the proceedings, would not be entitled to relief under rule 42(1)(a). This is not only logical and fair, but accords with the fundamental principle of finality of litigation."[2](Emphasis added)

[33] Ms Leshalabe relies on the fact that the shareholder certificate reflects the applicant. She says her being the sole shareholder and sole director of the applicant did not entitle Mr David Vogel and his family to serve the liquidation application on me.

[34] I do not believe the issue is as complex as both parties made it out to be. The fact that the applicant is a company (a separate corporate personality) does not mean this court cannot look into the true nature of the relationships and arrangements within. As a starting point, the act defines a *"shareholder"* and states that –

> "subject to section 57(1), means the holder of a share issued by the company and who is entered as such in the certificated or uncertificated securities register, as the case may be."[emphasis added]

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[1] 2019 (4) SA 459 (SCA).
[2] Id at para 25.

[35] Under section 57(1) a shareholder includes a person who is entitled to exercise the voting rights in relation to the company irrespective of the form, title or nature of the securities to which voting rights are attached.

[36] There is no dispute that Ms Leshalabe as the 100% holder of all the shares in the applicant was the sole moving spirit behind the company. She would have exercised all of the applicant's voting rights. She was aware of the move to apply for the liquidation of an asset held in the name of the company.

[37] I accept that her refusal to sign the resolution after the hearing before Lamont J may have been indicative of a change of heart about the liquidation. However, other than refuting that she was informed of the proceedings before Victor J, she is silent on the import of the return of service dated 7 January 2019.

[38] The return of service clearly indicates there was personal service on her. I am satisfied that as a sole moving spirit behind the applicant, she was notified of the application. By virtue of the notice to her, the pending application came to the notice of the applicant. She does not provide a satisfactory explanation why she did not act then or why she waited until July 2019 to do so. It was open to her to present herself before the court and raise the issue of non-joinder then. She elected not to do so.

[39] Mr Bouwer (counsel for the first, fourth, fifth and eighth respondents) argued that the respondents were procedurally entitled to the judgment. The application was brought under Section 81(1)(d) of the Companies Act which states that:

> "A court may order a solvent company to be wound up if—
>
> > (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and—

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up."

[40] Furthermore, he argued that while Section 354(1) of the Companies Act 61 of 1973[3] (the Old Companies Act) permits a court to stay or set aside the winding up proceedings, this is not such a case. I agree. Even though "the company" was not amongst the applicants in the winding up, that is not the issue that was raised by the applicant.

[41] The acrimony, deadlock and disagreements are evident from the papers. Given that the business of the company was dependent on the participation and contribution of the respective shareholders and or parties associated with each, I accept the respondents' assertion that the business did not trade since 2019. There is no satisfactory proof why the winding up should be stayed.

[3] 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.

[42] Lastly, if there were wrongs perpetrated on the company as Ms Leshalabe, alleges, there are other avenues which afforded a remedy to an aggrieved party under the Companies Act. It is not appropriate nor necessary for me to resolve the delinquency claims in these proceedings given the counter allegations.

[43] Accordingly, the following order is made:

a. The application is dismissed
b. The applicant is ordered to pay the costs of the application.

T SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 28 June 2022.

Heard On:	9 May 2022
Delivered On:	28 June 2022
Counsel for Applicant:	Adv M Nxumalo
Instructed by:	Mncedisi Ndlovu & Sedumedi Attorneys
Counsel for Respondent:	Adv RJ Bouwer
Instructed by:	Martin Speier Attorneys