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

REPORTABLE

CASE NO: 2019/38193

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12/07/2023
DATE

SIGNATURE

In the matter between -

HR COMPUTEK (PTY) LTD	**Applicant**
and	
DR WAA GOUWS (JOHANNESBURG) (PTY) LTD	**First Respondent**
YOLANDI ANN MES	**Second Respondent**
JOHANNES HENDRICK DU PLESSIS N.O.	**Third Respondent**
MARIAN OELOFSEN N. O.	**Fourth Respondent**
WELCOME NORMAN N.O.	**Fifth Respondent**
MASTER OF THE HIGH COURT, JHB	**Sixth Respondent**

Summary: ***Rescission of compulsory winding-up order by company*** - *Directors of company retain power to cause company to rescind such an order without co-operation of the liquidators - Dicta suggesting that rescission of such order only permissible in terms of section 345 of the Companies Act not correct.*
Proof of authority to act for company- *if put up – ought to be acceptable proof- Copy of extract of alleged resolution signed only by general manager, an unrehabilitated insolvent, not acceptable proof.*

JUDGMENT

COPPIN J:

[1] The applicant seeks to rescind an order placing it under provisional liquidation and granted in its absence on 2 November 2019, and placing it under final liquidation and granted in its absence on 6 January 2020. The application is only opposed by the first respondent, which alleges that it is a creditor of the applicant and at whose behest the liquidation orders were granted.

[2] The application is not opposed by the second respondent, who is the sole director of the first respondent, and the other respondents, namely the 1st to 5th respondents, who were appointed as the joint liquidators of the applicant pursuant to the grant of the orders as aforementioned. The sixth respondent is the Master of the High Court.

[3] In its founding papers the applicant, through its sole director, Mr Harry Tremorio Chakala (Mr Chakala), avers that its rescission application has been brought in terms of "the common law read with Rule 42" of the Uniform Rules. It alleges, essentially, that the liquidation orders ought to be set aside since they were obtained, in its absence and without proper notice to it, but, more particularly, because they were obtained fraudulently.

[4] The first respondent essentially denies the allegations and seeks the dismissal of the application. Both sides have raised *in limine* points against each other. The two prominent points raised by the first respondent against the applicant are the following: Firstly, that the

application for rescission of the winding-up orders could only be brought in terms of section 354 of the Companies Act[1]; and that, in terms of that section, the applicant itself cannot bring an application to set aside the liquidation orders. And secondly, that in any event, Mr Chakala, who caused the application to be brought in the name of the applicant, never obtained the consent of the joint liquidators cited herein, to do so, and that the applicant, therefore also for that reason lacked the necessary *locus standi.*

[5] The applicant also raised a point at the outset against the first respondent, which, basically is the following: that it has not been proved that the first respondent, i.e. the company, Dr WAA Gouws Johannesburg (Pty) Ltd, is properly before the court because: (a) the copy of the extract of a resolution attached to the answering affidavit and intended, essentially, to prove that fact, was not signed by the chairperson of the meeting where that resolution was adopted (i.e. as envisaged in section 73(8) of the Companies Act[2]) but was only signed by Dr Gouws, the deponent to the answering affidavit. It is not disputed that Dr Gouws, is an unrehabilitated insolvent. As such he is disqualified from sitting on the first respondent's board and in any event did not obtain the consent of the trustee of his insolvent estate to do what he had done in order to involve the first respondent as a party in this matter. According to this point, the only shareholder and board member of the first respondent is the second respondent who, herself, had never confirmed that such a resolution had been adopted.

[6] The applicant accordingly submitted that it was clear that Dr Gouws had appointed himself as the first respondent's representative; that his self-appointment was invalid, null and void; that the First respondent's purported opposition to this application was invalid, null and void, and that the supplementary and answering affidavit purportedly delivered

[1] i.e. of Act 61 of 1973 which was retained and continues to be applicable as envisaged in Schedule 5 Item 9 of the Companies Act 71 of 2008.
[2] Act 71 of 2008.

on its behalf in these proceedings should accordingly be struck out and the matter should proceed on an unopposed basis.

[7] In light of the nature of those points I ordered that they be dealt with first and separately from the merits of the rescission application. This judgment accordingly only deals with those points and the consideration of the merits has been deferred.

Locus standi

[8] The first respondent essentially relies on *dicta* in *Impac Prop CC v THF Construction CC*[3] (*Impac*) to the effect that an application for rescission of a winding up order had to be brought in terms of section 354 of the Companies Act because of what had been held by the Supreme Court of Appeal (SCA) in *Ward v Suit and Others: In Re Gurr v Zambia Corporation Ltd*[4], and submits that the decision in *Storti v Nugent and Others*[5] (*Storti*), to the effect that a rescission of a winding up order may also be brought in terms of the common law, was wrongly decided, because, the court in *Storti* was not referred to and had no regard for the decision in *Ward*. There are also *dicta* in *Ragavan & Another v Kal Tire Mining Services SA (Pty) Ltd & Another*[6] (*Ragavan*) to the same effect as those in *Impac*, namely, that an application for the rescission of the winding up order of a company can only be brought in terms of section 345 of the Companies Act.

[9] For its alternative argument on the point, the first respondent essentially relies on *dicta* in *Praetor and Another v Aqua Earth Consulting CC*[7] (*Praetor*), and ultimately on what was held in *O'Connell Manthe & Partners v Vryheid Minerale Edms Bpk*[8] (*O'Connell*), on the assumption that upon the winding up of the applicant the powers of Mr

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[3] (40906/16) [2019] ZAGPJHC 497 (5 December 2019).
[4] 1998 (3) SA 175 (SCA).
[5] 2001 (3) SA 783 (W).
[6] (40723/2018) [2019] ZAGPPHC 455 (12 August 2019) paras 14 and 15.
[7] (162/2016) [2017] ZAWCHC 8 (15 February 2017).
[8] 1979 (1) SA 553 (TPD) at 558C-D.

Chakala, as its director, were divested and that he could not cause the applicant to bring the application for rescission without the authorisation or consent of the joint liquidators. Furthermore, that since such consent had not been sought, or given, the applicant could not bring the application.

[10] The response of the applicant to those arguments is, in brief, the following. (a) The SCA in *Ward* did not hold that the rescission of the liquidation of a company had to be brought in terms of section 345 and could also not be brought in terms of the common law or Rule 42 and that the *dicta* in *Impac* (and *Ragavan*) to that effect are wrong; (b) that those *dicta* are in any event not binding and were effectively *obiter*; (c) that the decisions in *Storti* and *Praetor* were correct on the point; and that (d) in any event, in a compulsory winding up the directors of the company, notwithstanding the effect of the liquidation upon their positions as such, retain the power to cause the company, without the co-operation of the liquidator, to not only appeal against the grant of the liquidation order, but also to rescind such an order (although the position of a company that is wound up voluntarily is different and is governed by section 353 of the Companies Act).

Discussion

[11] The argument advanced by the first respondent appears to be based on a misreading of the following *dictum* in *Ward*[9]: "In order to have the final winding up order set aside the appellants were obliged to invoke the provisions of section 354(1) of the Act. I shall assume without deciding that they have *locus standi* to do so."

[12] Taken out of its proper context this appears to have been interpreted to mean that the only recourse anyone (i.e. including a party, or a company such as the applicant) has to rescind a final order of

[9] See at 180F.

liquidation granted in its absence is through section 354(1) of the Companies Act. But that is not a correct interpretation of that *dictum*.

[13] In *Ward* the application to rescind the liquidation orders made in that case in respect of the Zambia Airways Company, was brought by its joint liquidators who had been appointed in Zambia pursuant to the its voluntary liquidation in that country. After the company had been voluntarily wound up by its shareholders on 4 December 1994 in Lusaka, Zambia, (which led to the appointment of the joint liquidators), an employee of the company in Johannesburg, who had a claim against it for severance pay, brought an application in this court for the compulsory winding up of that company in terms of section 344 (g) of the Companies Act. A provisional order was granted which was made final on 28 February 1995. The provisional liquidator who had been appointed pursuant to the provisional order proceeded to liquidate the company's South African estate. Six months after the grant of the provisional order in this court, the two liquidators appointed pursuant to the Zambian liquidation order, brought an application in this court in terms of which they, *inter-alia*, sought to set aside the provisional and final orders of liquidation granted by this court. The matter went on appeal to the SCA, and it is in that context that the SCA in that matter stated, effectively, that they were obliged to bring the application for such decision in terms of section 354 of the Companies Act.

[14] In terms of section 354 any liquidator, creditor or member of a company that is wound up, has standing to bring an application to stay or set aside such winding up. The section specifically provides as follows: "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..." (Emphasis added)

[15] The "liquidator, creditor or member" envisaged in that section need not be "a party affected by" the winding-up proceedings, or the order made pursuant thereto, in order to have standing to apply for the stay of the proceedings or for the rescission of the winding-up order. The foreign liquidators of the company in *Ward* were not parties to the actual winding-up proceedings in this court (although there had been full disclosure of the Zambian winding-up and the appointment pursuant thereto in the papers in the application brought in this court) and they may have been precluded from bringing the application for rescission in this court in terms of Rule 42 or the common law. Those remedies seem to be confined to the parties affected by the order of winding up. But they clearly had standing in terms of section 354 of the Companies Act.

[16] It is furthermore unlikely that the court in *Ward* would have (effectively) summarily and by implication ruled that a company itself was precluded from bringing an application to rescind its winding-up through a decision of its directors, and without the co-operation of the liquidators, and would simply have ignored settled law concerning the residual powers of directors in that regard in a compulsory winding-up[10].

[17] Section 354(1) of the Companies Act, excludes a company (i.e., under compulsory winding-up) from bringing the application envisaged in that section itself. Whether through its directors and without the co-operation of its liquidator(s), or otherwise. But, if by virtue of their residual powers the directors of such a company may cause it to rescind a provisional or final liquidation order without the cooperation of the liquidators, then the company can clearly only do so in terms of the common law, or, presumably, also in terms of Uniform Rule 42.

[18] What the courts held on this point in *Storti* and in *Praetor* (that followed *Storti* on that point) is that the company through its board of directors

[10] See, *inter alia*, *O'Connell* and the authorities cited there.

may only apply for a rescission of the winding-up order on common law grounds. In *Praetor* the court (per Binns-Ward J) held as follows: "The effect of the winding up order was to divest the first applicant of his function as the company's director and to vest them instead in the liquidator(s). That raises the question whether the current application by the company, ostensibly at the instance of Mr Praetor, *qua* sole director, has been competently instituted. It appears to be generally accepted that the company's directors have what have been described as 'residual powers' to act on the company's behalf in causing it to oppose the confirmation of the rule in a provisional winding up, or to appeal against a winding up order. A useful collection of the relevant jurisprudence was put together by Gautschi AJ in *Storti v Nugent and others* 2001 (3) SA 783 (W), at 795G – 796C; see in particular, *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk.* 1979 (1) SA 553 (T) at 555H – 558E."

[19] And, more particularly, Binns-Ward J went on to hold as follows: "It seems to me that there is no rational basis to distinguish the standing of a board of directors to appeal in the company's name against a winding-up order from its standing similarly to apply to set aside such an order obtained without its knowledge. Indeed, in *Storti supra, loc. cit.,* it was stated that 'a company has the right to rescind... a winding-up order.' It is clear from that context that the learned judge had in mind that the application to rescind would be mounted by the company at the instance of its board, not its liquidators. I am willing to accept therefore that the second applicant as standing to bring the rescission application, although it would probably have been correct in such circumstances to have cited it without the words 'in liquidation' after its name." (Footnotes omitted)

[20] To the authorities cited in *Storti* and *Praetor* maybe added the Australian authority referred to in *National News (Pty) Ltd v Samalot Enterprises (Pty) Ltd*[11], where it was held that a company may through its board apply for the setting aside of an order for its winding -up[12].

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[11] (1986) 10 ACLR 741 SC (NSW) at 742.
[12] See also Joubert *LAWSA* Vol 4 Part 3 (2nd Edit) par 123 fn.21.

[21] The court in *Praetor* essentially adopted the same reasoning as in *O'Connell*, where the court reasoned that since a company against whom a final winding up order was granted may appeal against the grant of such an order through its board of directors and without the co-operation of the liquidator, there is no reason why a company in that manner cannot oppose the confirmation of a provisional winding-up order. By parity of reasoning the court in *Praetor* held that there was no reason in logic why a company in that same manner cannot apply for the setting aside or rescission of the winding-up order.

[22] The courts in *Storti* and *Praetor* did not err in their conclusions on that point. As observed in *Impac*[13] and explained in *Klass v Contract Interiors*[14], the analysis, interpretation and meaning given by the court in *Storti* to section 354 was "eclipsed" by the SCA's analysis and interpretation of that section in *Ward*. The primary issue in *Storti* was whether section 354 could be invoked for the purposes of rescinding a winding-up order on the grounds that it should not have been granted in the first place. Gautschi AJ in *Storti* held that it could not be invoked for that purpose and that the Insolvency Act and the common law could possibly be invoked in such an instance.

[23] On the other hand, the SCA in *Ward* held, in effect, that section 354 is wide enough and could be invoked for that purpose, i.e. to rescind a winding-up order on the basis that it should not have been granted in the first place. The court in *Storti* did not refer to *Ward* seemingly because, although reported after *Ward*, the judgment in *Storti* was delivered before the judgment in *Ward* had been reported.

[24] The reasoning in *Praetor* is sound. There is no reason in logic why the company cannot, through its directors, and without the co-operation of its liquidators, apply to set aside the liquidation order that had been granted in its absence. After all, it is able to appeal against the grant of

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[13] At par 10.
[14] 2010 (5) SA 40 (WLD) par 49.

such an order in that manner and to take all the necessary steps to oppose the confirmation of a provisional liquidation order[15]. The SCA in *Ward* did not preclude a company from doing so, and perhaps more fundamentally, did not deal with that issue at all. The *dicta* in *Impac* and *Ragavan*, and other matters, to the contrary, or suggesting the contrary, are, with respect, not correct, and are, in any event, *orbiter*.

[25] It follows that in this matter the applicant could validly bring this application for rescission, through Mr Chakala, its sole director and shareholder, without the co-operation of the liquidators.

[26] In any event, in this matter the liquidators were cited as respondents, but none of them opposed the applications or objected to its being brought without their consent or corporation, arguably indicating acquiescence or assent thereto.

[27] For those reasons the point in limine, raised by the first respondent concerning the *locus standi* of the applicant, is dismissed.

The opposition of the first respondent

[28] Turning to the point raised by the applicant concerning the standing of the first respondent in these proceedings. This calls for a decision whether enough had been placed before this court to warrant the conclusion that it the first respondent that is opposing the application and not some unauthorised person, in this instance Dr Gouws, doing so on its behalf[16].

[29] In an affidavit titled "First Respondent's Supplementary & Answering Affidavit", filed by attorneys, Mashabane & Associates Inc., purportedly

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[15] See *O'Connell* (above).

[16] See, *inter alia*, *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C) at 352A; *Cambridge Plan AG v Moore* 1987(4) SA 821 (D) at 833B-D; *Tattersall v Nedcor Bank Ltd* 1995 (3) SA 222(A) at 228F-H.

on behalf of the First Respondent, Dr Gouws, the deponent to the affidavit states, inter alia: "I am the general manager of the first respondent and [I] am duly authorised to depose to this affidavit on its behalf as is evident from the resolution attached hereto as annexure 'AA1'..."

[30] Annexure AA1 purports to be a resolution of the First Respondent. It reads as follows:

> RESOLUTION
>
> MINUTES OF THE BOARD OF DR.WAA GOUWS (JOHANNESBURG)(PTY)LTD ("THE COMPANY") HELD AT JOHANNESBURG ON 1 OCTOBER 2021.
>
> 1. It was resolved to oppose the application of HR Computec(Pty)LTD to set aside the winding up order obtained by the company.
> 2. It was further resolved that Willem Andries Adrianus Gouws be authorised to sign all documents and do whatever else is required to give effect to 1. Above.
> 3. Finally, it was resolved that Malesela Ngoasheng of Mashabane & Associates be appointed as the company's attorneys of record."

[31] The document then bears the signature of "WAA GOUWS" above the following words "Certified a true extract". It is further apparent that the document is a copy. It bears a certification that it is a true copy of the original, i.e., a copy of the extract.

[32] It is not disputed that the second respondent, Yolandi Ann Mes, is the sole shareholder and director of the first respondent, and hence its only board member. She did not file any affidavit in these proceedings, let alone an affidavit confirming any of those facts.

[33] Section 73(8) of the Companies Act provides as follows: "Any minutes of a meeting, or a resolution, signed by the chair of the meeting, or by the chair of the next meeting of the board, is evidence of the proceedings of that meeting, or adoption of that resolution, as the case may be."

[34] In the event of an extract of the minutes (or an extract of the resolution) being submitted as proof that such a resolution was taken and the company has a registered company secretary, the company secretary may sign the extract in place of the chairperson[17].

[35] Dr Gouws as an un-rehabilitated insolvent is disqualified from being a company director[18], including from chairing a meeting of the first respondent's board, and similarly, from being a company secretary[19]. He has also not been exempted from the application of any provision of section 69 (8)(b) of the Companies' Act, as contemplated in subsection (11) of that section.

[36] Dr Gouws' knowledge of the adoption of such a resolution is it best hearsay, since he could not participate in its adoption. In any event, because of non-compliance with section 73(8) of the Companies Act the extract appended to the answering affidavit as proof that the company had passed a resolution, inter-alia, to oppose the applicant's application for rescission, and authorising Dr Gouws to cause the application for rescission to be opposed and to appoint attorneys to represent it, is not evidence of the proceedings of that meeting of the adoption of such a resolution, for all the aforementioned reasons.

[37] Dr Gouws' say so is insufficient. Since his authority derives from the document that he put up, which does not meet the legal requirements, one cannot conclude that he had been empowered by the first respondent, as he contends. Accordingly, the first respondent's opposition to the application has not been proved to have been valid or authorised, nor had it been shown that the attorney for the first respondent had been properly authorised to act on its behalf. Since the

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[17] PA Delport *Henochsberg on the Companies' Act 71 of 2008* Vol 1 (Lexis Nexis) Issue 9 p 292.
[18] Section 69(8)(b)(i) of Act 71 of 2008.
[19] Section 84(5) of Act 71 of 2008.

very existence of a valid resolution is in issue, and since the same had not been produced thus far, despite the point having been raised by the applicant in its replying affidavit that had been delivered as long ago as November 2021, and since Dr Gouws, clearly, if not, in all probability, instructed the attorneys in this matter on such purported basis, it may not have been sufficient for the applicant to have proceeded in terms of Rule 7.

[38] The point raised by the applicant concerning the first respondent's standing is thus upheld, but it does not appear appropriate to at this juncture summarily strike out the purported opposition and answering affidavit by the first respondent without furnishing a further opportunity for the said attorneys to deliver proper proof of their authorisation and mandate to act for and on behalf of the first respondent in this matter[20]. The proof envisaged would include the delivery of a valid resolution passed by the First respondent in accordance with its Articles of Association and the Companies Act[21].

[39] Even though the applicant has arguably been substantively successful in respect of the points dealt with in this matter, given the circumstances of this matter, in particular the position of the first respondent, it is considered appropriate to reserve the question of costs for now.

[40] In the result the following order is made:

1. The point *in limine* in respect of the *locus standi* of the applicant is dismissed;
2. The point regarding the opposition on behalf of the First respondent is upheld.
3. Krige Attorneys or any other attorney purporting to act on behalf of the first respondent are to deliver proper and acceptable proof

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[20] See, inter alia, *FirstRand Bank v Fillis* 2010 (6) SA 565 (ECP) at 569A.
[21] See *Mall* (above); *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holdings* [2021] 4 ALL SA 810 (WCC) par 69.

of its mandate and authority to act on behalf of the first respondent within 10(ten) court days of the handing down of this order.

4. In the event of the non-compliance with paragraph 3 hereof, the applicant, if so advised, may apply for the striking out of the notice of opposition and affidavits filed for the first respondent in this matter.

5. The costs are reserved.

P COPPIN
Judge of the South Gauteng Local Division

APPEARANCES:

FOR THE APPLICANT: DZ Kela

INSTRUCTED BY: Ndumiso Voyi Attorneys

FOR THE FIRST RESPONDENT: A van der Walt

INSTRUCTED BY: Krige Attorneys Inc.

DATE HEARD: 17 May 2023

JUDGMENT DATE: Date judgment emailed to parties deemed to be 12 July 2023.