IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 40723/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED. ✓

12/8/19.
DATE

SIGNATURE

In the matter between:

RONICA RAGAVAN	1ST APPLICANT
OAKBAY INVESTMENTS (PTY) LTD	2ND APPLICANT

And

KAL TIRE MINING SERVICES SA (PTY) LTD	1ST RESPONDENT
CHAVONNES BADENHORST ST CLAIR COOPER N.O	2ND RESPONDENT
THEA CHRISTINA LOURENS N.O	3RD RESPONDENT
THE MASTER OF THE HIGH COURT	4TH RESPONDENT
KGASHANE CRISTOPHER MONYELA N.O	5TH RESPONDENT
MONIQUE STANDER N.O	6TH RESPONDENT
CENTAUR DE ROODEPOORT (PTY) LTD	7TH RESPONDENT

JUDGMENT

Fabricius J,

[1] In these urgent proceedings, the Applicants, apart from the usual cost order, sought the following relief: "That the judgment and order granted in favour of the First Respondent (the Applicant in the original application) granted 3 October 2018, under case number 40723/2018, winding-up the Applicant, be rescinded, alternatively that such judgment be rescinded and replaced with an order of provisional liquidation returnable on such date as the above honourable Court may determine". The alternative relief sought was abandoned by Counsel for Applicants during argument in reply. The Seventh Respondent's conditional application was not proceeded with.

[2] In the Founding Affidavit it was said that the application was brought in terms of the common law, alternatively in terms of ***Rule 31 (2) (b)*** of the ***Uniform Rules of Court*** and, further alternatively, in terms of ***Rule 42 (1) (a)***. It was also alleged that the liquidation was sought and granted in circumstances which fly in the face of West Dawn's constitutionally entrenched right to a fair public hearing in terms of s. 34 of the ***Constitution***. The Second Applicant is a shareholder of West Dawn and the deponent to the Founding Affidavit is a Director of West Dawn.

[3] It is clear from the Founding Affidavit that the final liquidation order, was challenged on a number of grounds which included not only the question of non-service, but also challenging the existence of the very debt upon which reliance was placed for purposes of the liquidation application. In this context reference was made to "highly suspicious circumstances" upon which the First Respondent sought the liquidation order without the knowledge of West Dawn.

[4] These allegations upon which Applicants rely, are disputed, and not surprisingly inasmuch as it was also alleged that First Respondent's application was intended to mislead the Court and that the relevant court process was abused.

Background:

[5] On 3 October 2018, this Court placed West Dawn Investments (Pty) Ltd under final liquidation at the instance of one of its creditors, the First Respondent. West Dawn was finally liquidated because the Court found that it was unable to pay its debts and that it was just and equitable to do so. The application was not opposed. Until set aside, this Court order is presumed to be correct.

See: ***MEC for Economic Affairs, Environment and Tourism v Kruisenga 2008 (6) SA 264 (CKHC) at 277 A to B.***

On 16 November 2018, the Applicants applied to rescind this liquidation order. On 14 June 2019, the First Applicant brought an application to

expedite the hearing of the rescission application so that it be heard on an urgent basis.

[6] Before its liquidation, West Dawn operated as a mining contractor and relied on mining contracts to generate income. Its main client was Optimum Coal Mine (Pty) Ltd ("OCM"). A mining contract with OCM was West Dawn's only stated source of income. During February 2018, OCM was placed under business rescue. It no longer produces any coal and is in the process of being sold. On 14 November 2018, OCM's business rescue practitioners cancelled the mining agreement between West Dawn and OCM, and accordingly West Dawn's primary, if not only, source of income has become cancelled.

[7] On 16 May 2019, the Fifth and Sixth Respondents were granted leave to intervene the rescission application. That application was heard by Davis J, who in a written judgment also confirmed that each of West Dawn's creditors had a direct and substantial interest in the rescission application. On that

basis, each of West Dawn's creditors, including the Seventh Respondent, has *locus standi* to oppose the rescission application should they have been notified of it. On 24 June 2019, the Seventh Respondent brought an application to intervene and oppose the rescission application. Seventh Respondent is a creditor of West Dawn with a claim of at least R45 million. On 25 June 2019, and by agreement between the parties, Seventh Respondent was granted leave to intervene in the rescission application.

Urgency:

[8] First Applicant contended that West Dawn was a major creditor of OCM with a pre- and post- business claim of R472.1 million. It was also implied that West Dawn's liquidators were conspiring with OCM business rescue practitioners to vote in favour of a business rescue plan "to the great detriment of West Dawn and its shareholders". A vote on the plan was apparently scheduled for 15 July 2019, and it was therefore contended that the rescission application had to be heard urgently so that West Dawn could be taken out of liquidation

before the vote. The First Applicant, on behalf of West Dawn could vote against the plan. It was contended that the entire basis for First Applicant's claims of urgency is based on:

1. The alleged disastrous business rescue plan;
2. The alleged date of the vote on the business rescue plan which was initially apparently scheduled to take place on 15 July 2019, but will now apparently take place towards the end of August;
3. West Dawn's ability to influence the outcome of the vote if it is taken out of liquidation; and
4. The suggestion that West Dawn's liquidators will vote in favour of the plan.

[9] On behalf of Fifth, Sixth and Seventh Respondents it was contended that the application could not be urgent for a number of sound reasons:

1. The urgent application was lodged on a Friday before a long weekend requiring an answer within three days thereafter. No proper basis was set out

for this time limit, and given the nature of the application it is patently unfair and inappropriate;

2. The business rescue plan that First Applicant was referring to was published on 6 December 2018, and it was common cause that a new business rescue plan would be published;

3. It would be this new business rescue plan that would be voted on, and neither First Applicant, nor any other creditor of OCM, could know what the substance of that plan would be;

4. Accordingly, it is premature and factually incorrect to contend that the rescission application was urgent, because an unknown business rescue plan must of necessity be voted against;

5. Furthermore, while First Applicant contends that West Dawn would be able to influence the outcome of the vote of the business rescue plan, on no conceivable basis could that be the case. Even based on the claims recognized in the previous business rescue plan, the total claims of OCM amount R5.184 million. These claims are likely to have increased by the time

the new plan was published. Based on the published business rescue plan, West Dawn has a voting interest of only 6.3%. In comparison, Seventh Respondent and Eskom, have claims of R1.013 billion and R3.75 billion respectively. For any business rescue plan to be adopted, it had to be supported by more than 75% of the creditors, of which at least 50% had to be independent creditors, according to the provisions of s. 152 (2) of the ***Companies Act 71 of 2008***. West Dawn was a related party to OCM and its vote therefore could not count towards the 50%. West dawn's ability to therefore influence the relevant vote is non-existent, and therefore it was simply incorrect to contend that the rescission application was urgent, because West Dawn could be able to influence the particular vote;

6. Furthermore, whilst First Applicant contends that the application had to be heard urgently, because West Dawn's liquidators would vote in favour of their plan (whatever that may be), this is factually incorrect inasmuch as on 19 June 2019, the Second Respondent, acting on behalf of West Dawn's

liquidators, deposed to an affidavit in which it was stated that West Dawn's liquidators had no intention of voting for the "old" business rescue plan.

7. The date for the vote on the new business rescue plan has now been extended to end of August 2019, and it was contended on behalf of the Seventh Respondent that this date is also likely to be postponed again.

Rule 42 (3):

[10] This ***Rule*** states: "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 propose". With reference to ***Old Mutual Life Assurance Company SA Ltd and Another v Schwemmer 2004 (5) SA 373 (SCA) at par. [25]***, it was contended on behalf of the Seventh Respondent that West Dawn's creditors as affected parties ought to have been joined, or at the very least, proper notice of the application should have been given to them in terms of ***Rule 42 (2) and 42 (3)***. It is common cause that First Applicant did not notify any of West Dawn's creditors of the rescission

application, let alone join them as parties. This point was squarely raised in Seventh Respondent's Answering Affidavit, but despite that, First Applicant had still not notified West Dawn's creditors of the rescission application. It was known who these creditors were.

Sufficient grounds for reliance on Rule 42 (1) (a)?

[11] The ***Rule 42 (1) (a)*** reads as follows:

"(1) The Court may, in addition to any other 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;"

(2) ***Rule 42 (2)***: "Any party desiring any leave under this Rule shall make application therefore upon notice to all parties whose interests may be affected by any variations sought.

This section is wholly procedural and does not deal with substantive law. It is clear from ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)***

2003 (6) SA 1 (SAC) and *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)*, that a judgment is erroneously granted if there existed at the time of its issue a fact which the Court was unaware of, which would have precluded the granting of a judgment which would have induced the Court, if aware of it, not to grant a judgment. It is clear that a judgment cannot be said to have been granted erroneously in the light of subsequently disclosed defence which was not known or raised at the time of the default judgment.

On the present facts, the Return of Service by the Sherriff is totally in order and upon the mere reading of it, would not have precluded the Court from granting the judgment. Service was disputed in these affidavits thereafter. First Respondent has not opposed this application, but has not placed any version before me as a basis to allege or conclude that the order was erroneously sought or granted. I must accept that the Court granting the order had satisfied itself that procedural and jurisdictional requirements had been complied with. There are no facts before me to indicate otherwise at the time

of granting of the order. It is clear that where a Plaintiff is procedurally entitled to judgment in the absence of Defendant, the judgment if granted, cannot said to have been granted erroneously in the light of a subsequently disclosed defence. A defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

See also: ***Erasmus Superior Court Practice, Volume 2, Second Edition by D. E. van Loggerenberg, Juta and Company at D1/568***, where the relevant requirements are correctly stated with reference to the case law.

[12] I need to emphasize that a Return of Service is regarded as prima facie evidence of its content and in the absence of evidence of the First Respondent, and/or any version by the Sherriff of this Court, there is nothing before me to show that there was any error in the proceedings.

See: ***Seale v Van Rooyen N.O, Provincial Government, North West Province v Van Rooyen N.O 208 (4) SA 43 SCA at 52B to C.***

[13] ***Rule 42 (1) (a)*** is therefore not applicable on the facts. In any event, and in addition, I am not satisfied, as I must be, in accordance with the provisions of ***Rule 42 (3)***, that all parties whose interests may have been affected, have been given notice of the order proposed herein.

Section 354 of the Companies Act of 1973:

[14] This section states that:

> "(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 winding-up, have regard to the wishes of the creditors or members as proof to it by any sufficient evidence".

It was contended on behalf of the Respondents, that inasmuch as the provisions of ***Rule 42*** did not apply to the present facts, Applicants ought to have relied on the provisions of the mentioned section. On behalf of Applicants it was contended that these provisions were simply irrelevant to these proceedings. In ***Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA) at 180E to F***, the following was held: "The language of the section is wide enough to afford the Court a discretion to set aside a winding-up both on the basis that ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events... In the case of the former, the onus on an Applicant is that generally speaking the order will be set aside only in exceptional circumstances". In my view, it is correct to say that s. 354 is the legislated basis to rescind winding-up orders, and that this would include

orders that were allegedly erroneously sought or granted. Applicants did not bring the rescission application with reference to this section, and on behalf of the Respondents it was contended that this was fatal to the rescission application.

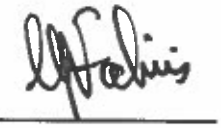
[15] It is clear from the allegations made in the Founding Affidavit that Applicants rely both on procedural deficiencies at the time of the hearing of the liquidation application, relating to non-service of the application and/or notice thereof, and on allegations that the debt relied upon was in issue. On the facts of this case, I am therefore in agreement with Counsel for the Respondents that the provisions of s. 354 are of application. The Court has a discretion in that regard and needs to take into account all surrounding circumstances and the wishes of parties that have an interest in the subject matter. On the facts of this case it is clear that all West Dawn's creditors remain unpaid and the liquidators' fees remain unpaid. It must be clear that I am not re-hearing the winding-up proceedings, nor sitting in appeal upon the

merits of the judgment in respect of those proceedings. Applicants have not relied on these provisions, and have certainly not laid facts before me on the basis thereof that show that the order ought not to have been granted either at all, or on the basis that it falls to be set aside by reason of subsequent events. Exceptional circumstances have also not been shown.

[16] Viewing the matter holistically and exercising my discretion in any event in the light of the above, the following order is made:

1. **The application is dismissed with costs, including the costs of two Counsel where so employed;**

2. **The cost order includes the costs of the proceedings before Neukircher J on 5 July 2019.**



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 40723/2018

Counsel for the Applicants: Adv P. Louw SC

Instructed by: BDK Attorneys

Counsel for the 5th & 6th Respondents: Adv C. Erasmus SC

Adv J. Klopper

Instructed by: Cavanagh & Richards Attorneys

Counsel for the 7th Respondent: Adv N. J. Graves SC

Adv J. Brewer

Instructed by: Mervyn Taback Incorporated

Date of Hearing: 31 July 20192018

Date of Judgment: 12 August 2019 at 10:00