IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 15531/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
28/06/2022

In the matter between:

KISHAN JAWAHARLAL	Applicant
and	
CELAGLO (PTY) LTD	First Respondent
MASTER OF THE HIGH COURT, PRETORIA	Second Respondent
JOHANNES ZACHARIAS HUMAN MULLER N.O.	
(ID NO: [....])	Third Respondent
MSAROOP LAVINA N.O.	
(ID NO: [....])	Fourth Respondent
KISH GAS (PTY) LTD	
(*in liquidation*)	Fifth Respondent

THE CAPITAL PARTNER (PTY) LTD Sixth Respondent

In Re: *Final Liquidation application*

CELAGLO (PTY) LTD Applicant

and

KISH GAS (PTY) LTD
(*in liquidation)* Respondent

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This is an application for rescission of the final liquidation order granted by my sister, Khumalo J, against the Fifth Respondent in favour of the First Respondent on 22 June 2022 in this Division.

[2] The First Respondent is the only party among the respondents who opposed the Applicant's application to have the liquidation order rescinded.

[3] I adjudicated over the application to rescind the liquidation order on 18 March 2022. Post the hearing, I granted an order in favour of the Applicant. This decision, therefore, sets out the reasons for my order.

[4] Both the Applicant and the First Respondent were represented by counsels.

THE PARTIES

[5] The Applicant is Kishan Jawaharlal, a major male businessman, shareholder, creditor, and sole director of Kish Gas (PTY) LTD ('Kish Gas").

[6] The First Respondent is Celaglo (PTY) LTD, a private company duly registered and incorporated in terms of the company laws of the Republic of South Africa with registration number 2014/027830/07 whose main address of business is at RG Group Building 2, Parc Nicol, William Nicol Drive, Bryanston.

[7] The Second Respondent is the Master of the High Court Pretoria who is cited in his official capacity as the dully appointed Master of the High Court for Pretoria, by the Minister of Rural Justice and Constitutional Development in terms of section 2 of the Administration of Estates Act 66 of 1995 whose principal place of business is at SALU Building, Thabo Sehume Street, Pretoria.

[8] The Third Respondent is the liquidator, Johannes Zacharias Human Muller, who has been dully appointed as liquidator with the powers as set out in section 386(1) of the Companies Act 61 of 1973 (the Companies Act), read together with item 9 of schedule 5 of the Companies Act. The liquidator is a director, who operates under the name and style Tshwane Trust C. (Pty) Ltd and is situated at 1207 Cobham Road, Queenswood, 0126.

[9] The Fourth Respondent is Ramsaroop Lavina who was appointed as a provisional liquidator, Johannes Zacharias Human Muller, who has been dully appointed as liquidator with the powers as set out in section 386(1) of the Companies Act, read together with item 9 of schedule 5 of the Companies Act. Further particulars are unknown to the Applicant.

[10] The Fifth Respondent is Kish Gas with registration number 2012/175468/07, a private company duly established in terms of the company laws of the Republic of South Africa whose main address of business is 150, Voorhammer Street, Silvertondale, Pretoria, Gauteng.

[11] The Sixth Respondent is The Capital Partner (PTY) LTD with registration number 2015/372808/07, a private company duly established in terms of the company laws of South Africa whose main address of business is 221, Albert Street, Waterkloof, Pretoria, Gauteng.

LOCUS STANDI

[12] By virtue of his association with Kish Gas, through *inter alia* being a sole director and creditor, the Applicant has a direct and substantial interest[1] and *locus standi* to bring this application on behalf of Kish Gas.

THE ISSUES

[13] The issue for determination before this court is whether the Applicant has met the requirements for recission in terms of Rule 42(1)(a) of the Uniform Rules of the High Court, section 345(1) of the Companies Act and/or the common law?

THE FACTS

[14] The matter has a history of continuous litigation from one court to the other. During October 2019, the Applicant and the First Respondent concluded a lease agreement for property situated at 341 Stormvoel Road, Silverton Ext 2, Pretoria.

[15] After the lease agreement, the Applicant and the First Respondent entered into a sale agreement for the same property. The sale agreement prompted the Applicant and the First Respondent to further conclude a memorandum of agreement that would regulate the sale agreement.

[16] According to the Applicant, on or about 7 December 2020 the First Respondent unlawfully cancelled the memorandum of agreement because of overdue rental. The cancellation of the memorandum of agreement took place whilst the Applicant was waiting for the transfer of the property.

[17] The Applicant further alleges that the memorandum of agreement placed no obligation on Kish Gas to pay arrear rentals and that there was no condition attached to the sale. The arrear rentals were in dispute between the Applicant and the First Respondent, and they were to be settled post the transfer of the property.

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[1] *P E Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B.

[18] The arrear rentals are the basis upon which the First Respondent successfully instituted liquidation proceedings against Kish Gas on 21 June 2021.

[19] The liquidation proceedings were decided through pleadings of the parties as per the directives that were issued by my sister, Khumalo J, on 17 June 2021. Therefore, there was no physical presence of the parties at any time during the determination of the case.

[20] The Applicant at a certain stage had difficulty in accessing CaseLines and brought this difficulty to the attention of the First Respondent. However, the First Respondent did not alert the court about the Applicant's obstacles in accessing CaseLines.

[21] The First Respondent was in receipt of the court directives indicating that the matter would be decided on pleadings. Despite being aware of the court directives, the First Respondent did not inform the former attorneys of Kish Gas about the aforesaid court directives. Additionally, even though the First Respondent was aware of the Applicant's application for postponement of the liquidation application, the First Respondent did not bring this information to the attention of the court.

[22] Consequently, the Applicant did not participate in the liquidation proceedings, and the court ruled in favour of the First Respondent.

[23] Aggrieved by the outcome of the liquidation proceedings, the Applicant now seeks a rescission of the liquidation order on the basis that it was granted in his absence and that the amount claimed by the First Respondent is disputed.

[24] The First Respondent is opposing the application for rescission of the liquidation order.

CONDONATION

[25] The starting point is to deal with the Applicant's application for condonation for the late filing of this application.

[26] The Applicant's explanation for the lateness is, *inter alia*, that there were several other applications related to this one that the Applicant had to attend to.

[27] According to the Applicant, their counsel only had access to CaseLines on 23 August 2021 and had to go through voluminous documents for preparation purposes.

[28] The Applicant further submitted that counsel could not immediately consult with them as counsel needed additional time to go through the documents.

[29] The Applicant also indicated that counsel sought further documents from him, and this also contributed to the delay.

[30] The Applicant further submitted that since the liquation order was granted, he has been engaging with legal representatives to seek advice and explore available legal route.

[31] As a result, the Applicant submitted that the delay of slightly over two months on bringing this application is not unreasonable.

[32] Furthermore, the Applicant contends that he was not in wilful or *mala fide* in his endeavours to bring this application but had only received proper legal advice when he met with his current attorneys.

[33] The Applicant also explained that he has prospects of success because the liquidation order was granted even though there is a bona fide dispute of fact relating to the outstanding debt.

[34] In my view, the explanation proffered for the lateness is reasonable.[2] Therefore, the application for condonation ought to be granted considering the foregoing circumstances.

APPLICABLE LAW

[2] *Academic & Professional Staff Association v Pretorius* 2008 ILJ (LC) 322 paras 17 – 22.

[35] A recission application seeks to set aside a decision of the court of first instance. However, a recission application is premised on narrow requirements. Rule 42(1)(a) of the Uniform Rules of the High Court provides that the court may rescind:

> "(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

[36] Rule 42(1)(a) of the Uniform Rules of the High Court recently became a subject matter in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[3], where Khampepe J supported by majority of the court said the following in relation to Rule 42(1)(a):

> "It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence *and* that it was erroneously granted or sought. Both grounds must be shown to exist" (own emphasis added).

[37] Once a judgment is granted in the absence of an affected party, and at a time of its granting existed a fact that was never brought before a judge, and that information could have persuaded a court to rule otherwise, such judgment may be rescinded.[4] In other words, where the Applicant has met the requirements for recission, this court may rescind its order.

[38] A further ground for rescission of judgment can be found from the common law.[5] In *Government of the Republic of Zimbabwe v Fick and Others*[6] the Court said*:*

> "At common law the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory

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[3] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) para 54.
[4] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) paras 25-7
[5] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A); and *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T).
[6] 2013 (5) SA 325 (CC) para 85.

explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind" (footnotes omitted).

[39] The common law grounds for rescission are self-explanatory and need not be explained further save to mention that the applicant has a duty to satisfy this Court that his default was not wilful and that he has a good defence.

[40] It is now settled that section 345(1) Companies Act and the common law requirements for rescission overlap.[7] Indeed, the Companies Act also empowers a court on application by, *inter alia*, a "creditor 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" to do so. Failure to persuade a court with sufficient proof as to why a liquidation order should be set aside, will have no bearing on the said order.

[41] The Applicant has pleaded all the aforesaid grounds for the recission of the judgment of the court *a quo*.

[42] I now consider the submissions of the parties to ascertain whether the Applicant complies with all the requirements for recission of judgment under Rule 42(1)(a) of the Uniform Rules of the Court, the common law, and the Companies Act.

APPLICANT'S SUBMISSIONS

[43] The Applicant's main submissions relate to being unaware of the court directives to the effect that the matter was going to be decided on pleadings.

[44] Counsel argued that they did not have access to CaseLines and that they did bring this barrier to the attention of the First Respondent.

[45] Furthermore, the Applicant argued that they had prepared a substantial

[7] *Ward and Another v Smith and Others: In Re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 181A-B.

application to have the liquidation application postponed and that the First Respondent was aware of the said application for postponement.

[46] Counsel further argued that the First Respondent, despite being aware that the Applicant had attorneys, decided to submit a practice note that did not contain the then Applicant's attorneys contact details.

[47] Counsel further argued that the First Respondent did receive the directives from the court stating that there was not going to be a physical appearance and that the matter was going to be decided through pleadings. However, the Applicant argued that the First Respondent did not bring the court directives to the attention of the Applicant.

[48] All in all, the Applicant argued that the First Respondent was aware of the challenges faced by the Applicant ranging from accessing CaseLines, presence of court directives, and an application for a postponement but did not bring this information to the attention of the court.

[49] Counsel for the Applicant *inter alia* argued that the Applicant disputes the outstanding debt of R 1 630 364.63 claimed by the First Respondent as being a liquid amount. To this end, counsel directed this Court to different certificates of balance that were issued to the Applicant by the First Respondent bearing various amounts namely, R845,090.95 and R1630 364.63 respectively.

[50] In addition, counsel for the Applicant submitted that the First Respondent alleged that they would prove the amounts claimed but failed to do so. Furthermore, the Applicant submitted that the First Respondent was aware that the rental amounts and/or utilities were in dispute. Counsel referred this court to email exchanges between the parties regarding same.

FIRST RESPONDENT'S SUBMISSIONS

[51] Counsel for First Respondent submitted that Kish Gas was over indebted and thus unable to pay its creditors.

[52] To this end, counsel also contented that Kish Gas also admitted that they were indebted to the First Respondent.

[53] With regards to the two certificates of balance indicating an amount R845,090.95 and R1,630 364.63 respectively, counsel submitted that the certificate of balance reflecting a sum of R845, 090.95 was in respect of rates and levies whereas the other one was for the arrear rental amount.

[54] Counsel further submitted that the rescission application had to be dismissed under Rule 42(1)(a) of the Uniform Rules of Court because the judgment was not granted in error.

[55] In addition, counsel submitted that the rescission application also did not have a chance to succeed under common law because there was no reasonable explanation that was offered by Kish Gas as to why they did not participate in the proceedings when they had filed their intention to oppose.

[56] Relying on the answers given to this court by the Applicant, counsel for the First Respondent contended that it was no excuse for the Applicant to claim that they did not receive the court directives indicating that the matter would be decided on pleadings. Counsel for the First Respondent contended that the court directives were easily accessible from various platforms including on the website for the Pretoria Society of Advocates.

APPLICANT'S REPLY

[57] The Applicant's reply was that counsel for the First Respondent was confident to indicate that Kish Gas owed money to the First Respondent but failed to direct the court to a document reflecting various amounts paid to the First Respondent by Kish Gas in excess on one million rands.

[58] The Applicant further stated that some of the said amount was paid directly to the First Responded and its attorneys. Counsel further informed this court that the said amount is still held by the First Respondent's attorneys.

EVALUATION OF SUBMISSIONS

[59] My reading of the pleadings, including the consideration of submissions of the parties, reveals certain important factors that are worth highlighting below.

[60] First, the First Respondent was aware at all material times that Kish Gas was represented by their erstwhile attorneys. However, when uploading their practice note, the First Respondent did not include the details of former Kish Gas attorneys. The exclusion of the attorneys' contact details is a factor that cannot be ignored because the First Respondent was in contact with the said attorneys, and they knew their contact details.

[61] Second, the certificates of balance deserve attention. There are two certificates of balance that were issued on 25 March 2021. The First Respondent alleged that it would address Kish Gas's debts towards it during the liquidation application.[8] However, a careful reading of the pleadings in the liquidation application do not in any way reveal an instance where the First Respondent addresses this issue. It therefore remains unclear to me about how the outstanding debt came into existence.

[62] A reading of the two certificates of balance further shows on one hand an amount of R1,630 364.63 in respect of a property leased by the First Respondent to Kish Gas. On the other, it shows an amount of R845 089.95 for the same property in respect of rates and levies. This distinction is not clear as currently indicated on the certificates of balance.

[63] A simple reading of the schedule to the lease agreement indicates that the "rates and taxes are included in the rent".[9] This means that the certificate of balance with an amount of R1,630 364.63 is inclusive of rates and taxes. But during the oral submissions counsel for the First Respondent stated that the certificate of balance with an amount of R845 089.95 was for rates and levies. In my view, this submission contradicts what is contained to the schedule to the lease agreement.

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[8] Respondent's liquidation application: founding affidavit para 18.
[9] Section 4 to the Schedule of the Lease Agreement.

[64] Further, a perusal of the entire conditions of the lease agreement including section 5 which deals with "utility and other charges" does not in any way support counsel's submissions for the First Respondent in that there must be two separate certificates of balance. I have difficulty in understanding the actual amount owed by Kish Gas to the First Respondent. The outstanding balance is not clear. This alone bolsters the Applicant's case.

[65] In the liquidation application, the First Respondent claimed an amount of R1, 630 364.63.[10] However, the certificate of balance with an amount of R845 089.95 for rates and levies does not form part of the claimed outstanding debt in the liquidation application. These invoices for both amounts were issued on 25 March 2021. If these invoices are both claimed, which is now the case, the amount claimed far exceeds the amount claimed in the liquidation application. The Applicant's concerns regarding the outstanding balance are in my view valid. There are simply countless questions about the actual outstanding balance.

[66] If one goes further, there are email correspondences between Kish Gas and the First Respondent *inter alia* regarding the sale of the same leased property, negotiation about the balance, portion of the rental price that is to be allocated to the purchase price including a deposit in the amount of R490 000, 00 paid to the Applicant in respect of the same property.[11] In fact, the First Respondent has received an amount of R 1 063 748,70 from the Applicant.[12] During oral submissions, counsel for the Applicant submitted that some of this amount is still in the possession of the First Respondents Attorneys. This is something that was not disputed by the First Respondent's counsel.

[67] As far as back as January 2020, the Applicant had raised concerns with the bill for utilities.[13] Nowhere in the pleadings does it show that both the parties resolved this matter.

[68] All these factors point me to one question, how is the debt liquid when all the

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[10] Liquidation application: Notice of Motion para 59.1.
[11] Applicant's Replying affidavit 093-185.
[12] Ibid.
[13] Email correspondence from Kish Gas to a representative of the First Respondent dated 07 January 2020.

aforesaid factors have not been finalised and/or refunds made to the Applicant in case that the sale does not proceed?

[69] A further reading of the pleadings reveals bank guarantees in favour of the Applicant for the purchase of the leased property. I fail to understand how a bank can issue bank guarantees to an insolvent company. Regrettably, this is something that counsel for the First Respondent simply brushed off as reckless lending during his oral submissions.

[70] I have also considered the submission by the Applicant that Kish Gas will continue to pay its creditors and that no creditors will be prejudiced if rescission is granted. It must also be noted that all the Respondents, except for the First Respondent, did not oppose this application.

[71] In light of the above, the Applicant in my view has satisfied this court that there are special and/or exceptional circumstances present in this case to rescind the liquidation order of Khumalo J under section 354(1) of the Companies Act. In other words, even under common law the Applicant has shown good cause and/or reasonable explanation that warrants the relief sought. This answers the legal issue in that the Applicant has met the requirements for recission in terms of both section 345(1) of the Companies Act and the common law.

[72] I now consider the application in terms of Rule 42(1)(a) of the Uniform Rules of the Court and ask the following: first, was the order granted in the absence of the Applicant? The short answer is yes. This is not disputed by the First Respondent but the surrounding circumstances that led to the Applicant's absence are an issue. According to the First Respondent, the Applicant is the co-author of his own misfortune because the Applicant filed a notice to oppose but did not participate further in the proceedings. However, there is information indicating the Applicant's attempts to know about the then liquidation proceedings such as emails to the First Respondent indicating lack of access to CaseLines.[14]

[73] For unknown reasons, when the First Respondent uploaded their practice

[14] See email correspondence between the parties: CaseLines 021 item 4.

note on CaseLines, they did not include the details of the Applicant's former attorneys, yet they were in communication with them. I fail to understand how one brings an application for liquidation, yet that person does not let the other party know about the developments thereof and/or at the very least, inform the court that the Applicant had issues with accessing CaseLines and that they intended to make an application for postponement.

[74] In my view, the applicant wanted to be in court and present their case but did not know how the matter was going to be heard including lack of access to CaseLines. The Applicant's details or their representatives were not part of the mailing list. This resulted in the court not having important information before it. Consequently, this led to the Court committing a rescindable error.[15]

[75] The second question is whether the order was erroneously sought or granted? Counsel for the First Respondent went at length and argued that the liquidation order was not erroneously sought and/or granted. To advance this argument, counsel for the First Respondent argued that this court need only to consider what was before the court *a quo* and nothing else. I do not see how this assists the First Respondent's case because the lease agreement, a core document that regulates the relationship between the two parties including the rental amount, rates and levies were part of the pleadings during the liquidation application in the court *a quo*.[16]

[76] The First Respondent is in my view missing the point. What is required here is that in addition to proving that the judgment was granted in their absence, the Applicant must show that the judgment that they need to be rescinded was:

> "erroneously granted because there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to

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[15] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* paras 58-59.
[16] Liquidation founding affidavit and annexures.

grant the judgment.[17]

[77] I believe that the error was committed when the Applicant did not receive communication regarding the way the application for liquidation was going to be heard. Despite the fact that he had good grounds that would have influenced the court in deciding the liquidation application, the Applicant did not have the opportunity to be heard. The total amount of indebtedness is disputed. The rates and levies are also disputed. There are huge sums of money that have been paid by the Applicant towards the First Respondent that have not been refunded. All these factors were not brought to the attention of the court below. I do not believe that the court *a quo* would have granted a liquidation order had it been made aware of the aforesaid information. Consequently, the Applicant has complied with the requirements (he was absent, and that the judgment was erroneously granted) for rescission of a judgment.

[78] My evaluation of the pleadings including the submissions of the parties informs me that even under Rule 42(1)(a) of the Uniform Rules of the Court, the Applicant still complies with all the requirements for the recission of a judgment. Accordingly, this also settles the legal issue.

[79] Having carefully considered the pleadings, the record, both the Applicant's and the First Respondent's written and oral submissions, I am of the view that the liquidation order granted by my sister, Khumalo J, against Kish Gas is rescindable.

[80] Therefore, I make the following order:

(a) The application for condonation is granted;

(b) the Court Order granted on 22 June 2021 by Honourable Judge Khumalo under the case number 15531/21, which was granted in the absence of Kish Gas (Pty) LTD (the Fifth Respondent), is hereby rescinded and set aside in terms of Section 354(1) of the Companies Act, 1973 (Act 61

[17] *Nyingwa v Moolman N.O*. 1993 (2) SA 508 (TK) at 510D-G.

of 1973, the “Old Companies Act”) by provisions of item 9 of the Companies Act, 2008 (Act 71 of 2008, the “Companies Act”).

(c) Kish Gas (Pty) LTD (the Fifth Respondent), who is the Respondent in the main application under case number 15531/21 is ordered to file its opposing affidavit to the liquidation application within 10 days from date of this order; and

(d) the First Respondent is ordered to pay the costs of this application.

M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 June 2022.

APPEARANCES:

Counsel for the Applicant:	Adv KA Slabbert (Nee: Wilson)
Instructed by:	MSMM Inc Attorneys Email: tmatlala@msmminc.co.za
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Date of Hearing: 18 March 2022

Date of Judgment: 28 June 2022