Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Hon. Mr Justice Binns-Ward
Hearing: 9 February 2017
Judgment: 15 February 2017

Case No. 162/2016

In the matter between:

CARY LAWRENCE PRAETOR First Applicant

GEOTHERMAL ENERGY SYSTEMS (PTY) LTD
(In Liquidation) Second Applicant

and

AQUA EARTH CONSULTING CC Respondent

JUDGMENT

BINNS-WARD J:

[1] Geothermal Energy Systems (Pty) Ltd ('Geothermal') was placed into liquidation by this court at the instance of the respondent, Aqua Earth Consulting CC. A provisional winding-up order was granted on 2 February 2016, and a final order followed on 15 March 2016. The winding up application was not opposed. The matter currently before the court is an application for the setting aside or rescission of the winding-up order. The parties cited as the applicants in the current proceedings were Mr Cary Praetor, the sole director of Geothermal who was cited as the first applicant, and Geothermal Energy Systems (Pty) Ltd (in liquidation), purportedly represented by Mr Praetor, which was cited as the second applicant.

[2] The first applicant purported to make the application in terms of s 354 of the Companies Act 61 of 1973. That provision affords standing to any liquidator, creditor or member of a company to apply for the staying or setting aside of winding-up proceedings. The first applicant failed to qualify himself as a creditor or member of the company and accordingly failed to establish that he had standing to proceed for relief under the provision. It was therefore no cause for surprise that I was informed at the commencement of the applicants' counsel's argument that the first applicant sought leave to withdraw his application. There was no tender of costs, however. Upon being pressed, counsel would go further than to concede that the first applicant should pay the 'wasted costs' occasioned by his application. In my view there was no merit in the qualification that the applicants' counsel sought to attach to the extent of the first applicant's liability for the costs of his abortive application; he must take responsibility unambiguously for the costs occasioned by it.

[3] The application brought under Geothermal's name is brought in terms of its alleged right to claim a rescission of the winding-up order at common law. It is brought on the basis that notwithstanding service of the papers at the company's registered office, they did not come to the attention of the company's management. The proceedings consequently went unopposed in circumstances in which the company had proper grounds upon which it could, and would, have resisted a winding-up order.

[4] The effect of the winding-up order was to divest the first applicant of his functions 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 a 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; [1] see

[1] Inasmuch as the learned acting judge made passing reference to Australian authority in the passage cited, it bears mention that the position in that country was altered by the introduction of s 471A of the Corporations Act, 2001. Directors seeking to represent the company after a winding up order has been made now require the approval of the court or of the liquidators in order to carry out any function or power as an officer of the company.

in particular *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 (1) SA 553 (T), at 555H-558E. 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 the 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 has 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. Issues such as security for costs might arise in these circumstances, but they were not raised in the current case.

[5] The respondent has taken a point of non-joinder. It has alleged that the liquidator is a necessary party. The applicants' counsel resisted that contention and submitted that the liquidator did not have a real and substantial interest in the determination of the matter, merely an indirect and purely financial one. The concept of 'a real and substantial interest' as the criterion for necessary joinder can be difficult to apply at times. One of the ways of identifying the presence of such an interest is to ask the question whether the relief sought in the proceedings would directly affect the legal interests of any party who has not been joined. If it would, the affected party should be given notice of the proceedings and formally joined. A rescission of the winding-up order would have the effect of divesting the liquidators of their office, but that would merely be an incidental effect of the determination of the company's status and thus something of an indirect character. I am not persuaded that the liquidator is a necessary party to the proceedings. It is customary in matters of this nature, if the court is inclined to grant the rescission application, for a rule to issue before any order is made with absolute effect. Having regard to the wide range of interests potentially affected by such orders there are good reasons for that practice, and the applicants' counsel indicated that he did not wish to advance any reasons why it should not be followed in the current matter. It means that if the application were to succeed, the liquidator would in any event have an opportunity to oppose the confirmation of the order or to make submissions concerning the terms upon which it should be

confirmed before it became absolute. As it was, the parties' legal representatives approached the liquidator extracurially at the court's request to ascertain his position. In response, the liquidator informed the applicants' attorneys by letter, dated 13 February 2017, that he abided the judgment of the court. The liquidator's letter was put before me after the hearing by the applicants' counsel.

[6] The principles applicable in the determination of applications for the rescission of court orders at common law are well established. They are rehearsed in the Appellate Division's judgment in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A). *Chetty*'s case concerned an application by a disbarred attorney for the rescission of the order made in an application by the law society for the removal of his name from the roll of attorneys. Miller JA, writing for the court, observed that the court enjoyed the power to rescind its judgment upon 'sufficient cause'. The learned judge of appeal proceeded at 756A-E, '*The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:*

(i) *that the party seeking relief must present a reasonable and acceptable explanation for his default; and*

(ii) *that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (De Wet's case supra* [*De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A)] *at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954 (3) SA 352 (O) at 357 - 8.)*

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.'

[7] The respondent brought the winding up proceedings in January 2016 on the basis of a claim it allegedly had against Geothermal in contract. The claim, which was for payment of amounts due in respect of subcontracting work for Geothermal undertaken by the respondent before mid-2011, had been the subject of dispute. The respondent alleged that the dispute had been settled and the amount owed to it by Geothermal fixed in terms of an agreement reached in June 2011. When Geothermal failed to pay, the respondent had instituted enforcement proceedings on motion in the High Court in Johannesburg. Geothermal had opposed those proceedings on the basis that the persons who had represented the company in the settlement talks had not been authorised to conclude any agreement. When the application came to hearing in the motion court, Campbell AJ considered that the matter could not be decided on paper and referred the claim for trial on pleadings. The matter was thereafter initially set down for trial at the end of July 2014, but no judge was available to hear it. The case was then postponed by agreement between the parties on the understanding that application would be made to obtain a different date on a preferential allocation basis. That idea appears to have come to naught because the matter was next enrolled for hearing only on 1 December 2016.

[8] Notwithstanding the pending trial, and in the face of its knowledge that a court had declined to afford it relief on paper because of the perception that the adjudication of the claim required the determination of pertinent disputes of fact, the respondent nevertheless decided to demand payment of its claim by addressing a notice to Geothermal in terms of s 345(1)(a) of the Companies Act 61 of 1973. That provision provides insofar as currently relevant: '*A company or body corporate shall be deemed to be unable to pay its debts if- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due- (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor*' (underlining supplied for emphasis). The procedure was plainly resorted to as a precursor to the institution of winding up proceedings. Section 344(f) provides that '*a company may be wound up by the court if it is unable to pay its debts as described in section 345*'.

[9] The respondent's resort to the procedure in terms of s 345 was unusual in the circumstances. The provisions of s 345 read with s 344(f) afford no exception to the rule that the courts apply against granting winding-up orders in matters in which the application for liquidation is founded on a claim that is bona fide disputed (the so-called 'Badenhorst rule'[2]). Bringing a winding-up application when it is known that the debt is genuinely disputed is stigmatised as an abuse of process. The respondent must surely have appreciated, in the context of its abortive endeavour to obtain judgment on its claim in motion proceedings in the Johannesburg High Court, that any application for the winding-up of Geothermal based on s 344(f) was liable to be faced off as an abuse of process.[3] It was nonetheless not legally precluded from resorting to the process in the face of that risk.

[10] The notice of demand in terms of s 345 was served at Geothermal's registered office, as provided by the statute. The registered office happened to be that of a firm of chartered accountants in Claremont. According to the companies' office records attached to the papers, the Claremont address appears to have been Geothermal's registered office since April 2011 when the accountants at that address became the company's auditors. Notice of the ensuing winding-up application was also served at the registered office.

[11] In terms of s 170 of the 1973 Companies Act that was in force until 1 May 2011, every company was required to have a registered office '*to which all communications and notices may be addressed and at which all process may be served*'.[4] A change in the situation of the registered office or of the postal address of a company for the purposes of the Act did not take effect unless the registrar of companies recorded the particulars thereof.[5] Section 23(3)(b) of the currently applicable Companies Act 71 of 2008 requires every company to maintain an office

[2] After the excursus on the principle set out in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

[3] Framing its application also under the just and equitable ground in terms of s 344(h) would not make any difference in the peculiar factual circumstances.

[4] Section 170(1)(b) of the 1973 Companies Act.

[5] Section 170(2)(d) of the 1973 Companies Act.

and to register the address of its office, or if it has more than one, its principal office.[6] The Uniform Rules of Court provide that service of process upon a company may be effected at its registered office.[7] Sections 346 and 346A of the 1973 Companies Act, which remain of application in respect of compulsory winding-up proceedings against allegedly insolvent companies, provide for service of the application and any resultant winding-up order to be effected on the company. The context of the other provisions of the Act just described and the relevant rules of court shows that the scheme of the legislation clearly contemplates that such service will be effected at the company's registered office. These considerations are important to the achievement of 'an ordered judicial process'.

[12] The demand in terms of s 345 of the 1973 Companies Act and the subsequent application for Geothermal's liquidation did not come to the notice of the company because it had been decided by the company's management during 2012 to give instructions to the firm of accountants at its registered office not to accept service of documents for the company. The reason for this bizarre decision has not been explained. It was a decision that plainly subverted the statutory object of the requirement that a company must have a registered office and thwarted the purpose of the aforementioned rules regarding service on companies in the Uniform Rules of Court, which are obviously directed at the ideal of achieving effective service of process. Geothermal did advise the respondent during 2012 that all communications to it should be addressed to its business address in Camps Bay. That indication may have been binding for purposes of the pending litigation in the Johannesburg High Court, but it could not legally displace the provisions of the Companies Act and rule 4(1)(a)(v) of the Uniform Rules of Court for the purpose of service upon or giving of notice to the company in any other context.

[13] It would seem, however, that notwithstanding the company's instruction, the office staff at its registered office forwarded documentation delivered to the company at the registered office to the company's last known place of business in Camps Bay. At some stage the company changed its business address in Camps Bay, evidently

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[6] In *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) it was held that 'principal office' denoted a company's principal place of business.

[7] Rule 4(1)(a)(v) of the Uniform Rules of Court.

without advising the staff at its registered address. In 2014, the company ceased trading and consequently no longer had a place of business. The personnel at its registered office appear also not to have been advised of this development. That much may be inferred from the fact that the firm of accountants whose address constituted the company's registered address advised the respondent when the section 345 demand was received that they had forwarded it to the company's last known place of business by registered post, but that it had been returned uncollected.

[14] The founding papers in the winding-up application disclosed the existence of the pending litigation in the Johannesburg High Court. There was no disclosure, however, of the fact that the persons at Geothermal's registered office had notified the respondent that Geothermal itself had not been in physical receipt of the demand in terms of s 354 or that notice to, or service upon the company at its registered office was factually ineffectual in the circumstances. In my judgment the respondent's failure to make this disclosure to the court seized of the winding-up application is to be deprecated. I consider that a party possessed of information that calls into question the effectiveness of the notice and service upon which it relies in any proceedings is duty bound to disclose it to the court, for upon such disclosure the court might be minded to give additional directions to achieve effective service. But the ethical consideration to which I have referred does not detract from the legal effectiveness of notice given and service effected in accordance with the applicable statutory prescripts. It could not be said that there was anything irregular about an order that issued consequent upon such notice or service. The statutory framework puts the onus on every company to ensure that notice at its registered office is effective. It would have been open to the respondent, had it made disclosure of the response it had received from Geothermal's registered office, to submit to the court that, having effected service within the law, it should not be required to do more. And the court would have been acting entirely within the law if it chose to accept that argument. The position certainly did not result in the order being erroneously granted in the relevant sense of that term and it is therefore unsurprising that Geothermal did not seek relief in terms of rule 42.

[15] Notice of provisional winding-up of the company was published in the Government Gazette. The notice was drawn to Mr Praetor's attention by Absa Bank. Praetor caused his attorneys to investigate, but the investigation appears to have been

sloppily undertaken and Praetor was informed that no record of a winding-up application could be found at the High Court. The applicant's attorneys also directed an enquiry to the respondent's attorneys in March 2016, but, discourteously, the respondent's attorneys failed to reply. In the result, it was only in early October 2016 that Mr Praetor obtained confirmation that Geothermal had indeed been placed into liquidation when he was contacted by the liquidator, who furnished a copy of his certificate of appointment as such. The current application for rescission of the order was thereafter instituted on 21 November 2016

[16] I am satisfied that Geothermal would be in a position to mount a viable opposition to the winding-up application. The history sketched above establishes that the claim on which the winding-up application was founded has been disputed in other undetermined proceedings. It is also evident that another court has already found the basis of that dispute to have given rise to a triable matter. It is arguable that the court that made the winding-up order was misdirected in doing so in the face of that evidence, but that is immaterial for present purposes because the current proceedings are not an appeal.

[17] In *Chetty*'s case supra, the Appellate Division was of the view that the court of first instance might have erred in treating Mr Chetty as a fugitive from justice and that the peculiar circumstances attending the maladministration of his trust account might have merited a less severe sanction than his striking from the roll of attorneys. The appeal court made no determinative findings in that regard, but it was prepared to allow on account of them that Mr Chetty had a bona fide defence which, prima facie, carried some prospect of success. The court nonetheless rejected Mr Chetty's claim for a rescission of the striking off order made against him because his explanation for his failure to have opposed the application was lacking.

[18] In my judgment the current application is doomed to failure on the same principle. It is not a reasonable and acceptable explanation for Geothermal to say it did not receive notice of the application because it deliberately, but for unexplained reasons, instituted measures that rendered its registered office ineffectual for its statutory purpose. Geothermal's behaviour was fundamentally inimical to 'an ordered judicial process' and nothing has been said to warrant condoning it.

[19] In the result, consistently with the effect of the approach adopted in *Chetty*'s case, the application for rescission will be dismissed.

[20] The following order is made:

1. The first applicant is granted leave to withdraw his application in terms of s 354 of the Companies Act 61 of 1973 for the setting aside of the winding-up proceedings in respect of Geothermal Energy Systems (Pty) Ltd (in liquidation).
2. The first applicant is directed to pay the respondent's costs of suit in the aforementioned application.
3. The second applicant's application for the rescission of the final winding-up order, dated 15 March 2016, in respect of Geothermal Energy Systems (Pty) Ltd (in liquidation) is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court