Republic of South Africa

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

Case No: 9657/2022

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 8 November 2022
Date of judgment: 9 November 2022

In the matter between:

NICHOLAS NGWANAMMOTO KGOTSE Applicant
(Identity Number: [....])

and

4 SEASONS LOGISTICS CC Respondent
(Registration No. 2006/084433/23)
Registered address: Unit E11 Millenium Park, 42 Stellenberg Road,
Parow Industrial, Cape Town, Western Cape.

JUDGMENT

BINNS-WARD, J:

[1] The applicant has applied for an order for the provisional winding-up of the respondent close corporation on the grounds that the respondent is unable to pay its debts. The applicant has alleged that the respondent is indebted to him in the sum of

R1 695 000, being the amount in which he obtained judgment against the corporation and its sole member, Mr Grant Lewis, jointly and severally, on 14 February 2022, in action proceedings in case no. 10222/2021.

[2] The action concerned a claim by the applicant for payment of the outstanding amount allegedly due and payable by the defendants in terms of a 'Repayment Agreement' concluded between the parties on 12 January 2021, in which the applicant was described as 'the Creditor' and the defendants as 'the Debtor'. The agreement recorded an acknowledgment of debt by 'the Debtor' to 'the Creditor' (i) in the sum of R1 800 000 plus interest thereon at 15% per annum '*for monies loaned and advanced*' and (ii) in the sum of R270 000 '*for interest accrued to date on the loan amount*'. It further provided for the redemption of the debt by payment in instalments, with an acceleration provision in the event of the 'the Debtor' failing to make any payment on due date. It is not in dispute that some payments were made in reduction of the debt so recorded, but that payments were not faithfully made in accordance with the stipulated instalment payment arrangement. The action was instituted only after various arrangements to accommodate 'the Debtor' in respect of the originally agreed schedule of repayments were also not complied with.

[3] A notice of intention to defend the action was delivered on behalf of the defendants by attorneys by attorneys Lucas Dysel Crouse Inc. (per one Handre Theron). The notice was served on the plaintiff's attorneys on 7 July 2021. On 13 August 2021, the plaintiff's attorneys delivered a notice of bar, on account of the defendants' failure to have delivered a plea. Judgment was taken against the defendants in default of their delivery of a plea before the expiry of the period afforded in the notice of bar.

[4] The winding-up application is opposed by the corporation, which also brought a counter-application for the rescission of the judgment obtained against it and Mr Lewis, and for upliftment of the bar. Mr Lewis was not cited as a respondent in the rescission application, as he should have been. But Mr van Rensburg, the attorney who appeared for the corporation, and who also acts for Mr Lewis in a similar rescission application lodged under case no. 10222/2021 (the papers in which were also placed before me), indicated that the court could accept in the circumstances that Mr Lewis had knowledge of the respondent's rescission application. Mr Lewis was also the deponent to the principal affidavit in support of the corporation's rescission

application as well as the answering affidavit on its behalf in the winding-up proceedings.

[5] By agreement between the parties, the winding-up application and the application for rescission of judgment were referred for hearing together on an agreed timetable as to the exchange of papers. The agreement was incorporated in an order made by Saldanha J on 15 June 2022.

[6] It is convenient to deal first with the determination of the application for rescission of judgment.

[7] The general requirements that an applicant for rescission of a judgment must satisfy in a case of this sort were reviewed in the appeal court's judgment in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA). An applicant is required to show good cause for such an order, which lies within the court's discretionary power to grant or withhold.

[8] The courts have consistently declined to define 'good cause' in any circumscribing way, but it is generally expected of an applicant in a matter like this 'to show good cause (a) by giving a reasonable explanation of [its] default (b) by showing that [its] application is made bona fide and (c) by showing that [it] has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success'.[1] These elements are not weighed hermetically; they are considered holistically. Thus, a weak explanation by the applicant for rescission on the reasons for its default may, in the assessment of the court, be counter-balanced by it showing good prospects of success if permitted to pursue its defence(s).[2]

[9] The respondent brought its application for the rescission of the judgment in terms of Uniform Rule 42(1)(a), which gives the court, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, the power to rescind or vary an order or judgment erroneously sought or granted in the absence of any party affected thereby. It seems to me, however, that rule 31(2)(b) is also of application. The latter provision requires any application to set aside a judgment granted by default within 20 days after the defendant has acquired knowledge of it. In the current matter, Mr Lewis has averred that the close corporation first obtained

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[1] *Colyn* supra, at para 11.

[2] *Colyn* supra, at para 12, relying on *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 767J-769D.

knowledge of the judgment when the Sheriff arrived at its premises on 28 March 2022 to attach its property pursuant to a writ of execution. The application to set aside or rescind the judgment was, however, brought only on 14 June 2022, and set down in terms of notice of counter-application for hearing the next day, 15 June 2022, together with the winding-up application. The application for the setting aside of the judgment was also brought under the case number of the winding-up application instead, as would ordinarily be the case, under the case number of the action. It was by that device that it obtained the label of a counter-application.

[10] Quite correctly in my view, the respondent sought condonation for bringing the application outside the 20-day limit prescribed in rule 31(2). The same considerations that pertain to showing good cause for rescission apply to showing good cause for the grant of condonation.

[11] Mr Lewis's explanation for the corporation's failure to conscientiously defend the action is singularly unconvincing in my judgment. He claims to have been unaware that the summons required of the defendants to take active steps to oppose the action. He fails, however, to provide any basis for allegedly making that mistake. He does not say that he did not read the summons. On the contrary, it is evident from what he did say that he appreciated that summons served as notice of a claim by the plaintiff. He admits that he attached sufficient significance to the process to discuss it with an attorney from Lucas Dysel Crouse Inc. If he read the summons – which in the absence of an averment to contrary, it is probable that he must have – he must have seen the instructions it contained concerning what was required of the respondent if it wished to contest the claim.

[12] It is apparent from the documentary evidence in the papers that Lucas Dysel Crouse Inc. had represented Lewis and the corporation in respect of the drafting of the forementioned 'Repayment Agreement' and also a preceding agreement titled 'Memorandum of Understanding', of which I shall treat in some detail later in this judgment. There is nothing in Mr Lewis's explanation to indicate the substance of his discussion with the attorney at Lucas Dysel Crouse Inc., or indeed why he considered it necessary or appropriate to consult the attorney if he genuinely believed that service of the summons required no action by the respondent if it did not admit the applicant's claim.

[13] It is evident that Mr Lewis furnished the attorney with sufficient particularity about the claim for the attorney to file a notice of intention to defend under a heading

containing all the correct particularity concerning the name and number of the case. It is inherently most improbable that an attorney would deliver notice of intention to defend an action on behalf of anybody without instructions to do so. Any attorney would appreciate that, apart from anything else (such as fees for services rendered), there would be costs of suit implications for the party on whose behalf he or she was entering notice of opposition. In the circumstances, it might be expected of Mr Lewis to address this inherent improbability in his explanation for the corporation's default by adducing the evidence of the attorney with whom he consulted and who delivered the notice of intention to defend the action on both his behalf and that of the corporation. The notice gives the attorney's email and file reference numbers as handre@ldcrouse.co.za and HT/S14085, which on the face of matters correlates to the forementioned Handre Theron.

[14] It is also most improbable that an attorney who had given notice of intention to defend on behalf of a client would not contact that client for further instructions upon receipt of a notice of bar. The inherent probabilities are that an attorney in receipt of a notice of bar would explain to his or her client what the prejudicial consequences of a failure to deliver a plea within the demand period would be. The notice of bar was served at the offices of the correspondent attorneys named in the notice of intention to defend. In the ordinary course it would have been passed on by them to Lucas Dysel Crouse. In the absence of any evidence to the contrary, I am entitled to accept that that is what probably happened.

[15] The failure by the corporation to adduce any evidence in support of its explanation for its default from the attorney at Lucas Dysel Crouse who dealt with the matter fundamentally undermines the plausibility of Mr Lewis's explanation. Mr Lewis did not advance any explanation for the failure. He also failed to explain in an adequate or convincing manner the delay in taking any steps to apply to set aside the judgment after steps were taken by the judgment creditor to execute it by attaching the respondent's property. On the contrary, Mr Lewis endorsed steps taken by a Mr Shane Fabian, who purported to be a manager of the close corporation's business, to negotiate terms for the settlement of the judgment debt. It is significant that the rescission application was brought only in response to the winding-up application; in other words, only when the shoe began to pinch very badly.

[16] The stark shortcomings in the corporation's failure to explain its default reflect adversely on the purported bona fides of the application. Contextually it bears telling

hallmarks of a stratagem of delay. The corporation's case is not assisted by what I consider to be the weaknesses of the defences it asserts that it could raise in the action, to which I shall now turn.

[17] Mr Lewis averred that the sum claimed by the plaintiff in the action arose from a loan by the plaintiff to him, and that any claim that the plaintiff might have to payment of the money therefore lies against *him*, and *not* the respondent corporation. On the available evidence, I do not think that any such defence would be likely to succeed. Even were the indebtedness originally his alone, which, for reasons I shall give presently, is by no means clear, the terms of the 'Repayment Agreement' entered into between the plaintiff, of the one part, and Lewis and the corporation, of the other, testify to an assumption by the corporation of (at least) joint liability with Lewis for its redemption.

[18] It seems to me in any event that there are grounds to believe that the plaintiff may have enjoyed a claim against the corporation directly even before the execution of the 'Repayment Agreement' under which it acknowledged a liability for the debt and gave an undertaking to pay it. It is evident from the testimony of Mr Lewis that the advance of the funds by the plaintiff that was the background to the ultimate conclusion of the 'Repayment Agreement' constituted an investment by the plaintiff in the business of the corporation in anticipation of the establishment of a de facto partnership between the plaintiff and Mr Lewis. Mr Lewis himself described the intended business relationship between him and the plaintiff as 'a partnership'.

[19] The character of the intended business relationship is outlined a memorandum of understanding agreement concluded between the plaintiff and Lewis, the latter plainly acting in his capacity as the sole member of the close corporation. The deed of agreement is by no means a model of draftmanship, but it is evident from its terms that the intention was that pursuant to the funding to be provided by the plaintiff, the existing business conducted by the close corporation in Johannesburg and Cape Town, respectively, was to be transferred to and divided between two companies to be established, in each of which the plaintiff and Lewis would be co-shareholders. One company would take over and expand the existing business of the close corporation in the one centre and the other company in the other centre. Pending the restructuring of the close corporation's business on that basis the money invested by the plaintiff was to be used by the close corporation in servicing its debt and the plaintiff was to exercise joint control with Lewis over the close corporation's operations and finances.

[20] In this regard, the memorandum of understanding recorded that the plaintiff ('Kgotse') and Lewis would '*share responsibility to settle off all historical debts* [of the close corporation] *with investments of cash inflows from Kgotse. The current monthly billing will be used to pay off monthly expenses and any surplus that remain* (sic) *will be allocated to offset any critical creditors. The outstanding payments from Service providers that owes* (sic) [the close corporation] *as per age analysis over 120 days will prioritised to settle all debts*'. It further provided '*Lewis and Kgotse will both have access on Business accounts and both parties will have shared approval on any payments to be serviced. Lewis and Kgotse they will* (sic) *draft blue print to priorities* (sic) *all creditors that need to be serviced and they will also follow up on outstanding debtors. The will be* (sic) *a revolving balance sheet of cash flow of investments to the business to align to longevity of the business and such will be approved by Kgotse and Lewis. Should the above merge* (sic) *be terminated or not honored* (sic) *for any reasons thereof* (sic) *the Business Loans will be recovered from the existing assets of* [the close corporation]'.

[21] Notwithstanding the inept wording of the memorandum of understanding, it is clear enough, in my judgment, that the funding advanced by the plaintiff constituted a contribution by him to the capitalisation of the close corporation's business in consideration for which he was given a joint beneficial interest in its assets and operations with the registered member pending the restructuring of the business operation in the two companies to be established. It is also evident that it was understood that should the intended joint venture fail or not proceed as agreed, the plaintiff would be entitled to claim repayment of the funding he had provided against the close corporation. It is implicit that in entering into the memorandum of understanding in those terms Lewis acted not only in his personal capacity but also on behalf of the close corporation, which as its sole member he had the necessary authority to do.

[22] It is evident that the 'Repayment Agreement', which in express terms superseded and extinguished '*all previous agreements, promises, assurances, warranties, representations and understandings*' between the plaintiff, Lewis and the close corporations, was intended to regulate the financial consequences of the termination of the business relationship that was the subject of the forementioned memorandum of understanding.

[23] It was also contended by Lewis on behalf of himself and the close corporation that the arrangement in terms of which the plaintiff advanced the forementioned funding constituted a credit agreement to which the National Credit Act 34 of 2005 applied. The argument, as I understood it, was that absent any basis for the court that granted judgment against the close corporation and Lewis to be satisfied that the procedures prescribed by s 129 of that Act had been followed, the court had lacked jurisdiction to determine the action. If the argument were sound, the judgment would have been a nullity and no point would be served by failing to acknowledge that, irrespective of the flaws in the close corporation's rescission application. The short answer to the contention is that the capitalisation by the plaintiff of the close corporation's business on the basis discernible from the terms of the forementioned memorandum of understanding was not a credit facility as described in s 8(3) of the Act, a credit transaction as described in s 8(4) nor a credit guarantee as described in s 8(5). It was also not a combination of any of the foregoing types of transaction. It was accordingly not a 'credit agreement' as defined in s 1 or s 8(1) of the Act.

[24] The references in the 'Repayment Agreement' to '*monies loaned and advanced*' and the '*loan amount*', do not detract from the true nature of the contract. It is trite that a court will have regard to the actual character of a contract, irrespective of whether it is formulated in such a way as to give the appearance of being something different from what it really is.

[25] The plaintiff did not require registration as a credit provider to enter into an agreement to capitalise the close corporation's business in return for obtaining a beneficial interest in the business on the basis described in the memorandum of understanding or to make an agreement for termination of that arrangement. There was accordingly no proper basis for the contention also made that the 'Repayment Agreement' was a nullity on account of plaintiff's non-registration as a credit provider.

[26] Even if I were wrong in rejecting the submission by the close corporation's attorney that the 'Repayment Agreement' is a credit transaction within the meaning of s 8(4)(f) of the National Credit Act because it stipulated for the payment of interest *a tempore morae* on the capital debt, it is evident on Mr Lewis's evidence that the asset value of the corporation exceeds R1 000 000 and it would follow accordingly that, by virtue of s 4(1)(a)(i) of the Act, the agreement would in any event not be subject to the statute's provisions.

[27] It was also contended that the agreement was unenforceable because, so it was alleged, the funds invested by the plaintiff were tainted. The maxim *ex turpi causa non oritur actio* was invoked. The plaintiff had for many years been an employee of the company commonly known as Bosasa. Reference was made to the findings made in the Commission of Enquiry into State Capture (the so-called 'Zondo Commission') about the involvement of Bosasa in corrupt dealings. There was, however, no evidence, that the plaintiff had been involved in any such activity and the allegation that the funds he used to invest in the corporation were illicitly obtained was entirely speculative. The plaintiff gave a plausible explanation that the money he had invested came from his severance pay, pension savings and money contributed by his sister. There was nothing unlawful about the transaction, and the means whereby the plaintiff obtained the funds to enter into it was irrelevant for present purposes.

[28] In his imaginative search for defences Mr Lewis also contended that the agreement in terms of which the plaintiff provided funding to the close corporation contravened ss 39 and / or 40 of the Close Corporations Act 69 of 1984. Neither of those provisions appears to me to be of application. Section 39 regulates payments by close corporations for the acquisition by the corporation from any of its members of that member's interest in the corporation. There is no suggestion that the plaintiff ever held a '*member's interest*' (as defined) in the corporation or that if he had that the corporation paid to acquire it. Section 40, which regulates the giving of financial assistance by a close corporation in respect of the acquisition by any person of a member's interest in the corporation also has no application on the facts.

[29] The point was not taken on the papers, but Mr van Rensburg asserted from the bar that the plaintiff had failed to give the defendants five days' written notice of its application for default judgment as prescribed in rule 31(5)(a). That subrule applies only to applications to the registrar for judgment. It seems to me that subrule (4) would have been applicable in the current case. Assuming that there was non-compliance with subrule (4) – a matter not canvased on the papers – nothing material would turn on it in my view. The notice would fall to be given to attorneys Lucas Dysel Crouse Inc., and on Mr Lewis's unsatisfactory version of events that firm of attorneys had no mandate to receive it. Reliance on the point was unacceptable opportunism in the circumstances and contributed nothing to persuading me to exercise the court's discretion in favour of granting the rescission application.

[30] The only point of possible substance made by Mr Lewis in support of the application for rescission was that the 'Repayment Agreement' did not, in terms, provide that the liability to pay the debt therein referred to was undertaken by him and the corporation jointly and severally. He argued that it followed that their respective liability was merely joint, and that the plaintiff had been entitled to judgment against the corporation for only half of the amount in which it was granted.

[31] On the face of it, the wording of the agreement would support Mr Lewis's contention. Ordinarily, all things being equal, that would justify the court, in the exercise of its discretion, in granting a remedial variation of the judgment. In the peculiar circumstances of the case I have decided, however, that it would not be appropriate, at least at this stage, to exercise the court's discretion in the corporation's favour.

[32] Firstly, when the prospect of a variation rather than a rescission was raised during the argument, Mr van Rensburg for the corporation urged against the court making any such order and pressed instead for rescission. Secondly, and more importantly, it seems to me, having regard to the background to the 'Repayment Agreement' (which has been described above), that there would have been no business sense in the conclusion of the agreement on the basis that the constituent parts of 'the Debtor' as therein defined (viz. Mr Lewis and the close corporation) be jointly, instead of jointly and severally, liable for the redemption. It seems to me therefore that the agreement is very likely susceptible to rectification. That impression is reinforced by the fact that, as mentioned earlier, the close corporation was party to negotiations for the settlement of the judgment debt without any qualification about the extent of its liability in respect of the full amount of the debt. If it were not for the fact that, as will shortly become apparent, an order will be made placing the corporation into provisional liquidation, this is a consideration that would have inclined me, had all the requirements for a rescission application been adequately met, to rescind the judgment, rather than varying it, so that the plaintiff, if so advised, could claim a rectification in amended particulars of claim. But as, for the reasons discussed earlier in this judgment, I have not been satisfied that the requirements for showing good cause have been satisfied, and as it will be for the liquidator(s) to decide whether to admit the plaintiff's claim in the full amount of the judgment debt or to disallow any part of it because of an evident mistake in the judgment, I have decided in the exercise of my discretion not to accede to the application at this stage on the understanding that

by doing so I do not intend to preclude the liquidator(s), if so advised, from relying on the point in relation to the plaintiff's proving of his claim. I should also make it clear that my refusal to accede to the rescission application at this stage does not preclude the corporation from proceeding on supplemented papers with the application for a variation of the judgment on the basis described should the provisional order of liquidation that is to be made not be made final, provided that it does so within the period to be stipulated in the order.

[33] The costs of the rescission application are reserved for later determination, if necessary. If the liquidator(s) admit the plaintiff's judgment debt claim in full, s/he/they will have every reason also to admit a claim by the plaintiff in respect of his taxed party and party costs in respect of his opposition to the rescission application, in which case a determination by the court will not be required. If, on the other hand, the provisional order of liquidation is discharged and an application for the variation of the judgment is pursued by the corporation on the basis adumbrated above, the reserved costs can be determined in such proceedings. If, however, the provisional order of liquidation is discharged and the corporation does not pursue the application for the variation of the judgment within the time allowed in terms of this court's order, then, and in that event, the costs of the rescission application shall be deemed to have been awarded in favour of the plaintiff on the date of the expiry of the period allowed to the corporation to pursue the application for a variation of the judgment.

[34] Turning now to the winding-up application. For the reasons set out in the discussion of the corporation's application to rescind the judgment, I am satisfied that the applicant for liquidation has established its standing as a creditor on a balance of probabilities. The close corporation failed to satisfy the debt upon service of a writ of execution. It thereafter failed to comply with a succession of arrangements for an agreed redemption of the judgment debt by payment in instalments. Mr Lewis alleges that the corporation is not actually insolvent. That may or may not be, but it is nevertheless apparent, for the reasons just described, that it is unable to pay its debts. In the circumstances I am satisfied that a proper case for a provisional order of liquidation has been made out.

[35] An order will issue in the following terms:

1. The counter-application by 4 Seasons Logistics CC for the rescission of the judgment granted against it in case no. 10222/2021 is not acceded to at this stage on the basis explained in paragraph 32 of this judgment.

2. In the event of the provisional order of liquidation in para 4 below not being made final, the close corporation is granted leave to further pursue the counter-application for a variation of the judgment granted against it in case no. 10222/2021, provided that it does so by way of the delivery of appropriately supplemented papers within 15 days of the date of the order discharging the provisional order.

3. The costs of the close corporation's counter-application for the rescission of the judgment granted against it in case no. 10222/2021 are reserved for later determination, if necessary, on the basis set forth in paragraph 33 of this judgment.

4. The respondent (4 Seasons Logistics CC) is hereby placed into provisional liquidation.

5. A rule *nisi* shall and does hereby issue calling upon all persons interested to show cause, if any, to this Honourable Court on Thursday, 1 December 2022, at 10h00 or as soon thereafter as the matter is called –

5.1 why the respondent should not be placed into final liquidation, and

5.2 why the costs of the winding-up application (excluding the costs of opposition) should not be costs in the liquidation.

6. Service of this order shall be effected:

6.1 by the Sheriff at the respondent's registered address;

6.2 by the Sheriff on the respondent's employees at the respondent's place of business at Unit E11 Millenium Park, 42 Stellenberg Road,Parow Industrial, Cape Town, Western Cape;

6.3 by the Sheriff on the South African Revenue Services in Cape Town; and

6.4 by publication in one edition of the Cape Times and Die Burger newspapers.

7. The Registrar shall transmit a copy of this order to the Sheriff of the district in which the registered office of the respondent close corporation is situate and to the Sheriff of every other district in which it appears that the close corporation owns property and the said Sheriff(s) shall attach all property that appears to belong to the close corporation and transmit to the Master of the High Court, Cape Town, an inventory of all property so attached as provided for in s 19 of the Insolvency Act 24 of 1936.

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

APPEARANCES:

Applicant's counsel:	**A. Titus**
Applicant's attorneys:	**A Fotoh & Associates Inc.** **Cape Town**
Respondent's legal representative:	**L.J. van Rensburg**
Respondent's attorneys:	**Van Rensburg & Co** **Bergvliet**
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