OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTHAFRICA

Case No: 27801/14

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
(4) **30 AUGUST 2016**
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DATE SIGNATURE

In the matter between:

LUCAS JOHANNES STEPHANUS JACOBUS JANSEN VAN VUUREN	1st Applicant
SUSANA JOHANNA MARIA JANSEN VAN VUUREN	2nd Applicant
STRYSBAR PROPERTY INVESTMENT 6 CC	3rd Applicant

and

GERRIT VAN DER MERWE	1st Respondent
J.H DU PLESSIS TRUSTEES CC	2nd Respondent
JOHANNES HENDRICUS DU PLESSIS N.O.	3rd Respondent
CHETAN KUMAIJ VENILAL PANNA N.O.	4th Respondent
FREDIRCK PETRUS SENEKAL	5th Respondent

JUDGMENT

CORAM: RE MONAMA J

[1] This is a rescission application. The applicants seek an order setting aside the liquidation order of Strybar Property Investment 6 CC which was granted on 2 August 2013.

[2] The first and second applicants are married to each other in community of property. They reside in Barberton in Mpumalanga.

[3] The third applicant is a close corporation. The first, second applicants and the first respondent or Atticus Trust are the sole members. The first and second applicants are jointly holding 50% members' interests and other 50% is held by Atticus Trust.

[4] The first respondent is a businessman who resides in Lanseria, Gauteng. The second respondent is a close corporation with its business address in Randpark. It has been appointed liquidator. The third and fourth respondents are employees of the second respondent. The fifth respondent is the party who brought liquidation proceedings against the third applica

[5] The first respondent and the first and second applicants met during 2009. They created a business relationship through the third applicant. The members of the third applicant are the first and second applicants and the Atticus Trust. They hold interests in equal shares. The interests of the Atticus Trust are protected by the first respondent.

[6] The third applicant owns an immovable property – Erf 100 St Lucia, in Kwa-Zulu Natal Province. The agreement between the parties was to convert the property into a sectional title scheme in terms of the St Lucia Town Planning Scheme.

[7] The parties' envisaged conversion into sectional title was not achieved because the first respondent demanded sub-division. This demand created a serious dispute which resulted in a deadlock.

[8] In the answering affidavit they alleged that the relationship between the parties has broken down irretrievably. Their differences have become irreconcilable. The deadlock resulted in an application for liquidation under case no. 26572/2013.

[9] The application for the liquidation was served at its registered offices in Johannesburg. On 2 August 2013 the third applicant was placed under final winding up order.

[10] The second, the third and fourth respondents were appointed as the joint liquidators. They tried twice to sell the only asset of the third applicant. The sale was stopped on two occasions. On or during 30 July 2014 the applicants launched the rescission application. They were represented by Hamel Attorneys who withdrew on 14 October 2014 before the respondents could serve their answering affidavits and related documents. Thereafter, the first and second applicants just disappeared.

[11] Given the attorneys' withdrawal the respondents were forced to make several unsuccessful attempts to serve the applicants with the answering affidavit and annexures. On 12 October 2015 the respondents obtained an order to serve same by publication in a newspapers and on the first applicant's father at 74 Hornbill Street, St Lucia. On 28 October 2015 the answering affidavit and annexures were served is St Lucia.

[12] On 28 July 2016 the applicants' new attorneys filed an application informing the respondents that they intend to seek a postponement at the hearing of the rescission application. The application supported by the affidavit of the attorney. The applicants do not provide any confirmatory affidavit. The respondents opposed the application for postponement

[13] The postponement was argued and rejected. It was found that the applicants were merely playing delaying tactics to the prejudice of the respondents. The absence of their replying affidavit counted heavily against them. They have done nothing since October 2015 to bring these proceedings to finality. To date they have not filed any replying affidavit. This is totally unacceptable – Justice delayed amounts to justice denied.

[14] The applicants contend that they were not aware of the liquidation proceedings, and that the said liquidation was not sanctioned by a special meeting. Accordingly, they contend that the winding up of the third applicant was "erroneous".

[15] The respondents raise two issues in their papers. They submitted that there was a deadlock between the applicants and Atticus Trust. These are parties who jointly owned the third applicant. They argued that the deadlock is insurmountable. The amount of contribution brought in by various parties is irrelevant. The respondents allude that the disappearance of the first and second applicants compelled them to institute interlocutory application for a different mode of service.

[16] Secondly, it was contended that the third applicant was unable to pay its debts. The debts are clearly itemised and identified.[1] They submitted that the application for liquidation was properly served at the registered office of the third applicant.

[17] The respondents persisted that in terms of section 81(1)(d) of Act 71 of 2008[2] and section 344(h) of Act 61 of 1973[3] they were entitled to the order of winding up and the application was properly made.

[18] There are three ways to rescind or vary orders which are obtained by default. They are governed by the provisions of Rule 31(2)(b) and Rule 42 of the Uniform Rules of Court ("the Rules") and the common law. In terms of Rule 31(2)(b), the conditions necessary for a default judgment are clearly stipulated. It is either the failure to note appearance to defend or to file plea. The applicants must also show "good cause" why their application for rescission must succeed. This requires, *inter alia*, the presence of a *bona fide* defence.

[19] The applicants do not and cannot rely on the provision of Rule 31(2)(b). The applicants' case, is therefore, based on the provisions of Rule 42. The applicants must prove that the order was "erroneously" sought and granted. The term "erroneous" has received interpretation in various decisions. Nothing is alleged which can be accepted as erroneous within the context of these provisions. The courts have held that the term

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[1] See paras 25 - 26 of the replying affidavit on pages 118 – 119 of the record.
[2] The new Companies Act.
[3] The old Companies Act.

"erroneously granted" means a' mistake in matter of appearing on the proceedings of a court or record".[4]

[20] The purpose of the rescission is to afford the aggrieved party an opportunity to litigate the real dispute. The applicant must therefore prove a *bona fide* defence.

[21] The parties have submitted affidavits in respect of their issue. The affidavits constitute their evidence. The applicants contend that the order of liquidation and the appointment of joint liquidators granted was:

> "-erroneously sought or erroneously granted, alternatively that I *[applicants]* have shown good cause for the rescission of the judgment."[5]

On a proper interpretation of their affidavits, they rely on Rule 42. This Rule caters for variation and rescission of orders. It provides that:-

> -"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) court order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

This Rule does not stipulate the time limits within which to bring the rescission application. However, the application must be brought within a reasonable time.

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[4] Bakoven Ltd vGJ Howes (Pty) Ltd 1992 SA 466 ECD at 471 at G-H.
[5] See paragraph 9.1 of the founding affidavit on page 24 of the record.

[22] According to the applicants' affidavit they acquired knowledge of the liquidation order on or about 10 October 2013. They only launched the rescission application on 30 July 2014. I do not accept the reasons for delay as reasonable. Even after they launched the rescission application, they disappeared. The respondents had to obtain an order for substituted service. To date the applicants are in default of their replying affidavit. The court is persuaded that the applicants have been acting maliciously. They have interdicted the sale and left it there. They were expected to act expeditiously and yet they failed to do so. They disappeared from the scene without trace. It is the principle of our law that justice must not only be done but must seen to be done. This principle is encapsulated in Section 35(3)(d) of Act 108 of 1996 which provides that every person has a right of a fair trial which include the right to have litigation begin and concluded without unreasonable delay.

[23] As stated in paragraph 20 the primary purpose of the rescission is to afford another party an opportunity to litigate. This means there must be a real dispute. The respondent have alleged deadlock. The deadlock is common cause. The parties have been involved in acrimonious litigation. It is difficult to see how they still can work together. The applicants do not disclose a *bona fide* defence to the claim. They do not deny that there is a deadlock.[6] They admit that:-

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[6] See paragraph 4.12 of the founding affidavit.

> "-The second applicant and I were opposed to subdivision and a dispute arose between us and the first respondent as to the issues of Sectional title sub-division."

The parties did not agree on how to proceed with their joint venture. This disagreement goes to the heart of trust. The respondents contend that their disagreement cannot be reconciled. The court finds that such statement is well founded and cannot force the parties to agree.

[24] The applicants also do not dispute that the close corporation was unable to pay its debts. Their evidence is that:-

> "-Any debts occurred by fraud for the third applicant was done without our knowledge and consent."[7]

The accusation of fraud is serious. It erodes any trust. The inability to pay debts in one of the recognised grounds for the liquidation provided that it is equitable and just. The nature of the debts demonstrates that they were intended for their business. The failure to pay these debts is a good grounds to wind up the third respondent. In the circumstances it is proper to get a neutral person to solve their problem b way of liqui

[25] The attitude of the applicants in the conduct of this matter is less than satisfactory. In my view they are embarking on this process merely to delay. They are delaying the work of the joint liquidators. Those factors notwithstanding, I am not satisfied that the applicants should be punished with cost

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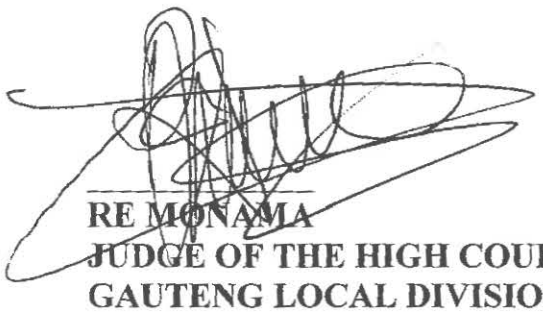
[7] See paragraph 9.6 of the founding affidavit on page 24.

[26] In the circumstance I make the following order:

1. The rescission application is dismissed.
2. The costs of this application are costs in the liquidation.



RE MONAMA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances

For the Applicant:	Adv. M Smit
Instructed by:	Bove Attorneys, Johannesburg
For the Respondent;	Adv. JA Swanepoel
Instructed by:	Mosterts Inc, Johannesburg
Date of hearing;	4 August 2016
Date of judgment;	30 August 2016