IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

12/11/2014
DATE

SIGNATURE

CASE NUMBER: 66839/12

DATE: 12 November 2014

PRAESCRIPTO (PTY) LTD — Applicant

V

VAN DER MERWE DU TOIT INC — First Respondent
JAN LODEWIKUS PRETORIUS N.O. — Second Respondent
ELIZABETH WILANDA PRINSLOO N.O. — Third Respondent
THE MASTER OF THE NORTH GAUTENG HIGH COURT — Fourth Respondent
THE SOUTH AFRICAN REVENUE SERVICES — Fifth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION — Sixth Respondent

In re:
MI-TAX (PTY) LTD (In Liquidation)

JUDGMENT

STRYDOM AJ:

Remedy Sought by Applicant

1. The Applicant in this matter initially sought, *inter alia*, an order setting aside the winding up of Mi-Tax (Pty) Ltd (in liquidation), (hereafter *"Mi-Tax"*), *alternatively* residing both the provisional

and final orders, dated 22 January 2013 and 10 February 2014 respectively, for the winding up of Mi-Tax[1]. Advocate Vorster appeared on behalf of the Applicant in this matter and Adv. Heystek for the First Respondent. After making representations Adv. Vorster submitted a draft order which has the effect of a notice of amendment of its notice of motion, to which there was no objection, and I accordingly granted the amendment. In terms of the draft order the Applicant now seek the following relief:

> *"1. The winding up of Mi-tax (Pty) Ltd (2002/005945/04) is set aside;*
>
> *2. The amount of R78,567.17 deposited by the Applicant into the trust account of EW Serfontein Inc Attorneys shall be retained on trust and invested in a separate trust bearing account pending final outcome of the action to be instituted by the First Respondent against Mi-Tax (Pty) Ltd within 6 weeks from date of this order. Should the First Respondent be finally successful with his action the amount together with any accrued interest shall be paid to the First Respondent.*
>
> *3. Should the First Respondent fail to institute such legal proceedings within 6 weeks, EW Serfontein Inc Attorneys shall be entitled to pay the invested amount together with accrued interest to the Applicant.*
>
> *4. Mi-Tax (Pty) Ltd shall be responsible for payment of the reasonable tax or agreed fees of the second and third respondent."*

Interlocutory Applications

2. The Applicant also applied for admission of an additional affidavit, to which there was no opposition. In the additional affidavit security is set for the amount of the indebtedness upon which the First Respondent relied when it approached the court for the Liquidation of the Mi-

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1 See: Prayers 1 and 2 of the Notice of Motion, page 1 of the paginated papers.

Tax, which was granted while Mi-Tax was in default of both filing of opposing papers and appearance.

3. Two interlocutory applications came before me in this matter, being:

3.1. An *application for condonation* for the Applicant's late filing of its replying affidavit[2], and;

3.2. An *application for striking out* of vexatious and/or irrelevant averments in the answering affidavit of the First Respondent[3].

4. The First Respondent indicated that it does not oppose the condonation application, and accordingly I admitted the replying affidavit, condoning the late filing of the same.

5. The Applicant indicated that, although it does not abandon the *application to strike* out vexatious averments in the First Respondent's opposing affidavit, it do not intend to bring the application before me. I find this to amount to an abandonment of the said application and indicated the same to the counsel for the Applicant. In any event, the application was not at any relevant time brought before me. Accordingly I consider the averments to which the Applicant complained about to be no longer contentious between the parties.

In limine points

6. The First Respondent formally took the Applicant to task on its *locus standi*. Instead of attaching the necessary share certificates to its replying affidavit the Applicant merely indicated that the said respondent is not seriously raising this issue.

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2 See: Paragraph 17 up to and including paragraph 17.9 on page 384 to 385 of the paginated pages.

3 See: Prayer (a) on page 339 of the paginated pages

7. The First Respondent and the Applicant arrange *inter se* that the Applicant will supply the said Respondent with the necessary prove of *locus standi*. Whether this has been done is unknown to me. I find the Applicant's answer to the challenge of its *locus standi* totally unacceptable and indicated the same to the parties. This judgment is given on the premis that the Applicant has the necessary *locus standi*, in respect of which I make no finding.

Nature of Application

8. The order for setting aside of the winding up of Mi-Tax is premised upon the provisions of section 354(1) of the Companies Act, 1973 (at 61 of 1973, hereafter *"the Old Company Act"*). The *alternative order* for rescission was sought upon the common law grounds for rescission of a judgment. Adv. Vorster indicated that he abides by the heads of his predecessor (Adv. Dredge), but will make further submissions of his own accord. Although Adv. Dredge made the distinction between section 345(1) of the Old Companies Act and the common law, Adv. Vorster submitted that the premise upon which the Applicant brought his present application is solely based on provisions of the Company Law. This distinction, to which I will return to hereunder, is in my view only relevant to the extent that the common law sets the minimum requirements which need to be met by an Applicant in a rescission application. In Ward and

Another v Smith and Others: In Re Gurr v Zambia Airways Corporation Ltd,[4] to which judgment I will return hereunder, the court found in this regard:[5]

> *"... no less would be expected of an Applicant under the section than of an Applicant who seeks to have a judgment set aside at common law."*

Applicable legal principals

9. As indicated above the Applicant brought its application in terms of section 354(1) of the Old Company Act, which was emphasized by Mr. Vorster. The provisions of section 354(1) of the Old Company Act are applicable to the winding up of companies, by virtue of the provisions of section 9 of the Companies Act, 2008 (Act No. 71 of 2008, hereafter *("the New Companies Act")*. Section 354(1) of the Old Companies Act reads as follows:

> *"The court may at any time after the commencement of a winding up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings ... on such terms and conditions as the court may deem fit."*

10. The following principles, as appears from case law, apply to the exercise of a court's discretion to set aside winding-up proceedings of a company under section 354(1) of the Companies Act:[6]

10.1. As a *general rule* the court's discretion is practically unlimited, although it must take into account *surrounding circumstances and the wishes of interested parties* such as the

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4 1998(3) SA 175 (SCA).

5 Ibid at 181 A-B.

6 See: *Klass v Contract Interior CC (in liquidation) and Others 2010(5) SA 40 (W)*, paragraph [65], and authority quoted therein, which I also examined. See further *Storti v Nugent and Others* 2001(3) SA 783 (W) on page 706 paragraph D-G.

liquidator, creditors and shareholders (members) of the company. The court's discretion should obviously be exercised judicially.

10.2. The court should further, as a *general rule*, not set aside a winding up where creditors or liquidators remain unpaid, or inadequate provision has been made for the payment of claims against the company in liquidation.

10.3. *Only where the claims of a liquidator and/or creditors have been satisfied*, the court may have regard to the wishes of the shareholder/s, unless those shareholders have bound themselves not to object to the setting aside order, or shareholder concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.

10.4. The court should, where appropriate, have regard to (a) commercial morality, (b) the public interest, (c) whether the continuation of the winding-up proceedings would be a *"mechanical device or a clever plan"* to avoid liability by the liquidated company or (d) render the winding up the instrument of injustice.

10.5. Unusual or special or exceptional circumstances must exist to justify in order for a court to exercise its discretion in favour of the Applicant.

10.6. This section cannot be invoked to obtain a re-hearing of the merits of the liquidation proceedings.

10.7. Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common law rescission.

10.8. This section can be used by an Applicant in circumstances, both where the liquidation proceedings should never have been instituted in the first place against a party, as well as where there are *subsequent facts* (*supervening events*) which give rise to the need to

set the winding up aside. Where reliance is placed on supervening events, the circumstances should be very exceptional.

10.9. A court will not exercise its discretion in favour of an application, if undesirable consequences with flow as a result of the rescission. An aspect to consider in this regard is whether the Applicant is solvent[7] at the time when it lodges its application.[8]

10.10. An Applicant is a *general rule* required to furnish, *in addition to exceptional circumstances*, a *satisfactory explanation* for not having opposed of the granting of the final order or appeal against the order. Relevant consideration would include:

10.10.1. the delay to lodge the application; and

10.10.2. the extent to which the winding up had progressed.[9]

10.11. The Applicant is as a *general rule* also required to meet the minimum standard[10] set by the common law for rescission of a judgment.[11]

Common law requirements

11. At common law a court has the *discretion* to rescind a judgment or order granted in default of appearance, on ***sufficient cause shown,***[12] which in turn involves two elements:[13]

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7 See: *Ex parte van der Merwe* 1962 (4) SA 71 at 72 E-H.

8 See: *Storti* – supra on p 806 G-J.

9 See: *Ward and Another v Smith and Others: In Re Gurr v Zambia Airways Corporation Ltd* 1998(3) SA 175 (SCA) at 181 C-D. Compare also *Aubrey M Cramer Ltd v Welch N.O.* 1965(4) SA 304(W) at 305 H. which was quoted with approval by the Supreme Court of Appeal in the Ward matter.

10 See: Herbs v Hessel N.O. en Andere 1978(2) SA 105 (T) at 109 F-G.

11 Compare: *Ward and Another v Smith and Others: In Re Gurr v Zambia Airways Corporation Ltd,* above, at 181 A-B.

11.1.1. The party seeking relief must present a *reasonable and acceptable explanation* for its default, and;

11.1.2. On the merits that party must have a *bona fide defence*, which *prima facie carries some prospects of success.*

12. In *Chetty v Law Society, Transvaal*[14] the court determined the interdependence between the two requirements:

> ***"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of default judgment against him, no matter how reasonable and convincing the explanation of his default. And 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 has reasonable prospects of success on the merits."***

13. In this regard there appears to be a strong analogy between the general criteria set for condonation applications and the consideration of granting (or refusal) of recession applications[15]

<u>Reasonable and acceptable explanation</u>

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[12] See: Chetty v Law Society, Transvaal 1985(2) SA 756 (A) at 765

[13] See: Ibid at 764 I – 765 D

[14] See: Ibid at paragraphs D-E.

[15] See: Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA) at 9H – 10A para's [12]

14. The requirements set for an Applicant in respect of a reasonable and acceptable explanation for its default are trite:

14.1. This does not involve an enquiry to penalise a party for its failure to follow the rules and required procedure.

14.2. The central consideration is always whether or not the explanation for the default gives rise to the inference that the Applicant does not have a *bona fide* defence.

14.3. The discretion of the court, exercised judicially, is primarily designed to do justice between the parties.[16]

14.4. *Wilful default* is normally fatal although gross negligence may be condoned. *Wilful* in this context connotes knowledge of the action and its legal consequences and a conscious decision, without undue influence, to refrain from opposing the application, irrespective of the motivation.[17]

Prima facie bona fide defence

15. In so far as it pertains to the consideration of the *prima facie bona fide defence* of an Applicant, the courts have been hesitant to expressly state that the probabilities of the said defence may be considered. The preponderance of probabilities by the court is normally directed at a

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16 Compare: Riddles v Standard Bank South Africa [2009] 2 All SA 407 (T)

17 See: *Saraiva Construction (Pty) Ltd v Zululand Electrical & Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D); Compare also the Grant-matter *supra.*

consideration of the *bona fides* of an Applicant's defence, rather than the probabilities of the defence itself.

16. Mr. Vorster submitted that in considering whether the Applicant presented a *prima facie* and *bona fide* defence against the claim (in respect of which the First Respondent took default judgment), I am not entitled to consider the probabilities of the defence, but are limited to consider whether the said defence would, by reference to considerations of the test in summary judgments, succeed. The standard required from a party resisting an application for summary judgment is that such a party is only required to set up a defence (which is recognised by the South African law), which if proven on trial would suffice as a defence against a plaintiff's claim. He further contended that in view of the latter consideration I am not entitled to apply the test in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**[18] with reference to the factual dispute between the parties. For the latter contention Mr. Vorster was not able to direct my attention to any authority. However, in respect of the prior contention Mr. Vorster strongly relied on the decision of **Standard Bank of SA Ltd v El Naddaf and Others.**[19]

17. I scrutinized the latter decision and cursory, it appears to be support for the contention of Mr. Vorster. On page 786 of that judgment the court considered the defence raised as follows:

> ***"Without requiring the defendant to prove her case or to show a balance of probabilities in her favour or to provide copious evidence, I nevertheless firmly say that it must be inadequate for a defendant, required to demonstrate a bona defence, to make bold averments without giving some of the flairs and colour***

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18 1984(3) SA 623 (A).
19 1999(4) SA 779.

provided by a degree of detail. The degree of detail must depend on the circumstances but I reiterate that in the circumstances like the present for a defendant merely to make the averment "I was misled by the plaintiff" is inadequate to demonstrate bona fides and in so far as the Grant case may suggest otherwise I am in respectful disagreement."

18. The latter judgment does not, however, in my view, support the contention of Mr. Vorster that I should apply the test in summary judgments to this matter. It he judgement does say that, it is with due respect wrong and I am not bind by it.

18.1. There is absolutely no basis to place the adjudication of a rescission application and the resistance of an application for summary judgment on the same basis. The major difference between the two proceedings is that in summary judgment proceedings the defendant (respondent) is entitled, by way of his legal representatives and/or an affidavit to aver such bona fide defences against the plaintiff's claim which ultimately amounts to a defence (or defences) in the South African law. The procedure precludes a plaintiff from rebutting the evidence of the defendant in such proceedings. If so the defendant must be given leave to defend the claim. On the other hand an application for rescission is brought as an ordinary application requiring the Applicant to set out the particular grounds upon which he is required to make out a *prima facie* case, the respondent who obtained a default judgment, is entitled to rebut the evidence of an Applicant in an answering affidavit to which the Applicant is entitled to reply and the parties are further entitled to file such further affidavits as the court might allow.

18.2. I could find no authority for the proposition that the normal rules of applications do not apply to rescission applications.

19. The unqualified application of the *Plascon Evans Paints* case, in so far as it pertains to foreseeable factual disputes between parties, to rescission applications is in my view also not

acceptable.[20] The ultimate reason is that in normal event a party applying for default judgment will be faced by a foreseeable factual dispute in respect of the defence it raises against the Respondent's claim. The Applicant is not required to prove its defence on probabilities but only to establish a *prima facie* defence. In my view this means the defence, considered with the dispute thereof by a Respondent, still leave room for a finding that the Applicant may have reasonable prospect of success with the defence if the matter goes on trial. If there is no *prima facie* defence it cannot said to be *bona fide.* To follow a different approach will be to ignore the evidence presented by a Respondent in his, her, its answering affidavit. Authority indicates that the court is entitled to consider the probabilities of a defence where the allegations or denials are so far–fetched or clearly untenable that a Court is justified to reject them merely on the evidence in the affidavits; [21] because the probabilities are so greatly against the Applicant that it cannot be said that he/she/it established a *bona fide* and *prima facie* defence.[22] Bold, vague and sketchy allegations[23] will lead to an inference (on probabilities) that the defences is not *bona fide*

20. In considering whether an alleged defence, on a *preponderance of probabilities* ***"prima facie carries some prospects of success"*** a cautionary approach should be adopted with due

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20 Compare the application of *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 E-645C in the matter of *Storti, supra,* at 806I-J

21 See: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003(6) SA1 at 10B par [13]

22 See: *Plascon Evans Paints Ltd – supra at 635C.*

23 See: *Sos-Kinderhof International v Effie Lentin Architects* 1991 (3) SA 574 at 578D-G

reference to the remarks of Leon J in the matter of *Sewmangal and Another NNO v Regent Cinema*[24] at 819A-C, where he formulated the follow *caveat*:

> *"In approaching this particular type of problem, it is not wrong for a court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponent to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he has been seen and heard by a court. An incautious answer in cross-examination may change the whole complexion of a case."*

21. I now turn to the facts of this matter, to examine firstly whether the Applicant established the requirements set by the common law (i.e. *"sufficient cause"*) and thereafter I will also whether it met the requirements of section 354(1) of the Old Companies Act, for recession.

Explanation for default

22. The First Respondent is a Company of attorneys as contemplated by the Attorneys Act read with the New Companies Act, which rendered professional services to Mi-Tax. Pursuant to a taxed bill of cost the First Respondent properly demanded payment from Mi-Tax in the amount of R153,567.17 in terms of section 345(1)(a)(i) of the Old Companies Act directed to the said company's registered address on 20 August 2012. Upon failure to reply to the demand within the required time period, the First Respondent applied for liquidation of Mi-Tax, as it was entitled to do. After obtaining a provisional liquidation order (a *rule nisi*) on 22 January 2013,

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[24] 1977 (1) SA 814 (N).

service of the Order was affected on the registered address of Mi-Tax, being 426 King's Highway, Lynwood, Pretoria. Copies of the pending liquidation application was also send by registered post to the residential address of the directors of Mi-Tax (being the deponent to the present Applicant and his wife) as reflected on the records of CIPC, being 234 McKenzie Street, Brooklyn, Pretoria. It is clear on the papers that the directors of Mi-Tax did not receive notice of the initial and / or pending liquidation procedures. Mi-Tax was finally liquidated on 22 January 2013.

23. On the Applicant's version, the deponent to its papers, who was also a director and shareholder of Mi-Tax, only became aware of the liquidation of the latter company on **28 June 2013**. The application for rescission was however only lodged on 10 September 2013, about 11 weeks after it came to the attention of the deponent of the Applicant. The Applicant's explanation of the latter delay is contained on pages 20 to 21 of the paginated pages. It is in summary as follows: The attorneys he initially approached to assist him, refused to take the instruction, because they had a conflict of interest; at the end of July 2013 he approached his present attorneys; they did research, set-up consultations with counsel, and himself, which all took time. This explanation is very close to being insufficient.

24. I am however convinced that, in the event that the deponent of the Applicant became aware of the pending liquidation proceedings against Mi-Tax, Mi-Tax would in all probability have opposed its liquidation. Whether Mi-Tax would have been able to rebut the deemed provision in section 345(1) of the Old Companies Act is not at this stage relevant, save to state that it would undoubtedly have raised the same defences, then, as it now presents. Obviously Mi-Tax would, if it had opposed its liquidation, have had the advantage to have any foreseeable factual disputes referred to for evidence. I am not so much convinced by the allegations of the deponent of the Applicant that Mi-Tax would have opposed the application for its litigation, but

by the evidence advanced by the First Respondent. It is clear from the opposing papers that the deponent of the Applicant, albeit thorough the companies that he control, is what is generally referred to as a "*professional litigant*." The said deponent directs litigation personally, and/or through the companies he control, against any person which he considers caused damage and / or infringement against him or the entities he control. The ultimate evidence of this is that the deponent had disputes with no less than 11 legal practitioners, some of whom are distinguished members of the Pretoria Bar, about outstanding fees. The deponent does not hesitate to dispute and/or to take any party to task with whom he differs from opinion.

25. The Applicant avers that the First Respondent obtained the liquidation of Mi-Tax stealthy and in a by deceitful way. I do not agree with this view. It is the Applicant's case in this regard that prior to the launching of the liquidation application, all communication between the relevant parties was either verbal or effected by means of e-mail. This is not disputed by the First Respondent. It is however also common cause that at the time when the First Respondent brought the application for Liquidation of Mi-Tax, the said Respondent's mandate to act on behalf of Mi-Tax was terminated. The parties were as a necessary result no longer communicating on the agreed manner as before. The First Respondent was not legally compelled in any manner to communicate with Mi-Tax in the manner which was done when it held a mandate to act on Mi-Tax's behalf.

26. It was submitted on behalf of the Applicant that service of the liquidation application was not properly effected because Mi-Tax was not "*furnished*" with a copy of the application for liquidation as required by section 346(4A)(a)(iv) of the Old Companies Act. It is common cause that the application for liquidation and the provisional order for liquidation were properly served by the Sheriff on the registered address of the Mi-Tax. In my view this legally meets the "furnish" requirement of the latter section of the Old Companies Act. I will return to this aspect

hereunder when considering whether the Applicant met the requirements set by the Companies Act for rescission of the winding-up order. It has on numerous accounts been found that a company exists at it registered address and at no other place.[25] In this regard it has been found that in event service of a summons is affected at a company's registered address it is effective for legal purposes.[26] In *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd*[27] the court expressly stated, with which I agree:

> *"The failure of Dawson and Fraser (Bophuthatswana) (Pty) Ltd to change the address of its registered office can in no way be a factor which could be considered as prejudicial to it."*

Evidence of *prima facie bona fide* defence

27. The Applicant's defences against the claim of the First Respondent is two fouled, being that:

27.1. Mi-Tax had an agreement with the First Respondent that the fees charged by the First Respondent would not exceed R75, 000. 00 (Seventy five thousand rand). I will refer to this defence hereafter as *"the fee cap agreement"*; and

27.2. The claim of the First Respondent had prescribed by the time it instituted the liquidation proceedings against Mi-Tax.

28. The Applicant did not rely in argument on the second defence, and in fact, after taking instruction, indicated that in the event that I grant rescission it will not rely on a prescription

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25 See: Dairy Board v John T Rennie & Co (Pty) Ltd 1976 (3) SA 768 (W)

26 Compare in this regard: Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd 2011 (3) SA 477 (KZN) which was applied in Arendsnes Sweefspoor CC v Botha 2013 (5) SA 399 (SCA).

27 1993 SA 397 (B) at 401B.

defence against the claim of the First Respondent, hence the setting of security for the claim of the First Respondent. It follows that only the defence of the *fee cap agreement* remains to be considered.

29. The First Respondent austerely and vehemently disputed the *fee cap agreement*. The deponent of the Applicant, being the driving force behind the Applicant and Mi-Tax, should have expected this opposition, especially in view of the fact that he appears to be a professional litigant.

30. Given the obvious foreseeable dispute about the fee cap agreement it is reasonable to expect that the Applicant would have been careful to present the alleged agreement so that it can be said to be properly fortified in order to present a *prima facie* case in its founding papers. On scrutinizing of the founding affidavit and attachments thereto I am, to say the least, unconvinced that a *prima facie* case was made out. The fee cap agreement is couched in bold, vague and sketchy terms. A paragraph which apparently serves as a conclusion of the Applicants evidence of the fee cap agreement reads as follows:

> *"20.1 Firstly Mi-Tax (Pty) Ltd (in Liquidation), had an agreement with the First Respondent, that the fees charged would not exceed seventy five thousand Rand."*

31. In my view the evidence presented by the Applicant in its founding papers, taken on its own, does not contain sufficient evidence to come to the quoted conclusion. It was reasonably foreseeable by the Applicant that his version would be vehemently disputed by the First Respondent. The evidence of the Applicant in his founding affidavit of the fee cap agreement does no warrant the inference that such an agreement was reached between the parties. The deponent of the Applicant explains that the attorney acting on behalf of the First Respondent, (Mr van Amstel); made several requests for deposito's to cover the fees for services the First Respondent rendered to Mi-Tax. First a deposito of 30, 000.00 was requested; thereafter the

First Respondent requested a deposito of R50, 000.00. A request for an estimation of the cost for the professional services the First Respondent rendered to Mi-Tax was made and received. The evidence further deals with the assumptions the deponent of the Applicant on the basis of the said request and estimation. The deponent then suddenly leaps to the conclusion that the parties had a fee cap agreement. The progressive deposito's, insisted on by the First Respondent, militates on the Applicant's own version, against any fee cap agreement. What is more disturbing is that Mi-Tax instituted a claim for damages against Engela & Gibbens Inc (attorneys) for the amount of the taxed bill of costs, received from the First Applicant in the total amount of **R219, 084.37.** This is the total amount of the fees which the First Respondent charged Mi-Tax for its services. The explanation for this is contains in the Applicant's founding papers in paragraph 6.12 and reads as follows:

> ***"The only reason I required a specified account was because I intended to recover the cost incurred for the rescission of the dismissal damages suffered by me from Engela & Gibbens, and which action was subsequently intrude against Engela & Gibbens under case number 6043/2011 in this Honourable Court. The pending action against Engela and Gibbens Inc. is a further reason for bringing of this application."***

32. If damages were suffered it was not suffered by the deponent of the Applicant but by Mi-Tax. It is however clear that the deponent see no distinction between him and the companies he controls. The necessary inference that flows from the quoted reason is that Mi-Tax is dishonest. If the Applicant's defence against the claim of the First Respondent is assumed to be correct Mi-Tax would have incurred legal fees of only R75, 000.00. I have confronted counsel for the Applicant with this inference. His answer was that party normally institute a claim for the largest amount possible, and Mi-Tax instituted the claim against Engela & Gibbens Inc in the event the fee cap agreement relied on by the Applicant is dismissed. There is no

evidence on the papers for the submission. But even if there was evidence, the explanation does not negate the necessary inference I made above. Lastly it appears that Mi-Tax had, on the Applicant's version not paid the full amount of the alleged agreement between the parties, an amount about R10, 000. 00 still being outstanding. (R219, 084.37 - R153, 567.17 = R65517.20). In the event that I miscalculated the outstanding indebtedness of Mi-Tax to the First Respondent, nothing much turns on this finding.

33. The defence of the Applicant become wholly improbable if considered against the evidence advance by the First Respondent. The High water mark of the First Respondent's rebuttal is that the alleged fee cap agreement is in direct contradiction of a written fee agreement which the relevant parties entered into.[28] I cannot ignore this agreement. The parties to the written fees agreement are the First Respondent, Mi-Tax and the deponent to the Applicant's founding papers. The Applicant has no real defence against the written fees agreement. There are in my view no prospects of success with the Applicant's defences, and I accordingly find it not to be *bona fide.* The Applicant thus failed to establish that it has any prospects of success with its claim against the First Respondent.

34. This should be the end of the Applicant's case and I need not enquire whether or not the Applicant made out a *prima facie* case for rescission in terms of the section 354(i) of the Companies Act. However in the event the Applicant could have been based solely on the Companies Act, and I am wrong that it is required to meet both ("*at least*") the common law and

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[28] See: Page 212 of the paginated pages.

the Companies Act requirements for rescission; I will also consider whether the Applicant met the requirements of the said Act.

Requirements of section 354(1) of the Old Companies Act

35. I have listed the requirements for rescission of a winding-up order, established by case law, set by section 354(1) of the Old Companies Act. To some extent there are overlapping requirements between the requirements set by the common law and the requirements of the aforesaid section of the Old companies Act. The following requirements set by for rescission in terms of section 354(1) remains to be considered: The allegation that the winding-up order of Mi-Tax should never have been granted; The presence of unusual or special or exceptional circumstances; subsequent fact or supervening events; payment of creditors of Mi-Tax; Solvency of Mi-Tax; wishes of the shareholders of Mi-Tax; commercial morality, public interest; consequences if rescission is granted and the extent of the progress of the winding-up of Mi-Tax.

Order should not have been granted

36. It was argued on behalf of the Applicant, that the First Respondent failed to comply with the provisions of section 346(4A)(a)(iv) of the Old Companies Act because a Mi-Tax was allegedly not *furnished* with a copy of the application, prior to it being presented to court Mi-Tax. Due to the alleged failure the court should not have granted the liquidation order in the first instance. I have dealt with the service of the application for liquidation by First Respondent's on Mi-Tax in paragraphs 27 and 28 above. I ad to note that service by the Sheriff is a stricter requirement than furnish. Since service of the application for liquidation was served by the Sheriff on the registered address of Mi-Tax the said company was furnished with a copy of the liquidation

application prior to the matter came before court. It follows that there is no merit in the argument.

Unusual or special or exceptional circumstances

37. Adv. Heystek correctly stressed that the Applicant failed to demonstrate unusual or special or exceptional circumstances.

38. Adv. Vorster was of view that the applicant need not comply with this requirement, for the applicant to succeed he merely needs to meet the common law requirements. The Applicant's submission is wrong. The absence of exceptional circumstances militates against granting the relief sought.

Subsequent facts or supervening events

39. The applicant relies for subsequent facts upon the security it set for the claim of the First Respondent in the amount of R78, 567.17. This appears as a classic case of too little too late.

40. The amount is too little because the claim of the First Respondent against Mi-Tax was for an amount of R153, 567.17 and not for the amount for which security was set. In the event rescission is granted, and on the assumption that the First Respondent issue summons against Mi-Tax and the matter go to trial, and the defence of Mi-Tax against the claim of the First Respondent is dismissed; the amount of security will only partly satisfy the claim of the First Respondent.

41. It is too late because security was apparently set as an afterthought, in order to create subsequent facts upon which the Applicant relied for the relief it now seeks. The affidavit in support of the security which was set was deposed to by Mr. Ernest Willem Serfontein on 3 November 2014, being the date when this matter came before me. In order to have had the

desired effect security should have been set earlier and for the full amount of the First Respondent's claim plus interest on the amount.

42. In my view the setting of security is not a subsequent fact or supervening event which assists the Applicant's application. The amount of security is in my view too little to convince me that the Applicant is serious in this regard.

Remaining requirements

43. It is clear on the version of the Applicant that not all creditors, more in particular the First Respondent has been paid in full. The security set by the Applicant, as indicated; do not help the Applicant in this regard, because the amount of the security is not for the amount of the claim of the First Respondent against Mi-Tax, as indicated above. The Applicant failed to deal with the solvency of Mi-Tax and/or the absence of negative consequences in the event rescission is granted. Instead emphasis was placed by the Applicant on the wishes of the shareholder of Mi-Tax, being the deponent to the application for rescission and so-called commercial morality and public interest. As I understand the authority, the wishes of shareholders of Mi-Tax, can only be considered as one factor, amongst others, and only after provision has been made for payment of all outstanding debts of Mi-Tax. The wishes of the deponent of the Applicant are obviously to have the winding-up of Mi-Tax set aside. The shareholder's wishes are totally outweighed by the absence of a *prima facie* and *bona fide* defence against the claim of the First Respondent, as I have found above.

44. The Applicant is unable to prove that it *prima facie* entered into a (verbal) fee cap agreement with the First Respondent. He has not been able to give a satisfactory explanation of the written fee agreement between the parties.[29] In the light of the above considerations, it cannot be said that an argument premised on reasoning along the lines of *post hoc ergo propter hoc* (reasoning which is frequently regarded as unreliable to prove causation) shows a *prima facie* defence which in the circumstances of this case is *bona fide*.

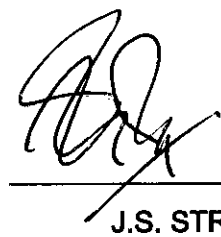
45. The ultimate result is that the Applicant has failed to show good cause for rescission of the winding-up order of Mi-Tax under the common law or section 354(1) of the Old Companies Act.

ORDER

In view of the above facts and considerations I make the following order:

1 The Application for recession of Mi-Tax is dismissed;

2 The Applicant is ordered to pay the cost of the First Respondent.



J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

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[29] See page 212 paginated pages.

Appearances:

Counsel for the Applicant:	Adv. Vorster
Instructed by:	Schoeman & Associates
Counsel for the Respondents:	Adv. Heystek
Instructed by:	Van der Merwe du Toit Inc
Date Heard:	4 November 2014
Date of Judgment:	12 November 2014