

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0101/2022

SOLANDRA INC. (In Liquidation)

APPLICANT

AND

**DALVI MADHAV VASANT
CGM INDUSTRIAL (PTY)
PRESITEX ENTERPRISES (PTY) LTD
MINISTRY OF TRADE & INDUSTRY
REGISTRAR OF COMPANIES
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT**

Neutral Citation: Solandra Inc. v Dalvi Madhav Vasant & 5 Others [2023] LSHC
138 Comm. (14 SEPTEMBER 2023)

CORAM: MOKHESI J

HEARD: 05 JUNE 2023

DELIVERED: 14 SEPTEMBER 2023

SUMMARY

Civil Practice: Application for rescission of judgment- The requirements considered and applied- A foreign liquidator acting in terms of foreign authorisation instituting proceedings before the court without first applying for recognition – Held, such a liquidator must first apply to be recognised before instituting proceedings in this country otherwise without such recognition he lacks locus standi.

ANNOTATIONS

Legislation:

High Court Rules 1980

Cases:

South Africa

Cooperativa Muratori Cementisti – CMC Di Ravenna and Others v Companies and Intellectual Property Commission 2021 (3) SA 393 (SCA)

Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd [2007]

ZSCA 85: 2007 (6) SA 87 (SCA)

Moolman v Builders & Developers (Pty) Ltd 1990 (1) SA 954 AD

Nyingwa v Moolman N.O 1993 (2) SA 508 (TK)

Rossitter v Nedbank Ltd [2015] ZASCA 196

JUDGMENT

[1] **Introduction**

This is an application for rescission of the order of this court granted on the 19 October 2022. The applicant is a company in liquidation in the British Virgin Islands, which owns 999 of the 1000 issued shares in CGM Industries (Pty) Ltd, a company which is incorporated in terms of the Laws of Lesotho. As to the propriety of the company in liquidation suing is not to be determined in this case in the light of the view that I take that the impugned orders of this court should be rescinded. This application is a sequel to the application which was lodged by the only director of CGM Industries (Pty) (CGM) Ltd (2nd respondent) seeking a host of orders, chief among which is the order that the shares of CGM's main shareholder who was liquidated (the applicant herein) struck off the register of companies and brought back into existence through an order of court and reinstated on the register of companies for purposes of continuing with liquidation, be forfeited to him.

[2] When the orders were made, the impression was that the applicant had been liquidated. This order was therefore adverse to the interests of the applicant. The applicant brought an application for rescission through the

instrumentality of one Ms Eugenia Shia Chang who is the sister of the shareholder of CGM who holds one share. The reliefs which were sought in this rescission application are the following:

“1. The normal rules and modes of service be dispensed with on the account of urgency of the matter.

2. That a Rule Nisi be issued and made returnable on a date and time to be determined by this Honourable Court to show cause (if any) why the following orders shall not be granted and made final;

2.1 Pending the outcome of these proceedings the order of this honourable court granted on the 19th October 2022 in CCA/0101/2022 shall not be stayed.

2.2 Pending the outcome of these proceedings the 1st Respondent shall not be interdicted from exercising any of the resolutions outlined in the order of this court dated 19th October 2022.

2.3 The order of this honourable court granted on the 19th October 2022 shall not be rescinded in as much as it was granted by error in the absence of the Applicant.

2.4 Upon the rescission of the order the Applicant be joined as a Respondent in the proceedings and be granted leave to oppose the application.

2.5 All decisions, acts, resolutions and activities done pursuant to the order granted on the 19th October 2022 be and are hereby declared null and void and without any legal consequences.

2.6 The 1st Respondent be directed to refund all monies that he may have spent as a result of the order of this court granted on the 19th October 2022.

3. Costs of suit be on attorney and client scale against the 1st Respondent, a person who purportedly signed a deed of settlement on behalf of the 2nd and 3rd respondents against both counsel who featured in the main application de bonis propriis jointly and severally one paying the other being absolved.”

[3] Factual Background

This application is opposed. I do not wish to burden this judgment with a lot of facts which are not germane to its determination. Suffice it for purposes of this judgment to state the following facts: The applicant is a company incorporated in the British Virgin Islands. It was liquidated and struck off the register of companies, and later brought back to life in terms of the laws of that Island for purposes of continuing with liquidation. The applicant is the majority shareholder in CGM (999 shares of 1000 issued shares). The remaining one share is owned by the brother of Ms Chang who deposed the affidavit on behalf of the applicant. The same state of affairs obtains in respect of Presitex Enterprises (Pty) Ltd (3rd respondent) in terms of shareholding.

[4] The orders of forfeiture therefore affected the majority shareholder who was not cited in the main proceedings. In his opposition, the 1st respondent raised two legal points against the applicant's case, namely, (i) The applicant's lack of capacity and power to institute legal proceedings and, (ii) Ms Eugenia Chang's authority to represent the liquidator.

[5] **Issues for Determination**

- (i) Points of law raised and
- (ii) The merits

[6] I turn to deal with the points of law raised by the 1st respondent.

(i) Authority of Ms Chang to represent Solandra Inc. (In Liquidation).

The 1st respondent argued strongly, and correctly in my view, that since Solandra is in liquidation the right to institute proceedings lies with the liquidator not the company. The situation of the applicant in this matter is compounded by the fact that its liquidation is in progress in a foreign jurisdiction. Ms Chang, who is South African sought to justify her *locus standi* to depose to affidavits on behalf Solandra on the basis of the Special Power of Attorney made in her favour by one Eugene Benedict Pak who on

the face it is the liquidator of Solandra Inc. appointed by the Supreme Court of British Virgin Islands. The said Power of Attorney which was issued on 23 May 2022, gave power to Ms Chang to represent Solandra Inc. (In Liquidation) in shareholders' meetings of CGM Industrial (Pty) Ltd and Presitex Enterprises (Pty) Ltd, to remove and appoint directors of CGM Industrial (PTY) and Presitex Enterprises (Pty) Ltd and to institute legal proceedings against Dalvi Madhav Vasant to recover all interests of CGM Industrial (Pty) Ltd he has 'unlawfully' taken, among other powers.

- [7] Even if we were to accept unquestionably that Ms Eugenia Chang has been delegated authority to do all these functions on behalf of Solandra Inc. there is a critical step which has been skipped rendering the supposed liquidator not to have *locus standi* to bring proceedings on behalf Solandra: The principle, trite it must be said, is that persons who are acting in representative capacity dealing with matters involving insolvency, bankruptcy or winding-up of companies in terms of foreign legislation must first apply to be recognised by the courts in this jurisdiction before they can bring proceedings. This is a well – settled principle as stated in **Moolman v Builders & Developers (Pty) Ltd 1990 (1) SA 954 AD** at 959G –H:

“Apart from the practical frustration of their functions that lack recognition brings about, it must be born in mind that it is a well-recognised principle that:

‘Where a foreign representative, such as an executor, liquidator, or receiver, wishes to deal with assets in this country in his representative capacity and by virtue of his foreign authorization he must first be recognised in his appointment by court of law or person of competent jurisdiction in South Africa before he is entitled to act’

(Per Watermeyer J in Liquidator Rhodesia Plastics (Pvt) Ltd v Elvinco Plastic Products (Pty) Ltd 1959 (1) SA 868 (C) at 869 C-D)”

[8] In the matter of **Cooperativa Muratori Cementisti – CMC Di Ravenna and Others v Companies and Intellectual Property Commission 2021 (3) SA 393 (SCA)**, at para [32] the court provided the rationale for the requirement that foreign liquidators acting in terms of foreign authorisation must first be recognised before instituting proceedings in this jurisdiction:

“[32] In dealing with issues involving foreign liquidators and similar persons acting in terms of the legislation governing insolvency or bankruptcy or the winding-up of companies, the established principle is for the foreign liquidator to apply for recognition in this country. Without recognition in this country they are not entitled to bring proceedings in a court in South Africa. The court granting recognition will then make an appropriate order including that they furnish security and will distribute the assets in this country in accordance with

the law of this country. Such recognition is granted in terms that protect the position of local creditors holding security for their claims under domestic law and the powers to be exercised by the foreign liquidator will be dealt with in the recognition order.”

[9] In the present matter the company is in liquidation and cannot bring proceedings unrepresented by the liquidator, and furthermore, given that a liquidator is foreign and acting in terms of foreign authorisation, he must first apply to be recognised as such in this country. In the absence of such recognition, the liquidator does not have *locus standi* to bring the proceedings for a company in liquidation in a foreign jurisdiction. This critical procedural step was not followed in this matter, and it is fatal to this application.

[10] However, the fact that this court has come to the above conclusion does not mean that this is the end of this matter as the court in terms of the powers it has under Rule 45(1) of the High Court Rules 1980, *mero motu* invited counsel to address it on the issue whether the order was not erroneously sought and granted in the absence of the necessary party. Rule 45(1) provides that:

“(1) 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) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as a result of a mistake common to the parties.

(2)

(3)

(4) Nothing in this Rule shall affect the rights of the court rescind any judgment on any ground on which a judgment may be rescinded at common law.”

[11] It is no doubt that the liquidator of Solandra Inc. (In Liquidation) has a direct and substantial interest in the order sought to be rescinded. It is common cause that the order was granted in the absence of this interested party. The next question to be determined is whether even though, the order was granted in the absence of the interested party, it was granted in error. The requirements in terms of this ground is that the order is erroneously sought and granted in circumstances where:

“[T]here existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it not to grant the judgment.” (Nyingwa v Moolman N.O 1993 (2) SA 508 (TK) at 510D-G: see also Rossitter v Nedbank Ltd [2015] ZASCA 196)

- [12] In rescission applications the existence or non-existence of defence on the merits is irrelevant in negating the order validly granted. This was stated in **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd [2007] ZSCA 85 : 2007 (6) SA 87 (SCA)** at paras. 25 – 7:

“A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claims as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.”

- [13] In the present matter, had the court been aware that Solandra Inc. is still in liquidation, it would not have acceded to the orders sought. In my considered view the orders were erroneously sought and granted in the absence of the affected party.

[14] **Costs**

The application for rescission brought supposedly by a company in liquidation was unsuccessful. The court had to raise the issue of whether its orders should not be rescinded, *mero motu*. As it turned out the order is rescindable. Although the 1st, 2nd, 3rd respondents were successful in resisting the application for rescission, on the approach triggered by the Court, they were unsuccessful. In my considered view the appropriate order of costs to be made in this matter is that each party bear its own costs.

[15] In the result the following orders are made:

- (i) The orders of this court issued on the 19 October 2022 in CCA/0101/2022 are rescinded.
- (ii) In consequence of (i) above, Solandra Inc. (In Liquidation) be joined as the respondent.
- (iii) All decisions, acts and resolutions done pursuant to the orders issued on the 19 October 2022 are hereby declared null and void and without any legal consequence.
- (iv) Each party to bear its own costs.

MOKHESI J

For the Applicant: Mr K. Ndebele from K. Ndebele Attorneys

For the 1st Respondent: Mr. Q. Letsika from Mei & Mei Attorneys Inc.

For the 2nd and 3rd Respondents: Adv. S. Phafane KC instructed by Mei & Mei Attorneys Inc.