THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 909/2023

In the matter between:

DR WAA GOUWS (JOHANNESBURG) (PTY) LTD	**APPELLANT**

and

HR COMPUTEK (PTY) LTD	**FIRST RESPONDENT**
YOLANDI ANN MES	**SECOND RESPONDENT**
JOHANNES HENDRICK DU PLESSIS N O	**THIRD RESPONDENT**
MARIAN OELOFSEN N O	**FOURTH RESPONDENT**
WELCOME NORMAN N O	**FIFTH RESPONDENT**
MASTER OF THE HIGH COURT JOHANNESBURG	**SIXTH RESPONDENT**

Neutral citation: *Dr Waa Gouws (Johannesburg) v HR Computek (Pty) Ltd and Others* (909/2023) [2025] ZASCA 103 (2025)

Coram: MBATHA, MOTHLE, HUGHES and UNTERHALTER JJA and MODIBA AJA

Heard: 27 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 15 July 2025.

Summary: Company Law – *locus standi* of directors in terms of s 354(1) of the Companies Act 61 of 1973 – residual powers of directors of wound-up company in bringing application to rescind order for winding up – whether a company being finally wound-up possessed necessary *locus standi* to bring an application to rescind or set aside a provisional order for winding-up – whether the directors of a finally wound-up company had residual powers to bring an application for rescission of a winding-up order without co-operation of its liquidators.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Coppin J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mbatha JA (Mothle, Hughes and Unterhalter JJA and Modiba AJA concurring):

[1] This appeal concerns the following cardinal questions of law. First, whether the company that is finally wound-up has *locus standi* to bring an application to rescind the provisional or final winding-up order. Second, whether such an application should be brought in terms of s 354(1) of the Companies Act 61 of 1973 (the Companies Act) or the common law. Third, whether it must do so with the assistance of the liquidators.

[2] On 21 November 2019, the first respondent, HR Computek (Pty) Ltd (HR Computek) was placed under a provisional winding-up order by the Gauteng Division of the High Court, Johannesburg (high court). A final order was made on 6 January 2020. The second, third and fourth respondents were appointed as joint liquidators. In July 2021 HR Computek brought an application seeking the rescission of the winding-up order and the setting aside of the certificate of appointment of the joint liquidators (the rescission application).

[3] The rescission application was predicated on the alleged fraudulent misrepresentation by the appellant, Dr Waa Gouws (Johannesburg) (Pty) Ltd (the Dr Waa Gouws company), acting at the instance of its director, Ms Yolandi Ann Mes (Ms Mes). In addition, HR Computek averred that the application for its winding-up was

never received by it. It was therefore unaware of the application, and as a result, it was deprived of an opportunity to oppose the winding-up application.

[4] In opposing the rescission application, the Dr Waa Gouws company challenged the *locus standi* of HR Computek by way of a point *in limine*. It contended that such an application could only be brought by a member, creditor or liquidator as envisaged in s 354(1) of the Companies Act.[1] As a result, HR Computek, assisted by its sole director, Mr Harry Chakala, had no *locus standi* to bring the application for the rescission of the winding-up order. In addition, the Dr Waa Gouws company alleged that HR Computek ought to have brought the application with the consent or co-operation of the joint liquidators.

[5] In opposing the point *in limine*, HR Computek relied on the director's residual powers to oppose the granting of the provisional and final winding-up orders in terms of the common law. Consequently, there was no reason, so it contended, why a company through its directors, and without the consent and co-operation of the liquidators, could not apply for the setting aside of an order granted in its absence.

[6] The argument raised by HR Computek found favour with the high court, which had separated the determination of the point *in limine* from the merits of the application for the rescission of the final winding-up order. On 12 July 2023, the high court (per Coppin J) dismissed the point *in limine* in respect of the *locus standi* of HR Computek. Alongside the dismissal of the point *in limine*, it upheld the point *in limine* raised by HR Computek regarding the *locus standi* of Dr Waa Gouws (in person), an insolvent, who acted for the Dr Waa Gouws company without the consent of the trustee. As a result, it ordered that Krige attorneys or any other attorney purporting to act on behalf of the Dr Waa Gouws company, deliver proper and acceptable proof of its mandate and authority to act for that company within ten days of the handing down of its order. It further ordered that in the event of non-compliance with the latter order, the respondents (HR Computek and Mr Chakala), if so advised, may apply for the strike-out of the notice of opposition and affidavits filed for the Dr Waa Gouws company in

[1] Section 354 of the Companies Act 61 of 1973 was retained and continues to be applicable as envisaged in Schedule 5 Item 9 of the Companies 71 of 2008.

the matter. The costs were reserved for the court that would determine the merits of the rescission application.

[7] Aggrieved by the decision of the high court, the Dr Waa Gouws company sought leave to appeal the judgment and order of the high court. The high court granted leave to appeal to this Court only on the question of the *locus standi* of HR Computek.

[8] It is against this background that we have to consider the following issues: First, whether the high court was correct in finding that there was no reason why the company cannot, through its directors, and without the co-operation of its liquidators, oppose or set aside the winding-up order granted in its absence. Second, whether s 354(1) did not find application in this case. Third, whether the company through its directors could bring the application for rescission or setting aside of a winding-up order.

[9] The high court in arriving at its decision, relied upon the judgments of *Storti v Nugent and Others* (*Storti*)[2] and *Praetor and Another v Aqua Earth Consulting CC* (*Praetor*)[3]. In *Storti*, the court concluded that where a winding- up order is assailable, a company may apply for rescission under the common law, provided it shows "sufficient cause".[4] Later on, in *Praetor*, the court reasoned that, since the directors may oppose or appeal a winding-up order in the company's name, there was no rational basis to distinguish that from seeking rescission of an order obtained without notice. In that regard, the court invoked *Storti's* recognition of a right to rescind. The same reasoning was followed by the court in *WN Attorneys Incorporated v Victor NO and Others*[5] where it held that the company and the directors have the 'residual power to oppose the final winding-up order and, by parity of reasoning, also apply for rescission'.

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[2] *Storti v Nugent and Others* 2001 (3) SA 783 (W) (*Storti*).
[3] *Praetor and Another v Aqua Earth Consulting CC* (162/2016) [2017] ZAWCHC 8 (*Praetor*).
[4] *Storti* at 807 A-C.
[5] *WN Attorneys Incorporated v Victor N.O and Others* [2024] ZAGPPHC 74 at para 9.

[10] The court in *Praetor* followed the decision in *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* (*O'Connell*) where it was reasoned that since the company in final liquidation retains the residual power to appeal against such order acting through its board of directors, without the consent or co-operation of the liquidators, 'there is no reason why a company could not take the necessary steps to oppose the confirmation of a provisional order'.[6] By the same token, the court in *Praetor* held that there was no logical reason why a company analogously could not apply for the rescission of the winding-up order.

[11] Before this Court, the Dr Waa Gouws company contended that an application for the stay or setting aside of a winding-up order of a company is only competent if it is made in compliance with s 354(1). In support of its contention, it submitted that though the directors may have residual powers to oppose the winding-up and/or to appeal a final order, the directors cannot do so through a resolution by a defunct board, as held in *Venbor (Pty) Ltd v Vendaland Development Co (Pty) Ltd t/a Camp Store* (*Venbor*).[7] They posited that as envisaged in s 348 of the Companies Act, the board of directors of HR Computek became defunct from the date of presentation of the winding-up application, hence no valid resolution could be passed. In addition, though conceding that the directors have residual powers to appeal a final winding-up order, the directors could not do so in the name of the company. For this contention, reliance was placed on the dicta in *Impac Prop Cc v THF Construction CC* (*Impac*).[8] In *Impac*, the court held that only the parties expressly mentioned in s 354(1) have *locus standi* to bring an application for setting aside or rescinding the winding-up order and not the company in liquidation. Furthermore, *Impac* also held that the failure to join the liquidators in the application was fatal as the liquidators have a direct and substantial interest in the matter.

[12] In addition, the Dr Waa Gouws company also placed reliance on the decision in *Ragavan and Another v Kal Tire Mining Services SA (Pty) Ltd and Others*

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[6] *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 (1) SA 553 (T) (*O'Connell*) at 558A.
[7] *Venbor (Pty) Ltd v Vendaland Development Co (Pty) Ltd t/a Camp Store* 1989 (2) SA 619 (V) (*Venbor*) at 626B-C.
[8] *Impac Prop Cc v THF Construction CC* [2019] ZAGPJHC 497 (*Impac*) paras 4 and 11.

(*Ragavan*)[9] which pronounced that s 354(1) is the only legislative provision that confers *locus standi* to a company which intends to bring an application for rescission or of setting aside of the winding-up order. In support of its contentions that a wound-up company could not pass a valid resolution to authorise the application and appointment of legal representatives, it placed its reliance on the dicta in *Venbor*.[10]

[13] Conversely, HR Computek submitted that the high court was correct in its reasoning and findings. The high court's reliance on *Storti* and *Praetor* were sound, as the two cases recognised the residual powers of the directors and the company to oppose, appeal, rescind or set aside liquidation orders. It further submitted that there was no merit in the submissions by the Dr Waa Gouws company that HR Computek should have sought the consent from, or the co-operation of the joint liquidators. In addition, it submitted that s 354(1) did not preclude the directors from bringing an application to rescind the judgment.

[14] Section 354(1) provides as follows: 'the Court may at any time after the commencement of the 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. . .'.[11] In interpreting this provision, the high court correctly found that '[t]he "liquidator, creditor or member" envisaged in that section need not be "a party affected" by the winding-up proceedings, in order to have standing to apply for the stay of the proceedings or for the rescission of the winding-up order'. Rule 42(1)*(a)* of Uniform Rules of Court states that an application for rescission may be brought by 'any affected' party. The rescission application brought in terms of Rule 42(1)*(a)* is not restricted to a liquidator, creditor or member. In fact, it refers to 'any affected' party, whether it be a company or its directors using their residual power to apply for the rescission of the winding-up orders. Furthermore, the *Storti* and *Praetor* judgments on which the high court relied, have been consistently followed. Whilst acknowledging that there are conflicting decisions that differ from *Storti* and *Praetor*, I respectfully find

[9] *Ragavan and Another v Kal Tire Mining Services SA (Pty) Ltd and Others* [2019] ZAGPPHC 455 para 14.
[10] *Venbor* fn 6 above.
[11] Emphasis added.

that the findings in *Impac* and *Venbor* are incorrect. In this regard the conclusions drawn in *Impac* and *Venbor*, that s 354(1) is the sole legislative provision that confers *locus standi* to a company after the commencement of winding-up, is incorrect.

[15] Section 354(1) must be interpreted in line with the trite principles of interpretation confined in *Natal Joint Municipal Pension Fund v Endumeni Municipality* judgment (*Endumeni*) and confirmed in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others*.[12] *Endumeni* reiterated that the process of interpretation is a unitary and objective exercise that pays due regard to the text, context and purpose of the document or instruments being interpreted.[13] In *Cool Ideas 1186 CC v Hubbard and Another* (*Cool ideas*),[14] the Constitutional Court held that the purposive approach, involves the interpretation of the legal text, such as statutes or contracts, in a manner that gives effect to the underlying purpose or intention behind the text. It emphasised that the words of statutes should be understood in their ordinary grammatical meaning, except where it would lead to absurdity.

[16] I conclude that Section 354(1) articulates clearly and unequivocally that a liquidator, creditor or member has *locus standi* to bring an application to stay or rescind the winding-up in terms of the provision. This aligns with the insolvency proceedings which are initiated by creditors and members of the company. And the liquidation process involves the oversight of the liquidators.

[17] I observe that the language utilised in s 354(1) specifically identifies the role players. It does not require that we read in parties, including the company or directors thereof, to reflect the legislative intent or purpose in the provision. This provision does not expressly, explicitly or implicitly exclude a company in liquidation or a board of directors from bringing such an application. I conclude that the drafters of the 1973 Companies Act never envisioned the exclusion of the residual powers of the directors and company in the context of the common law. Section 354(1) does not take away

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[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18 and confirmed in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29.
[13] *Endumeni* above paras 18 and 19.
[14] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

the inherent right acquired in terms of common law for the company in liquidation for obvious reasons. The common law right provides the company with an opportunity to challenge its winding-up, where it should never have been placed in liquidation for a variety of reasons, including fraudulent conduct. The high court correctly recognised that there are two distinct legal frameworks that govern the rescission applications in this scenario.

[18] On the other hand, the reasoning of the court in *Impac* was based on an incorrect interpretation of s 354(1), as it found that only the parties expressly mentioned in s 354(1) have *locus standi* to commence such proceedings. Equally so, where it held that the liquidator has to give consent to the proceedings, or co-operate with the applicant, because a liquidator has a direct and substantial interest. The distinction between the two legal frameworks is unmistakable. The directors have fiduciary duties to the company in relation to the opposition of the final winding-up order, whilst the provisional liquidator's focus is on the preservation of the assets, protection of assets and investigation of the affairs of the company, as fully set out in ss 386 to 370 of the Companies Act.

[19] Similarly, the *Ragavan* decision relied upon by the Dr Waa Gouws company was also incorrect in concluding that only s 354(1) confers *locus standi* to a party to the exclusion of the common law. Of significance is that it ignored that it was dealing with different stakeholders, the company and the board of directors, and on the other hand the s 354(1) applicants, being the liquidators, creditors and members of a company. The common law specifically gives the residual power to the company and the directors. The promulgation of s 354(1) was never intended to divest the company and the directors of their common law rights.

[20] The Dr Waa Gouws company, misconstrued the dicta in *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* (*Ward*). In *Ward*, this Court did not conclude that an application for a rescission of a winding-up had to be brought in terms of s 354(1), nor did it hold that such an application cannot be brought in terms of the common law or Rule 42. In *Ward*, this Court held that '[i]n order to have the final winding-up order set aside the appellants were obliged to invoke the

provisions of section 354(1) of the Act'. [15] This was said in reference to the liquidators, who had brought the application in *Ward*, as s 354(1) accords them the *locus standi*. It never pronounced that this was a general rule. Moreso, this was articulated in an *obiter dictum* statement.

[21] I now turn to consider the legal authorities that the high court relied upon in reaching its conclusion. In *Storti*, that court found that a wound-up company, represented by the board of directors, has a standing to apply for rescission of a provisional winding-up order. This conclusion substantiates the principle that the company continues to exist, even in the face of the winding-up order.[16] This aligns with the legal concept that the directors retain the residual powers to challenge and/or appeal the winding-up order. It can therefore be unequivocally concluded that the residual powers of the directors extend to the rescission of the winding-up orders in accordance with the common law or Rule 42.

[22] I find that, the court in *Storti* conclusively and correctly found that neither the common law nor Rule 42 requires that the company or directors be assisted by the liquidator or any other person. In establishing the requirements of a sufficient cause in a rescission application, the court emphasised that only two elements have to be satisfied: '(1) the party seeking relief must present a reasonable and acceptable explanation for his default, and (2) on the merits, such a party must have a *bona fide* defence which, *prima facie*, carries some prospect of success'.[17]

[23] In *Praetor*, where the court held the same perspective as in *Storti* and expressed itself as follows: '[i]t appears to be generally accepted that a company's directors have what has been described as "residual powers" to act on the company's behalf in causing it to oppose the confirmation of the rule in a provisional winding-up, or to appeal against a winding-up or to appeal against a winding-up order'.[18] In support of this contention, it referred to a useful collection of the relevant jurisprudence put up by Gautschi AJ in *Storti*. The court in *Praetor* went on to conclude that '…there is no

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[15] *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* [1998] 2 All SA 479 (A) (*Ward*) para 10.
[16] *Richter v Absa Bank Limited* [2015] ZASCA 100; 2015 (5) SA 57 (SCA) para 10.
[17] *Storti* fn 2 above at 807B-C.
[18] *Praetor* fn 3 above para 4.

rational basis to distinguish the standing of a board of directors to appeal in the company's name against a winding-up order from its standing *similarly to apply to set aside such an order obtained without its knowledge'*.[19] (Emphasis added.) I agree with this conclusion.

[24] In addition, *Preator* in affirming the finding in *Storti* that a company has the *locus standi* to rescind a winding-up order, it stated that '[i]t is clear from the context that the learned judge had in mind that the application to rescind would be mounted by the company at the instance of its board, not its liquidators'. It then went on to accept that the applicant (in *Praetor*) had standing to bring the rescission application. The courts in *Storti* and *Praetor* conclusively established, which I respectfully accept as valid, that there is no logical reason to distinguish the residual power to bring an application to set aside or appeal the winding-up order to the right to rescind a liquidation order in terms of the common law, Rule 42 or in terms of s 354(1).

[25] The pivotal conclusions reached in *Storti* and *Praetor* judgments were also confirmed in the *O'Connell* judgment. The court in *O'Connell* specifically affirmed 'that the company against which a final liquidation order is granted may appeal against such order acting through its board of directors and without the co-operation of the liquidator. This being the position, there is no reason why the company acting as aforesaid cannot take the necessary steps to oppose the confirmation of a provisional liquidation order. It added that '[t]his would include not only opposition and appearance on the return day but also any proceedings to anticipate such return date'.[20] Similarly in *Kets Group (Pty) Ltd v Business Partners Limited* (*Kets*)[21] the court followed the reasoning in *Storti* and *Praetor* and found them to be progressive in that there is no logic in that the application for rescission should be brought with the assistance of the liquidator. This view was also endorsed in *WN Attorneys Incorporated v Victor N.O and Others*.[22]

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[19] *Preator* fn 3 above para 4.
[20] Ibid *O'Connell* at 558.
[21] *Kets Group (Pty) Ltd v Business Partners Limited* [2024] ZAECMKHC 131 para 35.
[22] *WN Attorneys Incorporated v Victor N.O and Others* [2024] ZAGPPHC 74 para 9.

[26] In my view and by parity of reason, I have come to the same conclusion as the high court. The high court was correct in finding that HR Computek has *locus standi* to apply for a rescission of the winding-up orders. And that it did not have to bring the application in terms of s 354(1) nor that it be assisted by the joint liquidators of the company.

[27] In the result, I make the following order:

The appeal is dismissed with costs.

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Y T MBATHA
JUDGE OF APPEAL

Appearances

For the appellant:	A van der Walt
Instructed by:	Tsihlas and Krige Attorneys Inc., Pretoria
	Phatshoane Henny Attorneys, Bloemfontein
For the first respondent:	D Z Kela
Instructed by:	Ndumiso Voyi Inc., Johannesburg
	MM Hattingh Attorneys, Bloemfontein.