



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**CASE NO: CT00283ADJ2020**

**In the matter between:**

**SEYEDREZA SEYED NIKKHOO**

**Applicant**

**and**

**AMIR HOSSEIN REZAEI**

**Respondent**

**In re:**

**CASE NO: CT012MAY2019**

**In the matter of:-**

**AMIR HOSSEIN REZAEI**

**Applicant**

**and**

**SEYEDREZA SEYED NIKKHOO**

**Respondent**

**In re:**

**SINA PETROLEUM AND GAS (PTY) LTD**

**Issue(s) for determination:** This is an application for condonation for the late filing of rescission application and an application for rescission of a Default Order delivered by the Companies Tribunal on the 12<sup>th</sup> of July 2019.

**Coram:** Lindelani Daniel Sikhitha

**Date of handing down of decision:** 24 August 2020

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### **DECISION (Reasons and Order)**

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#### **A. INTRODUCTION**

[1] The Applicant is Seyedreza Seyed Nikkhoo who is an adult male businessman and a former director of Sina Petroleum and Gas (Pty) Limited (“the Company”). The Company is a private company duly incorporated in accordance with the company laws of the Republic of South Africa with registration number 2003 / 024520 / 07.

[2] The Respondent is Amir Hossein Rezaei who is an adult male businessman and a director of the Company. The Respondent is cited as the Applicant in the Application for removal of the Applicant as director of the Company. But for purposes of this determination, I will proceed to refer to him as the Respondent.

#### **B. THE APPLICATION**

[3] This is an Application for the rescission of a Default Order delivered by the Companies Tribunal, per Veldhuizen PJ, on the 12<sup>th</sup> day of July 2019, in terms whereof the Applicant was removed as a director of the Company. The

Applicant alleges that he was not in willful default of the Respondent's Application and further that he has a *bona fide* defences to the Respondent's claims and allegations. Since the Applicant delayed in filing his Application for Rescission of the Default Order, he simultaneously brought an Application for Condonation. I will therefore proceed to deal with the two applications as one application for reasons that will be outlined in my determination.

### **C. ANALYSIS OF APPLICABLE LEGISLATIVE PROVISIONS**

[4] In terms of section 195(1)(a) of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act") the Companies Tribunal, or a member of the Companies Tribunal acting alone in accordance with the Act, may adjudicate in relation to any application that may be made to it in terms of the Act, and make any order provided for in this Act in respect of such an application.

[5] In terms of regulation 142(1) of the Companies Regulations, 2011 ("the Regulations"), a person may apply to the Companies Tribunal for an order in respect of any matter contemplated by the Act, or these Regulations, by completing and filing with the Companies Tribunal's recording officer, the following documents:-

5.1 an application in Form CTR 142; and

5.2 a supporting affidavit setting out the facts on which the application is based.

[6] This Application for Rescission does comply with regulation 142(1) of the Regulations. In terms of regulation 142(3) of the Regulations a rescission or

variation of a decision of the Companies Tribunal appears to be possible and in fact, the Companies Tribunal seems to have jurisdiction to entertain such an application. The relevant provisions of regulation 142(3) read as follows:

***“An application in terms of this regulation must-***

- (a) indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made; and***
- (b) depending on the context -***
  - (i) set out the Commission's decision that is being appealed or reviewed;***
  - (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;***
  - (iii) set out the regulation in respect of which the applicant seeks condonation; or***
- (c) indicate the order sought; and***
- (d) state the name and address of each person in respect of whom an order is sought.”***

[7] After careful reading of the provisions of regulation 142(3) of the Regulations referred to above, it is my firm view therefore that the Companies Tribunal does have jurisdiction to vary or rescind its own decisions. In my view regulation 142(3)(b)(ii) of the Regulations, although lacking in detail, is intended to serve the purpose of affording parties an opportunity to apply for variation or rescission of orders of the Companies Tribunal. I have however noted that regulation 142(3) does not provide for the time period within which

an application for rescission or variation has to be brought before the Companies Tribunal.

[8] So where does this then put a party who wishes to approach the Companies Tribunal for a variation or rescission of the Companies Tribunal's Default Order? Does that then mean such a party have unrestrained time to bring such an application? I am of the view that to answer these questions one must do an exploration of the Regulations to see if the answers do not reside there. Regulation 154(1) of the Regulations surely provides an answer to this question and the relevant provisions read as follows:

***“(1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter-***

- (a) may give directions on how to proceed; and***
- (b) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Regulations, the member may have regard to the High Court Rules.”***

[9] Having regard to the provisions of regulation 154(1)(b) referred to above, I am convinced that I should follow the practice and procedure that is followed in the High Court when dealing with applications for rescission of default orders. It follows therefore that I should have regard to the High Court Rules (sometimes referred to as Uniform Rules of Court) which deal with launching of applications for rescission of judgment. Applications for rescission

judgments are provided for in rule 42 of the High Court Rules. The relevant provisions of Rule 42 of the High Court Rules read as follows:

**“(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 the result of a mistake common to the parties.**

**(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.**

**(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”**

[10] Rule 42 of the High Court Rules does not provide time frame within which an application for rescission or variation of judgment has to be brought. In terms of rule 31(2)(b) of the High Court Rules a defendant may within 20 days after

he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet. In terms of case law perused an application for rescission or variation of judgment in terms of Rule 42(1)(a) may be brought outside the 20 days period. However, such an application must be brought within a reasonable time period and any delay must be explained fully. An applicant must therefore also show good cause justifying an order for condonation. The party seeking such condonation should satisfy the court that the relief sought should be granted especially where the applicant is *dominus litis*.<sup>1</sup>

#### **D. APPLICATION FOR CONDONATION**

[11] I now turn to deal with the Application for Condonation for the late filing of the rescission application in this matter. The Applicant alleges that he obtained knowledge of the Companies Tribunal's Default Order in this matter for the first time on the 9<sup>th</sup> day of October 2019 through an email communication received from Helette Louw of Jordaan Attorneys (his erstwhile attorneys) ("Jordaan Attorneys").

[12] The Applicant further alleges that he left South Africa on 22<sup>nd</sup> of December 2018 to undergo medical treatment in Iran and he returned to South Africa on the 13<sup>th</sup> day of September 2019. Upon his return, he contacted Jordaan Attorneys to arrange a meeting with them in order to discuss the spoliation

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<sup>1</sup> See *Standard General Insurance Co Limited v Eversafe (Pty) Limited* 2000 (3) SA 87 (W) at 93G

application which has been brought in his name in the Johannesburg High Court against the Respondent. On the 9<sup>th</sup> day of October 2019, Jordaan Attorneys informed him of the Companies Tribunal's Default Order in this matter.

[13] On the 21<sup>st</sup> day of October 2019, the Applicant met with Mr. Eamonn David Quinn ("Mr Quinn") of Quin Attorneys Incorporated in order to discuss the Companies Tribunal's Default Order in this matter and the steps to be taken in order to obtain the rescission of the Default Order. Mr. Quinn advised the Applicant that he would need to obtain a copy of the Respondent's Application in this matter, in order to proceed with an Application for Rescission of Default Order. Mr. Quinn immediately requested the Applicant's file from Jordaan Attorneys and he received it on the 4<sup>th</sup> day of November 2019. However, this file did not contain a copy of the Respondent's Application for Applicant's removal as director that was made to the Companies Tribunal.

[14] On the 7<sup>th</sup> day of November 2019, Mr. Quinn sent an email communication to the Companies Tribunal requesting for a copy of the Respondent's aforesaid Application. On the 19<sup>th</sup> day of November 2019, Mr. Quinn received a copy of the Respondent's aforesaid Application from the Companies Tribunal.

[15] On 29 November 2019, the Applicant together with Mr. Ray Rafii met with Mr. Quinn at his offices in order for the Applicant to provide Mr. Quinn with detailed instructions in response to the various allegations contained in the Respondent's Founding Affidavit in support of his Application for removal of the Applicant as director of the Company. Mr. Quinn requested certain



documents from the Applicant and these were only provided by the Applicant on the 5<sup>th</sup> day of December 2019.

- [16] The Applicant therefore submit that good cause exists for the Companies Tribunal to condone his delay in brining the Application for rescission of default order outside the 20 court days period. The Applicant was only in a position to prepare the current Application for rescission of default order on the 19<sup>th</sup> day of November 2019 when Mr. Quin was furnished with the Respondent's Application by the Companies Tribunal.
- [17] The Applicant submits that the Respondent will not be prejudiced by the delay in bringing this Application and that it is indeed the Applicant who will suffer and continues to suffer severe prejudice, given that he has been excluded from the management of the Company by the Respondent. The Applicant further alleges that he has very good prospect of success in his Application for rescission of the Companies Tribunal's Default Order.
- [18] The Respondent did file an Answering Affidavit in response to the Application for rescission of Companies Tribunal's Default Order. It is noteworthy to point out the fact that the Respondent did not deal with the Applicant's condonation application and reasons provided thereof as fully set out in paragraph 4 to 11 of the Applicant's Affidavit in Support of Application for Condonation and Rescission of Default Order. I will deal with my finding in relation to the Applicant's condonation application at a later stage.

**E. ABSENCE OF WILLFUL DEFAULT**

[19] The Respondent's Application for removal of the Applicant as director of the Company was served upon Carlos Filipa, a receptionist, at the Company's registered address situated at 15A Marion Street, Sandown, Sandton. The Applicant alleges that his registered address as a director as per records obtainable from Companies and Intellectual Property Commission ("the CIPC") was 12 Edward Rubenstein, Sandown, Sandton. The Respondent and his family allegedly conduct business from the address situated at 15A Marion Street, Sandown, Sandton. The Respondent also conducts the business of a company known as Marion Lodge (Pty) Limited at the address referred to above.

[20] The Applicant alleges that the Respondent deliberately served the Application for Applicant's removal as a director of the Company at an address where he knew that the Application would never come to the attention of the Applicant. The Respondent clearly had the Application served at a wrong address under circumstances where he was fully aware that the Applicant was in Iran. The Respondent could have the Application emailed to the Applicant if he did wanted the Applicant to be served and to acquire knowledge of the Application.

[21] Be that as it may, in response to the allegations levelled against him by the Applicant, the Respondent to state the following:

***"The Respondent's application for the removal of the Applicant as one of the directors of Sina ("application") was served at Sina's registered address. Annexure FA 1 of the application containing***

***COR39 as issued by the Companies and Intellectual Properties Commission ("CIPC"), reflects the aforementioned registered address. The application was available at the registered address to be inspected by the Applicant at all times. The Applicant's absence from South Africa did not relieve him of his fiduciary duties and his duties of skill and care by remaining appraised of the affairs of Sina and therefore to maintain contact with Sina's registered office. In this regard the Applicant, failed to maintain contact with myself and/or Mr. Hossein Rezaei, the minority shareholder of Sina, during his stay in South Africa or after his subsequent visit to Iran. Accordingly, his conduct is in dereliction of his duties, which formed the very basis of my application to have him removed as a director of Sina."***

[22] Be that as it may, the Respondent did serve the Application for removal of the Applicant as a director of the Company at an address which he knew the Applicant will not receive it. This is indeed a classic case in which the Respondent flouted the fundamental principle of natural justice. Based on his response to the Applicant's Supporting Affidavit, the Respondent clearly does not care about the importance of affording his opponent an opportunity to be heard before an adverse decision is taken against such opponent. I find the attitude adopted by the Respondent to be exceedingly disconcerting to say the least.

[23] I am therefore satisfied that the Applicant was not in willful default of the Respondent's Application to have him removed as director of the Company. It is common cause that the Application was served at the registered address of

the Company situated at 15A Marion Street, Sandown, Sandton. The registered address of the Company is interestingly also a registered address of a lodge business that is conducted by the Respondent under the name Marion Lodge (Pty) Limited. The Respondent's Application for removal of the Applicant as a director of the Company was, conveniently for the Respondent, received by a receptionist by the name of Carlos Filipa.

[24] There is no explanation as to what the receptionist did with the Application and why such Application was not brought to the attention of the Applicant by the aforesaid receptionist. According to the papers before me, the Applicant's residential address is situated at 12 Edward Rubenstein, Sandown, Sandton. I am therefore satisfied that the Application never came to the attention of the Applicant and he was therefore not in willful default to respond to Respondent's aforesaid Application.

#### **F. *BONA FIDE DEFENCE***

[25] In his Application for removal of the Applicant as director of the Company, the Respondent alleges that the Applicant did the following:

25.1 Intentionally inflicted harm on the Company;

25.2 Acted in a fraudulent manner and/or attempted to do so; and

25.3 Fraudulently misrepresented himself.

[26] The Applicant deals with each of the 8 different sets of factual allegations that were made in support of the Respondent's contentions listed in paragraph [25] above in the manner outlined below:

26.1 The Respondent submitted documents to the CIPC in respect of the Applicant's purported resignation as a director of the Company with effect from the 12<sup>th</sup> day of July 2019. The Applicant denies having signed such documents. In addition, the Applicant alleges that the purported certified copy of his Passport document which was done on 04 June 2019 is impossible to have been legally done because the Applicant had his original Passport document with him in Iran.

26.2 The Applicant confirms that the signatures on Annexures "SEN10" and "SEN11" are all forgeries.

26.3 The forged documents were submitted to the CIPC to reflect that the Applicant resigned as a director and not that he was removed as a director in compliance with the Companies Tribunal's Default Order issued on 12 July 2019. As a result, the records of the CIPC reflect that the Applicant resigned as a director and not that he was removed. This was undertaken by the Respondent in a fraudulent manner and accordingly the Applicant laid the necessary criminal complaint against the Respondent in this regard.

26.4 In paragraph 16 of his Affidavit, the Respondent alleges that the Company purchased a Mercedes Benz motor vehicle for the Applicant in the sum of R199 950.00 on the basis that the Applicant would repay such sum to the Company. According to the Applicant, the allegations

made by the Respondent in this regard are self-evidently false, misleading and in fact have nothing at all to do with the Company.

26.5 As appears from Annexure “FA2”, the FNB Business Account: 62389 755 037 is a personal bank account of Mr. Hossein Rezaei, a shareholder in the Company. This is not a Company’s business bank account. On 18 November 2013 and on the same day he paid the amount of R199 950.00 on the Applicant’s behalf to Pinnacle Cars for the purchase of the Mercedes Benz motor vehicle, the Applicant paid the amount of R200 000.00 into Mr. Hossein Rezaei’s bank account to repay Mr. Hossein Rezaei for the purchase price he paid to Pinnacle Cars on behalf of the Applicant.

26.6 According to the Applicant, Mr. Hossein Rezaei assisted the Applicant in his personal capacity regarding the purchase of the Mercedes Benz motor vehicle and he paid Pinnacle Cars the purchase price of R199 950.00. The Applicant is accordingly not indebted to the Company, nor Mr. Hossein Rezaei and the transaction has nothing at all to do with the Company.

26.7 In paragraphs 17, 18 and 19 of Respondent’s Affidavit in support of his Application for removal of the Applicant as director of the Company, the Respondent alleges that the Company paid an amount of R770 000.00 to the Iranian Embassy on behalf of the Applicant. The Respondent further alleges that the Applicant failed to repay the aforementioned sum of money to the Company after same was refunded to the Applicant by the Iranian Embassy.

- 26.8 According to the Applicant and once again the Respondent, in his own evidence, is demonstrably telling false and misleading evidence. The amount referred to by the Respondent does not having anything at all to do with the Company. Annexure FA3 to the Respondent's Affidavit in support of the Respondent's Application for removal of the Applicant as director contains documentary extracts from the personal bank account of Mr. Hossein Rezaei.
- 26.9 According to the Applicant, the sum of R770 000.00 was in fact paid from Mr. Hossein Rezaei's personal account to the Iranian Embassy for the purchase of US Dollars. As appears from Annexure FA3, the amount of R310 00.00 was paid into the bank account on the 27<sup>th</sup> of May 2014 and the amount of R520 000.00 on the 6<sup>th</sup> of June 2014, to cover for the purchase of US Dollars. The amount of R310 000.00 was paid on the Applicant's behalf by Gil Petroleum into Mr. Hossein's Rezaei's personal bank account and the sum of R520 000.00 was paid into his personal bank account from the Company's bank account. The Applicant did not have an obligation to repay such sum money to the Company.
- 26.10 In paragraph 20 of the Respondent's Affidavit, certain allegations are made regarding the purchase of a Nissan motor vehicle. It is specifically alleged that the Company purchased the Nissan motor vehicle from Marion Lodge (Pty) Ltd and in fact paid for the Nissan motor vehicle. The said Nissan motor vehicle was allegedly registered in the personal names of the Applicant. According to the Applicant the Respondent is fraudulently misrepresenting the true nature of the

transaction relating to the Nissan motor vehicle. The transaction has nothing to do with the Company.

26.11 The Applicant purchased the Nissan motor vehicle in his personal capacity from Marion Lodge (Pty) Ltd during 2013. The document annexed as Annexure FA4 was delivered to the Applicant in blank on 3<sup>rd</sup> of March 2017 and he signed the document as a receipt of the Nissan motor vehicle. The document did not contain any particulars pertaining to the Company as a purchaser and such particulars must have been filled in later by the Respondent or Mr. Hossein Rezaei.

26.12 The original agreement was that the Applicant would purchase the Nissan motor vehicle for the sum of R130 000.00 and that he would pay it off by way of monthly cash payments and such payments would be paid to Mr. Hossein Rezaei. Annexure "SEN14" is a record of the various receipts and transactions thereof pertaining to the purchase of the Nissan motor vehicle.

26.13 According to the Applicant, after paying off the purchase price for the Nissan motor vehicle, Mr. Hossein Rezaei provided the Applicant with all the relevant documents pertaining to Marion Lodge (Pty) Ltd in order for the Applicant to register the Nissan motor vehicle into his personal name.

26.14 The Respondent proceed to open a criminal case relating to the Nissan motor vehicle under Case Number: 346/9/2018 at the Bramley Police Station. According to the Applicant, the case was withdrawn as a result of the documentation that the Applicant provided to the



police which confirmed that he in fact purchased the Nissan motor vehicle in his personal capacity.

26.15 In paragraphs 21 of the Respondent's Affidavit, the Respondent alleges identity fraud in respect of a letter to a company described as Makwena Engineering (Pty) Ltd ("Makwena") for the purpose of the Company supplying equipment to Makwena for a government tender. According to the Applicant, he signed a blank letterhead of the Company and gave same to Makwena for them to complete their government tender and the Respondent was aware of it. Makwena mistakenly inserted the Respondent's details above the Applicant's signature. The letter to Makwana was in support of their tender confirming that the Company would supply certain equipment should Makwena be successful in its tender bid.

26.16 The Respondent in paragraph 21.3 of his Affidavit alleges another act of identity fraud committed by the Applicant. He is claiming that the Applicant attended a Standard Bank branch requesting certain information regarding the Company and pretending to be the Respondent. According to the Applicant, during October 2018, the Applicant was a director of the Company and he could just access the Company's information in his name. Therefore this allegation is false and ridiculous and the Respondent also failed to provide Confirmatory Affidavits by either Mr. Hossein Rezaei or the unidentified representative of Standard Bank.

- 26.17 At paragraph 22 of his Affidavit, the Respondent makes various bald and general allegations pertaining to an attempted fraud “about three years ago” in terms whereof it is alleged that the Applicant went into a Standard Bank branch and asked that all the Company’s funds be transferred into the Applicant’s personal bank account. These allegations is simply false and ridiculous and no confirmatory evidence is provided in this regard.
- 26.18 In 2016, the Applicant did go into a branch of Standard Bank and asked for a statement pertaining to the Company’s bank account, which he duly received in his capacity as a director of the Company. He never asked for any funds to be transferred into his personal bank account. If such request was made by him, it should have required the approval of both the Respondent and the Applicant.
- 26.19 In paragraph 23 of his Affidavit, the Respondent makes various allegations pertaining to alleged misrepresentations being made by the Applicant to the Department of Trade and Industries (“the Dti”) In particular it is alleged that the Applicant made misrepresentation that he is the sole shareholder of the Company for the purpose of fraudulently obtaining a permanent residency.
- 26.20 The Respondent did not provide the reasons as to why the Applicant had to deal with the Dti with regard to the issue of permanent residence, given that this matter is a matter which is dealt with by the Department of Home Affairs (“the DHA”). According to the Applicant he never had any dealings at all with the Dti and he has certainly not

made any of the alleged misrepresentation with regard to the Company to the DHA with a view of obtaining the requisite permits for him to be in South Africa.

26.21 According to the Applicant he is the sole director and shareholder of a company described as The Curious Place (Pty) Ltd. It was intended that this company was to be a shareholder in the Company holding 67% of the issued shares. For reasons known by the Respondent, the Share Certificate was issued in the Applicant's personal name and not in the name of The Curious Place (Pty) Ltd.

26.22 In paragraph 24 of his Affidavit, the Respondent alleges that the Company loaned an amount of R424 000.00 to a Mr. Seyed M. Mir-Afzal, which sum of money was to be repaid to the Company, but it was allegedly repaid to the Applicant. Annexure FA8 to the Respondent's Affidavit is again an extract from Mr. Hossein Rezaei's personal bank account and the transaction concerning Mr. Mir-Afzal has nothing at all to do with the Company.

26.23 As far as the Applicant can recall, Mr. Mir-Afzal made payments of R215 000.00 and R210 000.00 to Mr. Hossein Rezaei in order for Mr. Hossein Rezaei to purchase scaffolding in Johannesburg for and on behalf of Mr. Mir-Afzal, who is based in Swaziland. Mr. Hossein Rezaei was not able to find or purchase the scaffolding and then he refunded the sum of R424 000.00 to Mr. Mir-Afzal on the 10<sup>th</sup> of August 2016, whilst keeping the balance of R1 000.00 for himself. There was certainly no loan made by the Company to Mr. Mir-Afal and

certainly no payment of the sum of R424 000.00 was made to the Applicant by the Company.

[27] According to the Applicant, the Respondent's allegations in his Founding Affidavit were knowingly contrived and for the fraudulent purposes of removing the Applicant as a director of the Company. The Respondent's true purpose of removing the Applicant as a director was to effectively remove the Applicant from the day-to-day affairs of the Company, in circumstances where the Company remains indebted to the Applicant on loan account in an amount of US\$ 2 387 650.00. The Applicant believes that the Respondent removed him as a director in order to take control of the Company and thereby being able to sell the Company's assets for the benefit of him and his father. This would prevent the repayment of the loan account of the Applicant.

[28] Based on what the Applicant outlined above, it is the Applicant's submission that he has a valid and *bona fide* defences to the Respondent's allegations and claims, as articulated in his Application for removal of the Applicant as a director. The Applicant is confident that he will succeed in reversing his removal as a director pursuant to a hearing in due course.

[29] I did peruse the Answering Affidavit of the Respondent and I could not find much that the Respondent is disputing except making bare denials with no relevant versions which are placed to show the basis for such denials. In addition, the Respondent is just making allegations regarding third parties without providing any confirmatory affidavits for such third parties to confirm truthfulness of such allegations.

[30] The test to be applied when dealing with a rescission application especially as to the issue of whether a *bona fide* defence has been disclosed, is similar to the test that is applied in the summary judgment application. The principles applicable to rescission applications brought in terms of the common law are similar to those brought in terms of Rule 42(1). The defences must not only be decided against the backdrop of the full context of the case but must also be *bona fide* and the nature of the grounds of the defence and the material facts relied upon must be disclosed fully.<sup>2</sup>

[31] I am therefore satisfied that the Applicant has shown that he has a valid *bona fide* defences against the allegations and claims that have been made by the Respondent in his Application for removal of the Applicant as a director.

**G. EVALUATION OF THE APPLICATION FOR RESCISSION OF DEFAULT ORDER AND THE CONDONATION APPLICATION THEREOF**

[32] I now turn to deal with the evaluation of the facts presented by the Applicant in relation to both the Application for Condonation and the Application for Rescission of Default Order. What are then the important factors which a party must consider before launching an application for rescissions of a default judgment?

[33] The Respondent (now the Applicant) is required to set out in an affidavit why the matter was not defended and what the *bona fide* defence is to the claim of

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<sup>2</sup> See *Standard Bank of SA Limited v El-Naddaf and another* 1999 (4) SA 779 (W) at 78A-786F

the Applicant (now the Respondent). As usual, the onus is upon the Applicant to set out legitimate reasons for why the matter was not defended.<sup>3</sup>

[34] When bringing an application for the rescission of judgement before court, the following principles are applicable:

34.1 The Applicant must give a reasonable explanation for his default. The court will be unwilling to help the Applicant if it is found that he was aware of the proceedings against him or if the default was simply due to his own negligence. If the Applicant's default is of a wilful or negligent nature, these will serve as considerations that the court will take into account when deciding whether an application should be granted.

34.2 In many cases an Applicant simply rescinds a default judgement to delay the inevitable. It is therefore necessary for the Applicant to show that he is not simply delaying the Plaintiff's claim. A *bona fide* defence, in other word a genuine defence, must therefore be shown, although it is not required to deal fully with the merits thereof or produce any evidence in this regard.

34.3 Ultimately, the court has discretion whether to rescind the default judgment or not, based on whether good cause was shown by the Applicant.

[35] It is my view therefore that an application for rescission of judgment should be accompanied by an application for condonation in the event that same is

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<sup>3</sup> See *Du Plessis v Tager* 1953 (2) SA 5 (O).

brought outside the 20 court days. In this matter, the Applicant has indeed brought an application for condonation of the late launching of this rescission application brought in terms of regulations 147 of the Regulations. I would, as I am entitled to, consider the application for condonation at common law, in terms of which a judgment or order may be rescinded on 'good cause' shown by the Applicant.

[36] The general approach to applications for rescission of default judgment was restated by Smallberger J (as he then was) in *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F-301C in the following terms:

***“In Grant v Plumber (Pty) Ltd 1949 (2) SA 470 (O) Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause, an application should comply with the following requirements:***

- 1. He must give reasonable explanation for his default;***
- 2. His application must be bona fide;***
- 3. He must show that he has a bona fide defence to the plaintiff's claim.”<sup>4</sup>***

[37] In my view, the jurisdictional requirement of 'good cause' which must be shown by an applicant entails three essential elements. First, a reasonable and acceptable explanation for the default, second, a demonstration that the application is made in good faith (bona fide), and a demonstration of a 'bona

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<sup>4</sup> See also a scholarly exposition by Jones J, in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711 E-I.

fide' defence to the Respondent's allegations and claims. In *Chetty y Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 B - C, the following was stated:

***“But it is clear that in principle and in the long standing practice of our courts, two essential elements of “sufficient cause” for rescission of a judgment by default are: (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (ii) that on the merits such a party has a bona fide defence which prima facie carries some prospect of success.”***

[38] Having established the proper approach that should be followed in dealing with this Application for rescission of Default Order, I turn now to consider the three elements of: good cause. I must do so considering the explanation proffered by the Applicant for his default to defend the proceedings instituted for his removal as director of the Company. The explanation is simply that the Applicant did not receive the Respondent's Application for his removal as director of the Company.

[39] The following facts that are common cause are considered important for my determination of the Application for Rescission in this matter:

39.1 that the Applicant was in Iran between 22 December 2018 and 13 September 2019.

39.2 that the Application was served at the registered address of the Company situated at 15A Marion Street, Sandown, Sandton.

39.3 that the registered address of the Company is also the registered address of a business of a lodge that is conducted by the Respondent under the name Marion Lodge (Pty) Limited.



- 39.4 that the Applicant's registered address as a director of the Company is situated at 12 Edward Rubenstein, Sandown, Sandton.
- 39.5 that the Applicant obtained knowledge of the Companies Tribunal's Default Order in this matter on the 9<sup>th</sup> of October 2019.
- 39.6 that on the 21<sup>st</sup> day of October 2019 the Applicant met with Mr. Quinn (his attorney) to discuss the Companies Tribunal's Default Order in this matter and the steps to be taken to obtain the rescission of the same.
- 39.7 that Mr. Quinn requested the Applicant's file from Jordaan Attorneys and he received it on the 4<sup>th</sup> day of November 2019.
- 39.10 that the file received from Jordaan Attorneys did not have a copy of the Respondent's Application for Applicant's removal as a director of the Company.
- 39.11 that on the 7<sup>th</sup> day of November 2019, Mr. Quinn requested a copy of the Respondent's Application to have the Applicant removed as a director of the Company from the Companies Tribunal. A copy of the requested Application was received from the Companies Tribunal on the 19<sup>th</sup> day of November 2019.
- 39.12 that on the 29<sup>th</sup> day of November 2019, the Applicant together with Mr. Ray Rafii did meet with Mr. Quinn in order to provide Mr. Quinn with detailed instructions in response to the various allegations contained in the Respondent's Founding Affidavit to the Application for removal of Applicant as director of the Company. During the aforementioned consultation, Mr. Quinn asked for certain supporting

information and the Applicant was able to provide such information on the 5<sup>th</sup> day of December 2019.

39.13 that Mr. Quinn was able to prepare the Applicant's supporting affidavit and same was then signed and commissioned on the 12<sup>th</sup> day of December 2019.

39.14 that the Application for rescission of Companies Tribunal's Default Order was served and filed with the Registrar of the Companies Tribunal on the 12<sup>th</sup> day of December 2019.

[40] Given the chain of events outlined above, I am therefore satisfied that the Applicant provided a reasonable explanation for the delay in bringing the Application for rescission of the Default Order and therefore he has shown good cause for his application for condonation to be granted.

[41] Further, I am also satisfied that the Applicant has shown that it has *bona fide* defences against the Respondent's allegations and claims, as articulated in the Respondent's Application to have the Applicant removed as director of the Company. The interests of justice and in fairness to both parties the Respondent's Application should be heard by the Companies Tribunal in the normal cause and the Applicant should be afforded an opportunity to defend himself before any decision is made by the Companies Tribunal.

## **H. FINDINGS**

[42] I am of the firm view that the issues raised by both parties need to be ventilated in a hearing before the Companies Tribunal to enable the presiding officer to

make an informed determination of the issues in dispute. This is so if one considers the fact that there are serious allegations and counter-allegations which borders along the line of misrepresentation and fraud that each of the parties is making against the other.

- [43] The Applicant has managed to show good cause that the Companies Tribunal must grant condonation for his delay in filing the Application for rescission of the Default Order. He has also managed to show good cause that he was not in willful default and further that he has valid *bona fide* defences against the allegations and claims made by the Respondent in his Application for removal of the Applicant as director of the Company.

## **I. ORDER**

- [44] I therefore make the following order:

- 44.1 The Application for Condonation of the late filing of the Application for Rescission of the Default Order is hereby granted.
- 44.2 The Application for Rescission of Default Order granted on 12 July 2020 is hereby granted.
- 44.3 The Default Order granted by the Companies Tribunal on 12 July 2019 is hereby rescinded.
- 44.4 The Applicant is granted leave to oppose the Application for his removal as director of Sina Petroleum and Gas (Pty) Limited.
- 44.5 Pending finalization of the Application for removal of the Applicant as director of Sina Petroleum and Gas (Pty) Limited, the Applicant should be reinstated as director of Sina Petroleum and Gas (Pty) Limited with

immediate effect.

44.6 The Applicant and the Respondent are hereby ordered to co-operate with each other and to sign the documents that are necessary and required by the CIPC for reinstatement of the Applicant as director of Sina Petroleum and Gas (Pty) Limited.

44.7 There is no order as to costs.

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**LINDELANI DANIEL SIKHITHA**

**Member of the Companies Tribunal**

**24 August 2020**