REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
Case No: 2023-029129

In the matter between:

PENTAGAR PROPERTIES (PTY) LTD	First Applicant
BUKHOSINI PROJECTS (PTY) LTD	Second Applicant
SISANDA ZIMKHITA MABUDE	Third Applicant
NHLANHLA JOSHUA SIBEKO	Fourth Applicant
and	
RENVAC CONSULTING ENGINEERS (PTY) LTD	First Respondent
SEAN BRUNKE ARCHITECT (PTY) LTD	Second Respondent
PHARMACEUTICAL MARKETING CONSULTING GROUP (PTY) LTD	Third Respondent
ENPROCON (PTY) LTD	Fourth Respondent
AFRIPHARM (PTY) LTD	Fifth Respondent
BENNIE KEEVY N.O	Sixth Respondent

KARINA ALETTA VAN NIEKERK N.O	Seventh Respondent
DAWA CANNABIS (PTY) LTD (in liquidation)	Eighth Respondent

In re:

RENVAC CONSULTING ENGINEERS (PTY) LTD	First Applicant
SEAN BRUNKE ARCHITECT (PTY) LTD	Second Applicant
PHARMACEUTICAL MARKETING CONSULTING GROUP (PTY) LTD	Third Applicant
ENPROCON (PTY) LTD	Fourth Applicant
AFRIPHARM (PTY) LTD	Fifth Applicant

And

DAWA CANNABIS (PTY) LTD	Respondent

JUDGMENT

Strydom J

[1] This is an application for the rescission of a final winding-up order granted by this Court against the eighth respondent, Dawa Cannabis (Pty) Ltd ("Dawa Cannabis"), on 31 June 2023. (the "liquidation order")

[2] In this application the applicants apply in terms of rule 42(1)(a) of the Uniform Rules of Court ("the Rules") and\or, in terms of section 354 of the Companies Act 61 of 1973 ("the Companies Act"), for the rescission and setting aside of the final liquidation order in terms of which Dawa Cannabis was liquidated.

[3] The first applicant (Pentagar) and the second applicant (Bukhosini) are companies who hold shares in Dawa Cannabis.

[4] The third applicant Ms Z Mabude ("Mabude") is the sole director of Pentagar and also a director of Dawa Cannabis.

[5] The fourth applicant is Mr NJ Sibeko ("Sibeko") a farmer.

[6] The first respondent is Renvac Consulting Engineers (Pty) Ltd ("Renvac"). Renvac was the first applicant in the liquidation application in its capacity as a creditor of Dawa Cannabis.

[7] The second to fifth respondents were the second to fifth applicants in the liquidation application and will be referred to as the second to fifth respondents or collectively as the respondents. They were creditors of Dawa Cannabis.

[8] The sixth and seventh respondents are the co-liquidators of Dawa Cannabis.

[9] The second, sixth and seventh respondents did not file a notice of opposition and the second respondent withdrew its opposition to the recission application.

[10] Dawa Cannabis was a start-up company which had the vision to become a successful and dominant player in the cannabis cultivation industry. It was envisaged that the cannabis would be cultivated on the farm of Sibeko, held in his company. Sibeko was appointed as director of Dawa Cannabis along with others. Part of the start-up requirements was to obtain the required licences from authorities and to design and plan processing units. For this purpose, the technical and professional services of the respondents were required. The respondents were appointed by Dawa Cannabis for this reason.

[11] Rule 42 provides as follows:

> *"1.The court may, in addition to any other powers it may have, mero moto or on the application of any party affected, rescind or vary :*

an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;."

[12] Section 354 of the Act provides as follows:

"1. 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 and set aside, make an order staying or setting aside the proceedings or for the continuation of any voluntary winding-up on such terms and conditions as the Court may deem fit.

2 The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence"

[13] It is common cause between the parties that the liquidation order was obtained by default and therefore, in the absence of Dawa Cannabis as represented by its directors.

[14] The applicants based its case on Rule 42(1)(a) in that the final liquidation order was *erroneously sought or granted* by the Court which granted the order.

[15] The first ground of rescission is that Mabude and Sibeko, representing Dawa Cannabis, were not made aware of the liquidation application or the liquidation order made on 31 June 2023 as the service was defective.

[16] It is alleged that they only became aware thereof on 13 September 2023 when one of the liquidators contacted Mabude. It is averred that if they were aware of the winding-up application they would have opposed same.

[17] The applicants aver that the return of service evidencing service of the liquidation application reflects that service of the application was effected by way of affixing to "*the principal door"* at […] S[…] Road, Sandton. It is stated that these offices are situated at an office park and that there are many *"principal doors"* at this office park.

[18] It is alleged that Dawa Cannabis was not served with a copy of the liquidation application as, from the Sheriff's return it mentions that same was only affixed to a principal door.

[19] The applicants further raise the point to show that the order was erroneously granted as the security bond issued in terms of section 346(3) of the Companies Act was stale on the date of the application.

[20] It is further averred that in the liquidation application the respondents relied on inadmissible evidence. Reference was made to a letter dated 9 February 2023 addressed to Renvac, which was allegedly made without prejudice and without an admission of liability.

[21] It is alleged that the liquidation application was solely premised on a notice delivered in terms of section 345 of the Companies Act, relating exclusively to Renvac's claim and that no reliance was placed on section 344.

[22] It is further alleged that no debt was due and payable to the respondents, in their capacity as creditors, of Dawa Cannabis. It is stated that all Dawa Capital's service providers (including the respondents) agreed to render their services "*on risk"* in anticipation of Dawa Cannabis being granted a licence and the project being financed.

[23] It was argued that this entailed that the service providers would only be paid once certain milestones were reached and not upon the rendering of invoices.

[24] The respondents opposed the rescission application, first on the basis that the Sheriff's return of service reflects that the application was served on the registered address of Dawa Cannabis on 8 May 2023. The Sheriff's return of service reflects that no other manner of service was possible but by affixing to the principal door of Dawa Cannabis. Service of the application on Dawa Cannabis was proper in terms of section 346(4A) of the Companies Act.

[25] It is the respondents' case that the certificate of security was valid and that the applicants incorrectly interpreted section 346(3) of the Companies Act. They further contended that the letter of 9 February 2023 is admissible evidence and that the court did not erroneously rely on this evidence.

[26] The respondents averred that the applicants failed to make out a case in terms of section 354 of the Companies Act for setting aside of the winding-up order.

[27] Lastly the respondents denied that they provided their services on an *"on risk"* basis.

[28] Accordingly, the issues for determination by this court are the following:

a. Whether the applicants have made out a case for the rescission of the final liquidation of Dawa Cannabis in terms of Rule 42(1)(a) on the basis that the order was allegedly erroneously sought, alternatively, erroneously granted, further alternatively in terms of section 354 of the Companies Act;

b. Whether the application for the liquidation of Dawa Cannabis was properly served as required in terms of section 346A of the Companies Act;

c. Whether a valid certificate of security was issued by the Master of the High Court in terms of section 346(3) of the Companies Act;

d. Whether the letter of 9 February 2023 was admissible evidence against Dawa Cannabis;

e. Whether the first to fifth respondents were appointed on an "*on risk"* basis;

f. Whether Dawa Cannabis is insolvent or not, as contemplated in section 344 read with section 345 of the Companies Act.

Was the order erroneously granted because of no service of the application on Dawa Cannabis?

[29] It should be noted that whether or not the representatives of Dawa Cannabis became aware of the liquidation application is not the issue. The question to be answered is whether proper service of the liquidation application took place. Only if it

is to be found that the liquidation order was granted despite defective service, a finding could be made that the liquidation order was erroneously granted.

[30] Section 346A of the Companies Act provides that a copy of the liquidation application must be served on the company, and this would mean whether service was effected by the Sheriff. *In casu,* the Sheriff's return certified that on 8 May 2023 Mr Ngobeni, a deputy sheriff served the liquidation application at […] S[…] Road, S[…], Sandton, being the registered address of Dawa Cannabis, by affixing it to the principal door at the registered address. A service affidavit was filed by the attorney acting for the applicants (now the respondents) at the time.

[31] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* 2021 (11) BCLR 1263 (CC) the Constitutional Court found relating to the question when an order was erroneously granted as follows:

> "*Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because 'there 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'."*

[32] In my view the applicants' contention that Dawa Cannabis's was not served with a copy of the liquidation application is not correct. The Sheriff's return reflects that the application was served on the registered address of Dawa Cannabis on 8 May 2023. This was done by way of affixing a copy to the principal door. This constitutes *prima facie* evidence that service was effected.

[33] The allegations that there is more than one principal door of various businesses in this office park do not rebut the *prima facie* evidence of service. The sheriff certified that he affixed the application on the principal door of Dawa Cannabis. There might have been other business with principal doors but that does not render the sheriff's certification false. The suggestion that the sheriff could have affixed the application at a wrong door cannot be inferred from the evidence now placed before the court.

[34] When the court granted the order, it had before it documents evidencing proper service of the court process on the registered address and could have accepted such service as proper.

[35] As far as service is concerned, in my view, the applicants have not provided this court with sufficient evidence to satisfy this court that the order was erroneously sought or granted pertaining to no service on Dawa Cannabis. The service was good in law and the application was properly served. The court cannot find that the court order, as far as this aspect is concerned, was erroneously granted.

Was the certificate of security invalid which resulted in an erroneous order?

[36] In terms of section 346(3) of the Companies Act, security for costs must be granted no more than 10 days before the date of the application.

[37] The date when the application was issued was 28 March 2023 and the certificate of tendered security is dated 21 April 2023. Thus, the certificate was issued on a date after the application was issued. The certificate of security can be granted any time after the application was issued and can be handed up at the date of hearing of the application. See *Court v Standard Bank of South Africa Ltd, Court v Bester NO* 1995 (3) SA 123 (A) at 131E.

[38] Accordingly, a valid certificate of security was issued by the Master of the High Court in terms of section 346(3) of the Companies Act.

[39] The liquidation order was consequently not erroneously granted as far as the certificate of tendered security is concerned.

Does the letter of 9 February 2023 constitute inadmissible evidence?

[40] This letter was a reply to letters of demand in terms of section 345(1)(a) of the Companies Act. In this letter Dawa Cannabis acknowledged that Renvac's claim was

valid and undisputed; that Dawa Cannabis was not operational and generating income; that it was still in the process of procuring funding with no successful thus far and that Dawa Cannabis does not have funds to settle the administration costs of the insolvent estate.

[41] These statements and concessions were allegedly made *without prejudice.* In *ABSA Bank Ltd v Hammerle Group 2015 (5) SA 215 SCA at paragraphs [13]-[15]* it was found that in an application for liquidation by a creditor for liquidation, an admission of insolvency should not be precluded from winding-up proceedings, as public policy dictates that such admission of insolvency should be admissible in such proceedings. The *ratio* behind the exception being that liquidation proceedings is a matter which by its very nature involves the public interest.

[42] Having considered the contents of this letter Dawa Cannabis admitted to its insolvency. The fact that there was still a possibility that Dawa Cannabis could have obtained finances to meet its debt which was due does not affect the conclusion that it could not pay its debts when these debts became due and payable. The contents of this letter amount to an admission of a debt in the amount of R551 993,40 owing to Renvac which was due and payable. The claim was stated to be valid and as far as this debt was concerned nothing was stated that services were rendered on an “at risk” basis. Leniency was requested.

[43] The contents of this letter constitute admissible evidence.

[44] In my view, Renvac, has made out a case before the court which granted the liquidation order and it cannot be found that the court erroneously granted the order. This case which had been made out was sufficient for granting the liquidation order.

The “at risk” contention.

[45] The applicants claim to have engaged with all of the service providers on a “*no risk basis”* basis in anticipation of Dawa Cannabis to have been granted a licence and the project being financed. The first to the fifth respondents deny that such an arrangement was applicable to their relationship with Dawa Cannabis.

[46] In support of this contention, the applicant's attach to the founding affidavit a confirmatory affidavit deposed to by Mr Mbatha, unsigned letters of appointment addressed to the second respondent to Shamus Rennie International (Pty) Ltd ("SIR").

[47] The respondents, correctly in my view, pointed out that the applicants' reliance on these documents to evidence the purported arrangement is misleading insofar as:

a. The second respondent and SRI did not contract with Dawa Cannabis on an "*on risk*" basis. The letters of appointment relied upon by the applicants as annexures "FA 12" and "FA 13" are unsigned by the second respondent and SIR.

b. The last page of these letters specifically provides for an acceptance of appointment on "*on risk*" terms which was not completed or signed by any of the first to the fifth respondents.

c. The first to the fifth respondents were not appointed by Mbatha Walters & Simpsons (Pty) Ltd and have no knowledge of the latter party's agreement with Dawa Cannabis.

d. Hayworth signs the appointment letters but does not provide a confirmatory affidavit.

e. The deponent to the founding affidavit was not involved in Dawa Cannabis at the time of the alleged appointment, but rather thereafter in July 2022. The deponent has no personal knowledge relating to the appointment of the first to the fifth respondents.

[48] In addition, the first to the fifth respondents have provided their own proposals and acceptance letters which dictates their respective payment terms as follows:

a. Renvac and Dawa Cannabis agreed on specific payment terms during 17 August 2022 and 20 September 2022, which did not include that services be provided an "*on risk*".

b. The second respondent and Dawa Cannabis exchanged correspondence regarding their payment terms during 11 to 14 November 2022, of which no mention whatsoever is made that services be provided "*on*

risk". Mr Thagane confirms that the settlement of the second respondent's invoices would be escalated to shareholders.

c. Insofar as the third respondent is concerned, Dawa Cannabis accepted the third respondent's payment terms on 17 May 2022. The first respondent's payment terms dated 26 April 2022 specifically provide for payment "a 50% deposit and monthly payments based on invoices presented to Dawa Cannabis for work done based on the purchase order(s) and monthly payments on work completed".

d. In respect of the fourth respondent, Dawa Cannabis accepted the fourth respondent's payment terms on 8 September 2022. The first respondent's payment terms dated 7 September 2022 specifically provide for payment "30% project commencement fees over two (2) tranche payments and the remainder on presentation of invoices".

e. Insofar as the fifth respondent is concerned, Dawa Cannabis accepted the fifth respondent's payment terms on 14 June 2022. The first respondent's payment terms dated 9 June 2022 specifically provide for payment "2 months in advance at commencement and thereafter monthly payments".

f. Dawa Cannabis confirms in an email of 14 November 2022 to the first to the fifth respondents that it was working on expediting their payments.

g. Dawa Cannabis further addressed the first to the fifth respondent's outstanding fees in a memorandum a month later. No mention is made of the alleged services provided on risk. The delayed payment is according to Dawa Cannabis attributed to updating new bank mandates, a director's resignation and subsequent shareholder having withdrawn.

h. Dawa Cannabis' email of 30 May 2022 addressing the settlement of outstanding fees and inability of Dawa Cannabis to pay same.

i. Annexure "FA 18" to the Founding affidavit confirms that payments are due and payable to the first to the fifth respondents.

[49] The evidence is overwhelming that the respondents did not provide their services on an "*on risk"* basis. This defence raise is without merit. To the extent that the applicants might have placed reliance on the common law to obtain a recission of

the liquidation order, the applicants failed to show a *bona fide* defence even on a *prima facie* basis.

Dawa Cannabis is insolvent.

[50] Considering that Dawa Cannabis remains indebted to the first to the fifth respondents in respect of their individual claims which cannot be paid, it is insolvent. Dawa Cannabis have no assets and only liabilities. None of these claims are genuinely disputed nor is there a record of any disputes.

[51] On 30 May 2023 Dawa Cannabis confirms that it is committed to the settlement of outstanding fees, but it indicates that Dawa Cannabis is unable to pay same. The submissions made in respect of the letter dated 9 February 2022 confirm Dawa Cannabis' position. The applicants' confirmation that further third-party funding is rewired to allow Dawa Cannabis to continue trading indicates its insolvent position.

[52] Moreover, the Court is in the dark as to Dawa Cannabis' financial position. Dawa Cannabis was invited by the respondents to disclose its financial position but has failed to do so.

[53] To date no funds have been paid by Dawa Cannabis in trust to secure the first Renvac's debt as it undertook to do.

[54] In my view, the court the court order was not erroneously granted and to the extent that it might have been necessary for Dawa Cannabis to have shown a *bona fide* defence against a liquidation order, it failed to do so.

Should the liquidation order be set aside in terms of section 354 of the Companies act?

[55] The court's power is a discretionary one. The creditors of Dawa Cannabis do not support the setting aside of the liquidation proceedings. The second respondent only withdrew its opposition and abided to the decision of court. This does not amount to a support of the application. The only subsequent events which took place

is not supportive of the application. The creditors remain unpaid, and the liquidators received no support, financial or otherwise, from Dawa Cannabis (in liquidation). There are no facts proven which renders the winding-up to be unnecessary or undesirable. Dawa Cannabis has embarked on a costly venture to establish a business using cannabis as its product. It had to procure services of professionals to get things started but always knew that it had to obtain finances. The evidence before court indicates that the required capital could not be secured. Dawa Cannabis was left stranded with extensive debt outstanding.

[56] This court was directed to the judgment in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others 2020(2) SA 93 (SAC) at para 31 where in was found as follows:*

> *"[31] The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, it is whether the company 'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant?' Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading." (excluding footnotes)*

[57] In my view, applicants also failed to make out a case for relief in terms of section 354 of the Companies Act.

[58] In the exercise of this court's discretion I do not intend to make a punitive cost order as requested by the first, third, fourth and fifth respondents.

[59] The following order is made:

The application is dismissed with costs.

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on:	18 March 2024
Delivered on:	10 May 2024

Appearances:

For the Applicants:	Adv. J.A. Venter
Instructed by:	Des Naidoo & Associates
For the Respondents:	Adv. V. Vergano
Instructed by:	Senekal Simmonds Inc