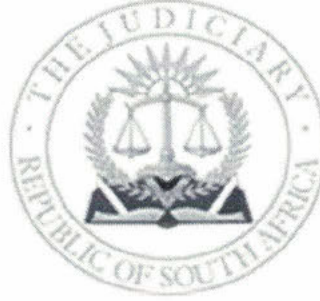



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024-077307

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
<div style="display: flex; justify-content: space-between;"><div>31 JANUARY 2025 DATE</div><div> SIGNATURE</div></div>	

In the matter between:

ALLELUIA MINISTRIES INTERNATIONAL NPC
(Registration number 2018/313377/08)

Applicant

And

KINGS VISION HOLDINGS (PTY) LTD
(In Liquidation)

1st Respondent

GONASAGREE GOVENDER N.O.

2nd Respondent

MARYNA ESTELLE SYMES N.O.

3rd Respondent

(The second and third Respondents are
Cited in their capacities as joint liquidators of
Kings Vision Holdings (Pty) Ltd (in liquidation))

THE MASTER OF THE HIGH COURT, JOHANNESBURG

4th Respondent

JUDGMENT

MAKUME, J:

INTRODUCTION

INTRODUCTION

[1] In this matter the Applicant seeks relief on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court in the following terms:

- 1.1 That its claim for payment of an amount of R73 million as set out in its particulars of claim is declared not to have been abandoned.
- 1.2 Granting the applicant leave to institute action against Kings Vision Holdings (Pty) Ltd (In Liquidation) ("KVH") in terms of Section 359(2)(b) of the Companies Act¹.
- 1.3 That those respondents who oppose the relief being sought be ordered to pay the applicant's costs jointly and severally including the costs of two Counsel on scale C.

FACTUAL BACKGROUND

[2] The applicant Alleluia Ministries International NPC ("AMI") is a non-profit Company duly incorporated and registered in terms of the laws of the Republic of South Africa and has its registered address at 13 Eastern Services Road, Kelvin View, Sandton, Gauteng. It conducts business as a church.

[3] The first respondent Kings Vision Holdings (Pty) Ltd (In Liquidation) (KVH) is a registered company in accordance with the laws of the Republic of South Africa and conducts business as event managers also from 13 Eastern Services Road, Kelvin View, Sandton, Gauteng.

[4] The second and third respondents are the joint liquidators of the first respondent and are represented in these proceedings by Messrs Brooks &

¹ 61 of 1973.

Braadveldt Inc Attorneys of 203 Jan Smuts Avenue, Parktown North, Johannesburg.

- [5] Annexure MES3 attached to the respondent's Answering Affidavit indicate that the Directors of the applicant ("AMI") were at some stage the following: Jacqueline Bezuidenhout, Celeste Jasmin Lukau, Lerato Mphela, John Peter, Ferguson and Alph Ndongela Lukau. Ferguson and Alph Lukau resigned as directors in the year 2020 and 2019 respectively.
- [6] The further documents attached to the Answering Affidavit indicate that both Ferguson and Alph Lukau were directors of KVH.
- [7] In this application the applicant relies on the provisions of Section 359 (2)(b) of the 1973 Companies Act. The applicant is applying for leave to initiate legal proceedings against KVH because the applicant's claim is deemed to have been abandoned by virtue of the fact that the applicant did not give notice of its claim to the liquidators within the period prescribed in the Act.
- [8] The applicant, AMI, says that if it is not granted this order, it fears that the liquidator will plead that its claim prescribed on the 3rd September 2024 hence this application.
- [9] It is common cause that KVH was tasked with event managing as well as organizing church events for AMI. It also handled all the Commercial Affairs of AMI. On the 30th August 2021 Ferguson in his capacity as a trustee of the NC Trust and a director of KVH passed a resolution placing KVH under voluntary winding up.
- [10] The CM100 document which is filed with the application for voluntary winding up does not mention AMI as a creditor of KVH in the sum of R73 million. On 26 October 2021 the Master of the High Court in Johannesburg appointed the second and third Respondents as joint Liquidators of KVH.
- [11] Section 359 (2) (a) & (b) reads as follows:

“(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks’ notice in writing before continuing or commencing the proceedings.

(b) If notice is not given the proceeding shall be considered to be abandoned unless the Court otherwise directs.”

[12] AMI contends that its claim of R73 million against KVH arose prior to liquidation. This means that it was required of AMI to give notice of its claim to the liquidator by the earliest 26th November 2021 and having failed to do so AMI then had to approach this Court to show cause that its claim is not abandoned.

[13] The first issue raised in these proceedings is that the application is not urgent and falls to be struck off for lack of urgency alternatively that urgency is self-created. Secondly on the merits the respondent says that no case has been made and that the application should be dismissed with costs.

URGENCY

[14] The first creditors meeting was held on the 13th April 2022 at the Randburg Magistrate Court. At that meeting AMI was represented by an advocate and an attorney, there was no mention by them of a claim by AMI.

[15] The second meeting of creditors was set to be held on the 18th May 2022. The meeting did not materialize and was postponed several times, it still stands postponed.

[16] It was only on the 7 March 2023 in an affidavit deposed to by AMI’s attorneys Sim that it was revealed that AMI claimed to be a creditor of KVH and wished

to prove its claim. This was a year and six months after the liquidation of KVH on the 3rd September 2021.

- [17] On the 8 March 2023 the general meeting of creditors continued despite an attempt by the NC Trust to derail such meeting. On the 5 June 2023 in an affidavit at the reconsideration application Sim stated that AMI is a creditor of KVH and has a claim of R73 856 435.38 which arose between 1 March 2019 until 1st October 2021.
- [18] On the 17 October 2023 the liquidators served and filed their answering affidavit in the review application in which affidavit the applicant's claim of R73 million was specifically disputed. In that answering affidavit the liquidator indicated that if AMI persist with its claim they are free to issue summons.
- [19] It is in that answering affidavit that the need to bring the current application against the respondent arose or manifested itself, AMI did nothing.
- [20] It is also common cause that between the 15 February 2024 until 11 July 2024 attorney's Sim on behalf of AMI addressed correspondence to the liquidator requesting them to waive noncompliance with Section 359 (2) in order to allow their client to issue summons without further delay.
- [21] On the 10th April 2024 the liquidators informed AMI that noncompliance of the provisions of Section 359 (2) is not waived. The applicant did nothing despite having been so informed.
- [22] In their draft particulars of claim AMI maintains that reconciliation of the amount due to them was finalised by the Auditor Mr Vosloo on the 20 July 2023. If that is so then there is no basis that their claim will prescribe on the 3rd September 2024. They still have sufficient time i.e. two years still to issue summons.
- [23] AMI's case for urgency in my view is not based on fact but on speculation and fear of prescription. This AMI raised despite having said in their own words that prescription will not apply.

[24] In the final result I have come to the conclusion that this application is not urgent because:

24.1 Firstly prescription is not in issue and cannot be used to create urgency. In their draft particulars of claim AMI maintain that the loan debt would only become due once reconciliation has been finalised. It is so that reconciliation was confirmed on 20 July 2023 which then means that the claim will prescribe in the year 2026.

24.2 AMI knew as early as February 2024 that the liquidators have refused to waive compliance of Section 359(2) it is at that time or shortly thereafter that AMI should have filed this application and not wait until August 2024 a period of 5 months.

[25] Coetzee J in the matter of *Luna Meubel Vervaardigers (EDMS) BPK v Makin and Another (t/a Makin's Furniture Manufacturers)*² lamented the fact that Rule 6(12) had become one of the most abused rules in this Division and added that “far too many attorneys and advocates treat the phrase ‘which shall as far as practicable be in terms of these rules’, in the sub-rule (a) simply *pro non scripto*.”

[26] The Honourable Judge Cachalia J in the matter *Digital Printers v Riso Africa (Pty) Ltd.*³ concluded as follows: “The urgent court is not geared to dealing with the matter which is not only voluminous but clearly involves some complexity and even novel point of law.”

[27] The words of Cachalia were later to be echoed and cited with approval by Wepener J in *In re the several matters before the urgent court roll 18 September 2012*⁴.

² 1977 (4) SA 135 (W).

³ unreported, case number 17318/02 (GSJ).

⁴ [2012] 4 All SA 570 (GSJ).

- [28] The applicant has not proffered any explanation as to why it took approximately 16 months to launch this application when it knew that the second creditors meeting was not closed or why having received the liquidator's response on 10 April 2024, it still took three months to launch this application.
- [29] Lastly AMI will not suffer any irreparable harm if this matter is not heard in the urgent court because on its own version the claim will not prescribe on 3 September 2024.

DOES SECTION 359 (2) (a) and (b) FIND APPLICATION IN THIS MATTER

- [30] Notwithstanding the fact that this matter is not urgent I allowed the parties to make submissions on the merits and in doing so the answer lies in the proper interpretation of Section 359(2)(a)(b).
- [31] In terms of subsection (1) (a) of Section 359 all civil proceedings by or against the company concerned shall, when a court has made an order for the winding up of a company, be suspended until the appointment of a liquidator. It is common cause that when KVH was placed under winding up AMI had not commenced any civil claim against it. This means that Section 359 (1)(a) is of no application to AMI.
- [32] It is subsection 2(a) and (b) which have a bearing in any claim AMI would like to pursue.
- [33] It is common cause that AMI say that its claim arose before commencement of the winding up but that it had not as yet been fully quantified and was only so quantified in June 2023. What the subsection then required of the AMI to do was to inform the liquidators about its claim and that they were awaiting final quantification thereof. AMI did not do so either within the four weeks prescribed or at the first creditors meeting, where they were legally represented. AMI is now approaching the court to condone that failure in terms of Subsection 2(b) which reads as follows: "(b) If notice is not given the proceedings shall be considered to be abandoned unless the court otherwise directs."

[34] Viljoen JA in the matter of *Umbogintwini Land and Investment Co (Pty) Ltd (In Liquidation) v Barclays National Bank Ltd and Another*⁵ asked the following question “Does s 359 (2) render it obligatory for every person, including the person who has every intention of proving his claim in the insolvent estate, to give notice in terms of s 359(2) of the Companies Act?”

[35] The Learned Judge continued to respond to that question as follows at page 910E-I:

“After the liquidation of the company the creditor has to decide whether to submit a claim for proof in the estate or to proceed in terms of Section 359(2)(a) to enforce his claim against the company. Section 359 deals with the institution of legal proceedings if that is, at the stage of the initial election, the course decided upon. That does not rule out the possibility that legal proceedings other than those contemplated in s 359(2) may, depending upon the vicissitudes following in the wake of the creditor’s initial election to pursue his claim by proving it in the estate, be instituted at a later stage. In my view s 359(2)(a) is capable of one construction only. The obligation to give notice within a period of four weeks after the appointment of a liquidator is imposed upon the creditors who intends to institute legal proceedings forthwith. The creditor who intend to enforce his claim by proving it at a meeting of creditors of that estate is not hit by the provision at all. Had the Legislature intended to impose the obligation on a creditor who might at a later stage decide or be compelled to institute civil proceedings against the estate, it could easily have provided therefore in clear terms. The provision was designed, in my view to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interest of the general body of creditors, the nature and validity of the claim or contemplated claim and how to deal with it – whether, for instance, to dispute or settle or acknowledge it.”

[36] The truth of the matter is that AMI does not have a valid claim against KVH if it had then this should have been recorded in the CM100 signed by Ferguson. Secondly at the first meeting AMI was represented, they did not indicate that


⁵ 1987(4) SA 894 (A) at 909C.

- [36] The truth of the matter is that AMI does not have a valid claim against KVH if it had then this should have been recorded in the CM100 signed by Ferguson. Secondly at the first meeting AMI was represented they did not indicate that AMI was a creditor. It is in my view inconceivable that Ferguson waited for 11 months after the appointment of the liquidator despite him having had knowledge of a claim he did not have to give an exact amount just merely mention it with the *proviso* to give further details thereof would have sufficed.
- [37] If the claim truly and genuinely existed a claim of that magnitude would have been pursued at the earliest available opportunity.
- [38] I have come to the conclusion that the Applicant has failed to make out a case in terms of Section 359(2).

ORDER

1. The application is dismissed.
2. The Applicant is directed to pay the Respondent costs on attorney and client scale which costs shall include the costs of two Counsel.

Dated at Johannesburg on this 31st day of January 2025



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

FOR 1,2 & 3 RESPONDENTS : ADV GD WICKINS SC
INSTRUCTED BY : MESSRS BROOKS & BRAADVELDT INC.