

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 2478/23

In the matter between:

NAXA TRADING (PTY) LIMITED

Applicant

And

VOLTEX (PTY) LIMITED

Respondent

REASONS FOR THE ORDER GRANTED ON 14 OCTOBER 2024

Cengani-Mbakaza AJ

Introduction

[1] By way of a certificate of urgency filed of record, on 14 October 2024, the applicant approached this court seeking an order that this matter be enrolled and heard on an urgent basis in accordance with Uniform Rule 6(12) of the Uniform Rules of Court.

[2] Paragraph 2 of the certificate of urgency provided as follows:

- ‘2. That the court order granted in Case No 3478 dated 14th day of May 2024, liquidating the company which is the applicant annexed hereto marked Annexure A, be and is hereby stayed, pending the rescission application lodged and set to be heard on the 22nd day of October 2024.’

[3] In amplification of the application as mentioned above, the applicant averred that she was only informed of the court order on 22 May 2024. Thereafter, she approached her instructing attorney and applied for a rescission of the court order dated 14 May 2024.

[4] On 01 October 2024, the applicant's director was subpoenaed to attend to an enquiry under the Insolvency Act 24 of 1936 (the Insolvency Act) at Gqeberha Magistrate's Court. Following her non-appearance, on or about the 09 October 2024, a warrant for her arrest was authorised by the Magistrate's Court, Gqeberha, along with Mzolisi Bekezulu (Mr Bekezulu).

[5] Upon thorough examination of the certificate of urgency, on 14 October 2024, at approximately 12:00, I issued the following directive:

- '1. That, the applicant serves its notice of motion and founding affidavit to the respondent on or before 14H00 through the sheriff of this court.
2. That, the respondent files its answering affidavit on or before 16H00 on 14 October 2024.
3. That, the applicant files its replying affidavit on 14 October 2024 @ 16h45 (if any). Matter to be heard at 17:00 on 14 October 2024.'

[6] Pursuant to the directives, the respondent received the documents as instructed and subsequently filed a notice of opposition to the matter. Shortly after 17:00, the parties' legal representatives met with me in chambers to discuss the future conduct of the case. Mr Genukile, counsel for the applicant, confirmed his readiness to proceed with the application. Similarly, Mr Brody, the respondent's attorney expressed his preparedness to proceed, stating that he would not file an answering affidavit as he deemed it unnecessary, instead he would rely on the content of the applicant's existing papers. Mr Brody reiterated this position during the court hearing.

[7] Having carefully considered the papers filed by the applicant and the oral submissions made by both parties, I granted the following order:

1. The usual time frames relating to forms and service be and is hereby dispensed with and as such the matter be heard as one of urgency in accordance with Rule 6(12) of the Uniform Rules of Court.
2. The court order dated 14 May 2024 together with warrants of arrest which were authorised on 08 October 2024 be and are hereby stayed pending the final determination of the rescission application to be heard on 22 October 2024.
3. There shall be no order as to costs.'

[8] On 16 October 2024, the respondent's attorney submitted a formal request for a written judgment.

The background facts

[9] For purposes of clarity, I shall commence by identifying the parties to this matter followed by a narration of the relevant facts. Naxa Trading Pty (Ltd) (Naxa Trading) and Voltex Pty (Ltd) (Voltex) are separate entities duly registered in terms of the Companies Act 71 of 2008, each possessing unique registration numbers.

[10] Voltex is a leading supplier of electrical equipment and components in South Africa operates as a wholly owned subsidiary of Bidvest Group Limited, a listed entity on the Johannesburg Stock Exchange. Voltex conducts business through various trading styles and divisions including Atlas Cables, Cabstrat Johannesburg, Phambili interface, and Technic-Lamp.

[11] On 18 November 2021, Naxa Trading represented by Ms Ncebakazi Bekezulu (Ms Bekezulu) allegedly entered into a credit agreement with Voltex whereby Voltex would supply goods to Naxa Trading on a credit basis, as needed.

The credit agreement stipulates that payments would be made within 30 days of the statement date, subject to variation only by written consent.

[12] Voltex claimed to have fulfilled all its obligations under the sale agreement, supplying goods from October 2021 to March 2022. On 23 August 2023, issued a letter to Naxa Trading in terms of section 345 of the Companies Act 61 of 1973 (the companies Act). The letter notified Naxa Trading that it was indebted to Voltex in the sum of R453.611.05 (Four Hundred and Fifty-Three Thousand Six Hundred and Eleven Thousand Rand and Five cents). The service of the notice was effected via email and the Sherriff's return was duly received.

[13] On 10 October 2023 Voltex approached this court seeking an order to provisionally wind up Naxa Trading and that a *rule nisi* be issued calling upon the persons concerned including Naxa Trading to show cause why the order should not be made final. The return date was 14 November 2023.

[14] Following the ex parte application, a provisional order was issued. On 14 May 2024, the interim order was confirmed and made absolute. On 23 August 2024, Voltex, addressed a letter to Naxa Trading's director Ms Bekezulu notifying her of the requirement to attend the first and second meeting of the creditors, as prescribed by Section 414 of the Companies Act 61 of 1973 (the Companies Act) and Section 64 of the Insolvency Act. On 11 September 2024 before the Master of the High Court in Makhanda, Mr and Ms Bekezulu failed to attend. Consequently, on 07 October 2024, a second letter was addressed to Mr Bekezulu informing him of his non-attendance and notifying him of the next meeting. The subsequent meeting was set for 09 October 2024 in the Magistrate's Court at Gqeberha before Magistrate J Herselman.

[15] Despite notification, neither Ms nor Mr Bekezulu attended the meeting scheduled for 09 October 2024. Consequently, the Magistrate authorised warrants for their arrest, pursuant to their failure to appear.

Reasons for the order granted

Urgency

[16] Uniform Rule 6(12) of the Uniform Rules of Court requires an applicant to explicitly set forth the circumstances which render the matter urgent. The applicant must show that it will not be afforded substantial redress in due course.¹ The right to freedom of movement and not to be detained arbitrarily without a just cause is guaranteed by the Constitution of the Republic of South Africa. The right to personal freedom is a sacrosanct entitlement that has consistently been vigilantly protected by our courts and zealously upheld by our law, which views any infringement thereof as a grave violation.

[17] In a constitutional democracy, personal freedom is paramount. Therefore, any interference with an individual's liberty can only occur under strictly defined circumstances, subject to rigorous safeguards and limitations. In considering the balance between dispensing with formalities and ensuring a fair hearing, I acknowledged the need to weigh whether Voltex could adequately present its case within the given time frame. This delicate balance was crucial in preventing prejudice to Voltex, maintaining the integrity of the administration of justice, and evaluating the strength of Naxa Trading's case.

[18] Despite the condensed timeline in urgent applications, where the respondents are not obligated to file answering affidavits, Voltex's attorney had the option to seek a brief indulgence for submitting an answering affidavit. His decision not to do so despite the court's engagement, resulted in the forfeiture of the opportunity to dispute material facts, advance defences or contest Naxa Trading's application to the urgency of the claim.

¹ Uniform Rule 6(12) of the Uniform Rules of Court provides that:

(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under para (a) of this subrule, the applicant must set forth explicitly the circumstances which is *[sic]* averred render *[sic]* that matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at the hearing in due course. See also Rule 12 (a) (ii) of the Joint Rules of Practice for the High Courts of the Eastern Cape.

[19] Further to my engagement with Volte's attorney regarding the absence of the answering affidavit, he opted to raise his objections orally at the bar, thereby relinquished the chance to formally develop his case in writing. In the absence of opposing evidence, Naxa Trading's version of events remained uncontroverted and was accordingly accepted by the court. Exercising the discretion and considering the exigencies of the situation, the court relaxed the formal rules of procedure allowing for flexibility in the interests of justice. The outstanding warrants of arrest, stemming from Naxa Trading directors' alleged failure to settle the disputed debt, presented a significant and immediate threat to their personal freedom. Although I initially questioned the validity of the warrants of arrest, on face value, further examination of the documents clarified their legitimacy.

The merits of the urgent application

[20] Pursuant to Uniform Rule 45A of the Uniform Rules of Court, the court possesses a discretionary authority to suspend the execution of any order for a period deemed appropriate.² In the matter of *Stoffberg NO and Another v Capital Harvest (Pty) Ltd*³ Binnas-Ward J stated the following regarding Rule 45A:

² Uniform Rule 45 A provides as follows: '45A The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.

³ (2130/2021) [2021] ZAWCHC 37 (2 March 2021) (Stoffberg). In Stoffberg, Binnas-Ward J also dealt with the principles for a grant of a stay in execution as follows: '[15] It would appear that Davis J proceeded on an acceptance that 'the basic principles for a grant of a stay in execution were expressed in the judgment of Waglay J in *Gois t/a Shakespeare's Pub v Van Zyl and Others 2011 (1) SA 148(LC)* at paragraph 37, where the learned judge held: The general principles for the granting of a stay in execution may therefore be summarised as follows:

- (a) A court will grant a stay of execution where real and substantial justices require or where injustice would otherwise result.
- (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
- (c) The court must be satisfied that:
 - (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and
 - (ii) Irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
- (d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject matter of the on-going dispute between the parties.
- (e) The court is not concerned with the merits of underlying dispute- the sole enquiry is simple whether the causa is in dispute.

[26] The broad and unrestricting wording of Rule 45 A suggests that it was intended to be a restatement of the court's common law discretionary power. The particular power is an instance of the court's authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. 'Real and substantial justice' is a concept that defies precise definition, rather like 'good cause' or 'substantial reason'. It is for the court on the facts of each given case whether consideration of real and substantial justice is sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension it might be persuaded to allow should be granted.' [accentuation added]

[21] During the parties' submissions, it was common cause that a rescission application was to be heard on 22 October 2024 which was a period of 7- calendar days from the date of the hearing of the urgent application. In her papers, Ms Bekezulu relied on Uniform Rule 42(1) (a) seeking to rescind a final order granted on 14 May 2024, claiming it was erroneously granted. She submitted that non-service of the main application and interim order precluded her from exercising her right to oppose the final order thereby prejudicing her interests.

[22] Further to the rescission application, Ms Bekezulu averred that she never entered into an agreement with Voltex and is not indebted to the company. Moreover, Naxa Trading, which is a plant hiring business, has no connection to Voltex, an electricity equipment company. She raised the questions about the authenticity of the signature at page 22 of the agreement. Given these findings, she laid a criminal charge of fraud at Ngangelizwe Police Station, Mthatha. Briefly, Ms Bekezulu raised Voltex's lack of proper verification of the applicant's identity, unauthorized signature, and negligent conduct of Voltex in particular Voltex's actions or inactions which led to the harm against her.

[23] In his argument, Voltex's attorney contended that Rule 42 (1) (a) has no application to the rescission application. He referenced to two authorities.⁴ He further argued that for the rescission application, Naxa Trading should have relied on Section 354 (1) of the Companies Act.⁵

[24] I thoroughly considered the submissions presented by Voltex's attorney in his argument. In this urgent application the underlying cause stems from the disputed contract between Voltex and Naxa Trading. It is not for this court to decide on the merits of the on-going dispute between the two parties. Upon examining the application, I refrained from deciding on the rescission application's competency. The papers filed suggest that Naxa Trading aims to rescind the winding up order due to purported irregularities and errors. If the underlying issues are not resolved irreparably harm may inevitably occur. Therefore, in this situation, Voltex will suffer no prejudice if the final order granted on 14 May 2024 is stayed pending the determination of the rescission application, considering the fact that the hearing is just seven days away. This view is supported by the principle that Naxa Trading and its directors will suffer injustice if the order were to be allowed to operate despite the rescission application.

[25] Furthermore, given Voltex's awareness of the rescission application, I found no justifiable reason warranting the infringement upon the liberties of Naxa Trading's directors. After careful consideration, I concluded that Naxa Trading's application should succeed. On the issue of costs Naxa Trading's counsel showed receptiveness to the proposal that I make 'no order as to costs', thereby precluding any cost implications for either party.

Conclusion

⁴ Mokasule N.O V Botha N.O and Others (M283/20) [2023] ZANWHC 54 (17 May 2023); Blue Bulls Company (Pty) Ltd v mega Burst Oils and Fuels (Pty) Ltd (2021/1879) [2022] ZAGPJHC 314 (21 April 2022)

⁵ This Section 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 or for the continuance of any voluntary winding-upon such terms and conditions as the Court may deem fit.'

[26] In the result, I granted the order as reflected in paragraph 7 of this judgment.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

Counsel for the Applicant	:	Adv S. Genukile
Instructed by	:	Makangela Mntunga Inc. 50 Blakeway Road Mthatha c/o Whitesides Attorneys 53 African Street Makhanda
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