



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO: EL 457/2023

In the intervention and rescission application by:

GARTH MERRICK VOIGT N.O.

First Applicant

DEBORAH JOUBERT N.O.

Second Applicant

CAROL-ANN SCHROEDER-MANN N.O.

Third Applicant

In re the urgent application between:

BAFANA MVUYISI GCANGA

First Applicant

PUMZA GCANGA

Second Applicant

and

**THE MAGISTRATE OF THE MAGISTRATE'S
COURT, EAST LONDON**

First Respondent

THE SHERIFF OF THE MAGISTRATE'S
COURT, EAST LONDON

Second Respondent

SOUTH AFRICAN POLICE SERVICES,
EAST LONDON

Third Respondent

JUDGMENT IN RESPECT OF APPLICATION FOR JOINDER AND RESCISSION

HARTLE J

Introduction:

[1] The applicants in this opposed application for joinder and rescission are professional insolvency practitioners (*The “liquidators”*). They were appointed by the Master of the Eastern Cape High Court in Makhanda (*The “Master”*) pursuant to the provisions of Section 386 (1) of the Companies Act, No. 61 of 1973 (*“The Companies Act”*), read with section 66 of the Close Corporations Act, No. 69 of 1984 (*“The Close Corporations Act”*), to take charge of the winding up of the Close Corporation known as Abbotsford Service Station Close Corporation (*“The Close Corporation”*).

[2] The Close Corporation was placed under final liquidation by order of the Makhanda High Court on 29 November 2022.¹

[3] The applicants in the urgent application in which the liquidators wish to intervene are the sole members of the Close Corporation (in liquidation). They are married to

¹ The applicants have filed in support of this application copies of both the final order of liquidation as well as the provisional rule *nisi* which on the face of it confirm that such orders were made by the Makhanda High Court and exist as an objective fact. The final order has not been taken on appeal and is not the subject of any other proceedings to set it aside.

each other. I will refer to them individually as Mr. and Mrs. Gcanga or collectively as “*the members*” of the Close Corporation.

[4] After their official appointment as liquidators and in the course of their administration of the winding up of the Close Corporation, the applicants caused subpoenas to be issued to the members using the machinery at their disposal made provision for in sections 414, 415, 416 and 418 of the Companies Act to interrogate them at an official enquiry. Their stated objective was to investigate alleged irregularities relating to the sale of the Close Corporation’s business. (As an aside there appears to be a valid concern underlying the need for the enquiry which the members have not even attempted to allay in the papers.)²

[5] The members failed to comply with the subpoenas ostensibly on the advice of their attorney. They questioned the validity of the final liquidation order granted by the Makhanda High Court which they consider to be “*void without the necessity for their set aside*” by reason of the fact that it was purportedly “*issued by a court with no jurisdiction or legal competence*”. This is ostensibly because the notice of motion in the liquidation proceedings supposedly lacked any reference to a prayer for a final liquidation order.

[6] Indeed, so it was pointed out to the first applicant in a letter addressed to the liquidators by an attorney acting on behalf of the members ahead of the enquiry, Investec (the creditor that sought the liquidation order) had applied for a provisional liquidation order only. They purported to reason that there was no application for a final liquidation order on the return day, suggesting that “*no one invoked the Court’s*

² Mr. and Mrs. Gcanga did not file any affidavits in the present application. The answering affidavit was deposed to by an attorney who avers that she acts as the members’ “*instructing attorneys*”. She claims that the facts deposed to in her affidavit fall within her personal knowledge but evidently knowledge of the denials raised by her on behalf of the members in it are not given such context. The legal submissions advanced by her are also premised on the bald denials which are her own without any supporting affidavits filed by the members. One such bald denial is in response to the serious allegation that the members have not accounted to the Close Corporation for the purchase price of R16 250 000.00 arising from the sale of its business and stock and that Mr. Gcanga may have indirectly benefited from the receipt of amounts paid to an entity of which he is the sole director. The other significant denial is the existence of a valid final order of liquidation of the Close Corporation. These averments form the subject matter of an application for striking out on the basis of inadmissible hearsay evidence that have frankly not raised any real disputes of fact on the papers.

competence to grant final liquidation". According to their attorneys, this could only have been done through the mechanism of a notice of motion and an affidavit, a step that was purportedly not taken by Investec in this instance.

[7] Not only did the members complain that the order was void, but so too the liquidator's "*notice*" and "*summons*" flowing therefrom. They intimated that they would therefore not "*honour*" the invitation to appear at the enquiry but forewarned that if Investec or the liquidators contested their "*position*", they would seek a declarator that the final liquidation order was void.

The urgent application:

[8] In consequence of the members' failure to comply with the subpoenas, the liquidators procured warrants for their arrest and these were about to be executed upon by the Sheriff (who warned them telephonically of his instruction beforehand) when the couple approached this court on an urgent basis ("*the urgent application*") for what appears with hindsight to be a stay of their execution in perpetuity. I say so because they have not yet sought the declaratory order that they threatened to obtain to determine the claimed issue of the validity of the final liquidation order.³ This is evident from the terms of the order in the urgent application, granted in a Rule *nisi* format, as follows:

- "1. The applicants' non-compliance with the Rules relating to time and service and this matter is heard as one of urgency.
2. A rule *nisi* hereby issues, calling on interested parties to show cause if any to this court on **18th April 2023** as to why the following orders are not made final:
 - 2.1.1 That pending the resolution of the dispute as to the validity of the final liquidation order upon which the s 418 of the Companies Act, 1973 summons and the warrant of arrest issued by the First Respondent are

³ Mr. Mlenga who appeared for the members stated in terms during argument that they have no intention of initiating any proceedings to resolve the dispute. This is because they hold the view that the final order of liquidation is a "*nullity*" and void in law.

founded, the implementation of the warrant of arrest issued by the First Respondent in the matter of Abbotsford Service Station CC under Master's Reference No: E000042/222 is stayed.

2.1.2. The Second Respondent and Third Respondents are interdicted and restrained from executing the warrant of arrest by the First Respondent in the matter of Abbotsford Service Station CC under Masters reference No: E000042/222, pending the resolution of the dispute.

3. The relief prayed for in sub-paragraph 2.1 and 2.2 operates immediately as interim relief pending the return and or any extension of the return day.
4. The costs of the application be borne by any of the parties opposing the relief sought therein on a scale to be determined by this Court.”

[9] Needless to say no notice of the application was given to the applicants, or to the Master for that matter who formally appointed the liquidators. (Only the Magistrate, the Sheriff and the South African Police Service are cited therein as respondents and interested parties. Although they plainly have nothing to do with the “*dispute*” implicated in prayer 2.1.1 of the order referenced above, the Magistrate and the Sheriff were officially engaged in their respective capacities in the issue and execution respectively of the relevant warrants at the instance of the liquidators.)⁴

- a. The liquidators were additionally not served with a copy of the first Rule *nisi* dated 7 March 2023 after its granting that was extended on various dates before it was made final by this court on 20 June 2023.

[10] The first applicant explains that the existence of the urgent application was co-incidentally brought to his attention on the return date by an attorney who happened to

⁴ Mr. Mlanga sought to suggest in argument that the reason why the members did not seek to interdict the liquidators in an urgent application is because “*in their eyes the liquidators are void*”. He explained though that the urgent proceedings were necessary, this despite the “*nullity*” argument, since there was a “*danger of the court order*” in the hands of the sheriff or South African Police Service that posed a threat to the members.

notice the matter on the unopposed motion court roll of cases to be heard at the Tribunal in East London on 20 June 2023.

The relief claimed by the liquidators:

[11] The liquidators, citing their interest in the matter in their official capacities in pursuit of their appointment and formal involvement in the liquidation processes concerning the Close Corporation, not to mention their roles in having set the enquiry in motion and having themselves procured warrants for the arrest of Mr. and Mrs. Gcanga, seek the leave of this court to be joined as parties as envisaged in Uniform Rule 10 read with Rule 6 (14). They submit that if they had been given notice of the application they would certainly have opposed the relief that was being sought on the basis that the warrants of arrest had been procedurally correctly and lawfully applied for and issued against the members.

[12] They contend that their non-joinder is fatal to the urgent application and that their absence from the proceedings provides a ground for the orders granted in their absence to be rescinded.

The members' bases for their opposition to the present application:

[13] The members oppose the present application.

[14] They have raised preliminary objections which all have at their core the contention that the final liquidation order is void and that it is capable of being ignored without the necessity for its being set aside. The voidness contended for also purportedly justifies their argument that the applicants therefore lack *locus standi* to institute these proceedings and generally to conduct themselves officially as liquidators responsible for winding up the affairs of the Close Corporation. They also take a stab at the argument that this court does not have jurisdiction to entertain the present application (given their claim of the invalidity of the final liquidation order) on the basis

that the so-called impugned order was granted by the Makhanda High Court as opposed to the present court.

The jurisdiction of this court:

[15] In the latter respect it beggars belief that the members obtained the relief sought on an urgent basis and without notice to the liquidators in this very court and now suggest that it is not open to them to assert their right in the same forum to be joined and to claim a basis that the prior orders granted by this court in their absence (in circumstances where they ought to have been joined) should be rescinded.

[16] Indeed Mr. Gcanga in his founding affidavit in the urgent application rather ironically anticipated by the following statement that the liquidators (who he insists on referencing as “*provisional*” despite the final order of liquidation and the Master’s official letter of appointment) might have wished to participate in those proceedings:

“I am advised that it is not necessary for the provisional liquidators to be joined as they do not have a real and substantial interest in this application, however should they wish to participate in these proceedings, they would have to come show cause on the return day as to why this order is not made final.”⁵

[17] The application in my view is entirely incidental to the prior orders granted by this court in the urgent application which retains the necessary jurisdiction to consider the present application for joinder and rescission sought after the fact.

The locus standi of the liquidators:

[18] The members contend that the liquidators do not have authority to have brought the present application since their appointment was a provisional one only which does

⁵ It is not clear who, if any party was served with the urgent application. In the opening paragraphs of his founding affidavit Mr. Gcanga states that the application will be brought on *no* notice to the respondents “as giving notice to could easily defeat its purposes.” (sic)

not include in a liquidator's wherewithal at such a stage the authority to institute legal proceedings without the leave of this court or the Master.

[19] The liquidators maintain that such a contention is factually wrong and rely in this respect on their certificate of appointment which coincidentally precedes the date of the final order of liquidation.⁶

[20] Section 74 of the Close Corporation Act however provides that the Master shall make an appointment "*as soon as practicable after a **provisional winding up order has been made***", which first event occurred on 25 October 2022. The liquidators were appointed in this instance on 16 November 2022 with the powers according to the certificate set out in section 386 (1) of the Companies Act read with section 66 of the Close Corporation Act. In terms of section 66 (1) of the latter act, the laws mentioned in item 9 of Schedule 5 to the new Companies Act⁷ apply to the liquidators of a close corporation. One of those laws is the 1973 Companies Act. Section 386 of that Act in turn provides that any liquidator in any winding up (or liquidation), whether of a company or a close corporation, shall have the power, *inter alia*, to bring or defend on behalf of the company or close corporation, as the case may be, any action or other legal proceedings of a civil nature.

[21] Even for a moment indulging the members' argument that the final liquidation order is void, the appointment of the liquidators is a function performed by the Master which stands separate from the final liquidation order and which has legal consequences provided for by statute. As Mr. Kotze who appeared on behalf of the liquidators pointed out, that decision of the Master stands and has not been set aside.⁸ The Master's appointment of the applicants as liquidators as an objective fact can therefore hardly be wished away and continues to have effect in law until set aside.

⁶ The members' argument instead is that absent a valid final order of liquidation the winding up of the Close Corporation at best remained provisional.

⁷ No. 71 of 2008.

⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* [2004] 3 All SA 1 (SCA). *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers N.O.* [2019] ZA CC 36 at paras 50 – 51.

[22] One such consequence is that the liquidators were empowered to invoke the machinery of sections 414 - 418 of the Companies Act at their disposal to call the members to an interrogation and to take the action which they did in causing a warrant to be executed for their arrest when they failed to appear. Another consequence that self-evidently arises is their power to conduct civil litigation arising in the interests of the close corporation in liquidation flowing from its winding up. In particular in this unique situation the liquidators are best placed to vindicate the fact that they have been stymied in carrying out their lawful objectives through the interrogation proceedings by the final order granted in the urgent proceedings.

[23] There is simply no merit in this objection *in limine* either.

Was the appointment of the liquidators a nullity?

[24] In order to sustain this argument, the members argue that the final liquidation order was a nullity which would infuse everything flowing therefrom including the appointment of the applicants by the Master and everything done by them in terms thereof.

[25] Ironically though, they felt it necessary to approach this court in the urgent proceedings to stay the execution of the warrants for their arrest founded upon the final liquidation order which they presently assert is a nullity capable of being ignored.

[26] The void final order is said to have arisen in the supposed fact that the notice of motion in the winding up application did not seek an order for “*final winding up*” as a result of which the jurisdiction of the Makhanda High Court was never invoked to grant such an order. This is offered both as a fact and as a legal submission.

[27] Firstly from a factual perspective this does not appear to be an acceptable premise. Although Investec asked for an order in prayer 1 in the liquidation application

*“that the ... Close Corporation is hereby placed in **provisional liquidation**”,* prayer 2 of the relevant Notice of Motion requested an order: *“That a rule nisi is hereby issued calling on all interested parties to advance reasons, if any, before this court at 09h30 on a date to be determined by the...Court, why the Respondent should not be placed in final liquidation.”* When that date arose, the final order within the contemplation of the applicant in the liquidation proceedings was engaged with and the rule *nisi* confirmed.

[28] As an aside this is the customary procedure adopted in this division according to which applications for the winding up of close corporations are expected to be dealt with.⁹ The provisional liquidation of a corporation is an essential first step and the notices of motion are framed in rule *nisi* format with the provisional orders being confirmed after the required service and publication thereof.¹⁰

[29] The relevant rule *nisi* granted in favour of Investec in the liquidation application is dated 25 October 2022. It is apparent that interested parties were invited in terms thereof to advance reasons before the Makhanda High Court on Tuesday, 29 November 2022, as to why the Close Corporation should not be placed in final liquidation. On that date the legal representatives of the Close Corporation were present when Investec’s entitlement to move the final order of liquidation was argued. The order was thus granted and stands.

[30] It is simply spurious to suggest therefore that the jurisdiction of the court was not invoked or that there is no final order of liquidation in place.

⁹ Paragraph 10.11 of the Gauteng Practice directives provides contrariwise that the parties are directed to seek a final winding up order in the notice of application, but that the court may nonetheless in the exercise of its discretion grant a provisional order and direct that service and publication of a provisional order can be effected. I mention this since Mr. Mlanga who is from Johannesburg where the custom is obviously different from the Eastern Cape, referenced the Gauteng Practice directive as according with his understanding of what Investec was supposed to have asked for in the liquidation proceedings.

¹⁰ This two tiered process mimics the model in sections 9 – 12 of the Insolvency Act No. 24 of 1936.

[31] Mr. Mlanga on behalf of the members sought to maintain that since the Makhanda High Court had no jurisdiction to make the final order of liquidation this is one of those instances where the *Motala* exception is of application.

[32] The Supreme Court of Appeal in *Motala*¹¹ developed a rule that if a court without jurisdiction issues an order it is not binding even where that order has not been challenged in subsequent legal proceeding. This is in fact the essential basis upon which the members assert that they have no obligation to heed the final order of liquidation or to regard as valid in law anything flowing therefrom.

[33] Whilst the *Motala* exception exists and continues to provide justification in certain unique situations where orders have been issued by a court without authority notwithstanding the inviolate rule of law that court orders irrespective of their validity are binding until set aside, this does not appear to be one of those situations where it can be said that the Makhanda High Court did not have authority to grant the final order of liquidation.¹² On the facts presented before this court such a finding simply cannot prevail.

Do the liquidators have an interest in being joined?

¹¹ *Master of the High Court, Northern Gauteng High Court, Pretoria v Motala N.O. & Others* [2011] ZA SCA 238.

¹² In an article entitled “*Invalid Court Orders*” Mitchell Nold De Beer (Constitutional Court Review 2019, Vol 9, 285-315) provides a useful summary of the judgments of our courts that have brought into tension the two competing principles of the rule of law, i.e. legality and certainty. Whilst the courts proceed from the premise that all court orders are binding unless they are overturned on appeal or through rescission proceedings, there is one exception. Where a judge issues an order outside of his or her legal authority or competence, it is invalid and not binding and, by implication, can be ignored. It is unnecessary to explore the exception any further in this instance because there is simply the absence of any factual basis to have brought the final liquidation order under scrutiny in this instance into question as an invalid order. (See also *Municipal Manager O.R Tambo District Municipality & Another v Ndabeni* 2023 (4) SA 421 (CC) at [24]. This judgment postdates the article but reinforces the view held that all court orders are binding until set aside. The Constitutional Court confirmed, citing *Department of Transport v Tasima (Pty) Ltd*, referenced in the article, that wrongly issued judicial orders are not nullities. They are not void or nothingness but exist in fact with possible legal consequences. If the judges had the authority to make the decisions at the time they did, then such orders are enforceable.)

[34] As for the liquidator's claim for joinder in these proceedings the test for joinder is trite. In *SA Riding for the Disabled Association v Regional Land Claims Commissioner* the Constitutional Court stated that:¹³

"[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

"In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests."¹⁴ ¹⁵

[35] The liquidators have certainly not waived their right to be joined and are vital parties since the interrogation proceedings initiated by them have in effect been thwarted by the final order granted in the urgent proceedings in a scenario where they had no opportunity to state their position.

[36] Ironically the members recognized the validity of the liquidators' appointment in reaching out to them in an attempt to avoid appearing at such an interrogation, and in acknowledging that they might on the return date of the urgent proceedings have had an interest in coming to court to oppose the relief sought yet assert a lack of material interest by them in the subject matter of the concluded urgent proceedings.

¹³ 2017 (5) SA 1 (CC) at paras 10 and 11.

¹⁴ *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at para 9.

¹⁵ See also *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) at 33-E.

[37] I agree with Mr. Kotze's submission that the liquidators were indeed the parties "*most interested*" in being joined in the urgent proceedings that sought to preclude the members' from having to comply with the subpoenas ostensibly lawfully issued at their instance.

[38] The imperative for their joinder becomes clearer when regard is had to the fact that the members have taken no steps to resolve the "*dispute*" highlighted on their behalf in the urgent application (and indeed have stated that they have no intention of doing so) and that the effect of the relief granted in that matter is that the warrants for their arrest cannot be executed upon for as long as the orders granted in their absence (incorporating the Rule *nisi*, the extensions that kept it alive as well as the final order which states simply that "*The Rule Nisi is confirmed*") remain in place.¹⁶ This means that the liquidators are stalled in their entitlement to interrogate the members concerning a substantial sum relating to the purchase price of the Close Corporation's business that has allegedly been unaccounted for and which they have to answer for to the general body of creditors whose interests they represent in their formal capacities.

[39] This issue must certainly be decided in favour of the liquidators. They must be allowed an opportunity to respond. The final order granted in the urgent application amply demonstrates that a finding adverse to the interests of the Close Corporation (in liquidation) which they are lawfully mandated to look out for has been made that seriously needs to be ameliorated.

Should the orders granted in the rescission application be rescinded:

¹⁶ This was the very basis upon which the urgent application to stay the warrant was premised, namely, that the underlying *causa* for the judgment is under dispute. The members in fact undertook in the urgent application to bring an application within ten days to resolve that dispute, but never did so. Mr. Mlanga feebly contended that since the undertaking was not carried forward into the terms of the order granted that the members therefore had no obligation to give effect to their undertaking.

[40] The Constitutional Court has confirmed that in situations where a court should insist on the joinder of an interested party, something it may do *mero motu*, and does not do so, it commits a procedural irregularity within the ambit of Rule 42 (1)(a).¹⁷

[41] I take Mr. Kotze's point that the fact that the liquidators were mentioned by Mr. Gcanga in the founding affidavit in the urgent application, and that it was said that if the liquidators disagree that they do have an interest then they could "*come and show cause on the return day as to why this order is (sic) not made final*", should have resulted in this court enquiring whether proper notice of the application had been given to the liquidators. Having failed to do so, the court in my view granted the final order in the urgent application in error.

[42] That being the case, an order granted in the absence of the liquidators is an order granted in error or by mistake meeting the requirements of Rule 42 (1)(a) for rescission purposes.

The application to strike out:

[43] The applicants filed an application to strike out certain averments in the answering affidavit on the basis that they constitute inadmissible hearsay evidence.

[44] The paragraphs of the answering affidavit implicated are the following:

45.1 Paragraph 7, which denies that the content of the principal deponent's affidavit is true and correct;

45.2 Paragraph 10, which denies that the Close Corporation was finally liquidated and alleges that no order for the final winding up was sought in the notice of motion in the application for its liquidation;

¹⁷ *Morudi and Others v NC Housing Services and Development Co. Limited and Others* 2019 (2) BCLR 261 (CC) at paras 31 – 34; *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at paras 68 – 70.

45.3 Paragraph 13, which deals with the letter from Precious Muleya Attorneys, who previously appeared for the members, and which letter sets out various factual allegations that are also not confirmed by the author of that letter;

45.4 Paragraph 17, in which Ms. Moodley, the attorney who deposed to the answering affidavit on behalf of the members, asserts that on the return day of the liquidation application the provisional order lapsed because “*no one invoked the Makhanda High Court’s competence*”; and

45.5 Paragraph 18, alleging by implication that Investec had not applied for “*final liquidation*”.

[45] The answering affidavit was deposed to by the members’ attorney, Ms. Moodley, who claims to have had personal knowledge of the facts deposed to without providing any context under which she could have acquired such knowledge of the assertions referenced above.

[46] Neither Mr. nor Mrs. Gcanga deposed to any affidavit confirming what is said by attorney Moodley.

[47] This interlocutory application too was opposed on behalf of the members citing the absence of a supporting affidavit setting out any prejudice to the applicants. In this respect however Rule 6(15) does not require an affidavit, neither is it necessary in my view for prejudice to be shown in such purported affidavit when the evidence sought to be struck out is self-evidently inadmissible hearsay evidence. Therein lies the objection, namely, that such evidence is inadmissible. It is a trite principle that inadmissible hearsay evidence may always be struck out, simply because it is inadmissible, even where no prejudice can be shown.¹⁸

¹⁸ *Madikizela v The Public Protector and Others; Mabuyane v Public Protector and Others, Speaker : Winnie Madikizela Mandela Local Municipality and Others v Public Protector and Other* (800/2021; 802/2021; 818/2021) [2023] ZAECHC 4 (10 February 2023) at par 25 citing *Titty’s Bar and Bottle Stores (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) S 362 (T) at 368G in which the principle is asserted that Rule 6 (15) is not exhaustive of the grounds on which the application to strike out may be brought.

[48] In the end the answering affidavit said nothing at all helpful. The purported denials were also clearly at odds with the factual evidence, especially the most important fact, which is that the Makhanda High Court competently and by following the customary procedure in liquidation proceedings in this Division granted a final liquidation order, preceded by a rule *nisi* in exactly the manner Investec prayed for it.

[49] In the result the application to strike out also succeeds.

Costs:

[50] In my view the members were ill advised to have ignored the interests of the Close Corporation (in liquidation) in the first instance by failing to join them in seeking the adverse order that now pertains in the concluded urgent proceedings, and thereupon in strenuously resisting the present application. In the urgent application they did not even canvass the issue of the supposed voidness (which would have been counter-intuitive in the light of the order requested) but they did seek to create the impression that there was a dispute to be resolved. Mr. Mlanga, however, placed it on record quite unequivocally in the present hearing that the members have no intention of raising any dispute with Investec, the Master, or the liquidators, on the facile basis that they now consider the final liquidation order to be void.

[51] It was bizarrely suggested on behalf of the members that punitive costs should be granted against the liquidators purportedly acting on a sortie of their own. The startling assertion is made in the present application that *“it follows therefore that until the Makhanda High Court pronounces that its order is valid, it remains void without any further ado and that the appointment of the liquidators, the s 417 enquiry including this application are void.”* Despite their presumptuousness that the final order has no validity, and despite the order secured in the urgent proceedings that grants them impunity as it were on the exact opposite pretext that the warrants had legal force, they have no intention whatsoever of challenging the final order of liquidation in the Makhanda High Court.

[52] In my view such an approach is opportunistic and to be deplored.

[53] The legal expense of this entire exercise on the part of the applicants in their representative capacity in having to vindicate the interests of the Close Corporation (in liquidation) will have to come from the estate's coffers to its detriment unless this cost to it is reimbursed by an appropriate costs order. Whilst the members may well have acted upon advice, it still remains appropriate not as a tool to penalize them, but as a measure to absolve the Close Corporation (in liquidation) of any shortfall, to order them to pay the costs of the application on the scale of attorney and client out of their own pockets.

[54] Concerning the proceedings of 16 May 2024, the applicants were ready to argue the matter on this date on the opposed roll. Mr. Mlanga arrived late, having missed his flight from Johannesburg. The members' heads of argument were however also filed late causing the matter to have to stand down initially so that the additional papers could be read. When the matter was recalled in the afternoon, I was informed from the bar that Mr. Mlanga had requested that it stand down until the following day, with the costs to be reserved. It does not require any elaboration that these costs should be borne by the members who instructed counsel only on the eve of the opposed hearing to come on board and represent their interests at the hearing. I had also incidentally issued a directive to the members' attorneys to file their outstanding heads of argument two days before, which was simply ignored.

Order:

[55] In the result I make the following order:

1. The application to strike out succeeds, with costs.
2. Garth Merrick Voigt, Deborah Joubert and Carol-Ann Schroeder-Mann are joined as the fourth, fifth and sixth respondents respectively in the urgent application, under Case No. EL 457/2023.

3. The provisional and final orders granted by this Court in the urgent application on 7 March 2023 and 20 June 2023 respectively are rescinded.
4. Mr. and Mrs. Gcanga are personally directed to pay the costs of the liquidators in their representative capacities in the joinder and rescission application.
5. Mr. and Mrs. Gcanga are further directed personally to pay to the applicants in their representative capacity the reserved and wasted costs of 16 May 2024.
6. All the costs orders above shall be on the attorney and client scale.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 16 & 17 May 2024

DATE OF JUDGMENT : 5 September 2024

Appearances:

For the applicants in the intervention and rescission application: Mr. D Kotze instructed by BLC Attorneys c/o Bate Chubb & Dickson, East London (ref. Mr. P Van Zyl).

For the respondents: Mr. M Mlanga instructed by Donald & Associates Inc. c/o Majali Gwabeni Attorneys Inc., East London (ref. Mr. A Gwabeni).