



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: 4052/24P**

In the matter between:

**MARK HENRI PIENAAR N.O.**

**Applicant**

and

**NANO INKS KZN (PTY) LTD  
(IN BUSINESS RESCUE)**

**First Respondent**

**THE COMPANIES AND INTELLECTUAL  
PROPERTY COMMISSION**

**Second Respondent**

**THE AFFECTED PERSONS LISTED IN  
ANNEXURE "A" TO THE NOTICE OF MOTION**

**Third Respondent**

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**JUDGMENT**

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**Nicholson AJ:**

[1] Before me are three applications, namely, a final winding up application, second, a rescission application, and third, an application for striking out.

[2] The applicant in the winding up application seeks to make the provisional winding up a final order. In the rescission application, Polymeric Africa (Pty) Ltd ('Polymeric') seeks an order rescinding the provisional winding up order and certain statements in the first respondent's affidavit be struck out.

### **The Parties**

[3] For context, I shall provide a brief background of the parties.

[4] On or about 23 November 2023, the board of directors of the second respondent Nano Inks KZN (Pty) Ltd (in business rescue) ('Nano Inks') resolved to appoint Mark Henry Pienaar as a Business Rescue Practitioner ('BRP'), which was confirmed by the second respondent (the 'CIPC') on 27 November 2023.

[5] On or about 26 March 2024, the BRP brought an urgent application for provisional winding up on the grounds that Nano Inks' liabilities exceeds its assets and there is no reasonable prospects for the rescue of Nano Inks<sup>1</sup>. The application was duly granted.

[6] It is instructive that the third respondent is an annexure containing the affected parties, which is annexed to the notice of motion "A". Polymeric is neither listed as an affected party, nor a proven creditor<sup>2</sup>. However, Polymeric is listed as an intercompany creditor, because Polymeric and Nano Inks share common shareholding and directorships<sup>3</sup>. Accordingly, it appears that Polymeric's claims against Nano Inks were either rejected by the BRP or not proven.

### **Striking Out application**

[7] In *Beinash v Wixley*<sup>4</sup>, the SCA asserts:

'What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the Court must be

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<sup>1</sup> The founding affidavit in volume 1 of the papers, page 15, paragraph 9

<sup>2</sup> The founding affidavit in volume 1 of the papers, page 30, paragraphs 40 and 41 / page 92, Annexure "F"

<sup>3</sup> The founding affidavit in volume 1 of the papers, page 23, paragraph 23

<sup>4</sup> *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-B

satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.’

[8] I have considered the averments in the BRP answering affidavit to the rescission application. While both parties appear to use very strong language against each other, it does not rise to the level of scandalous, vexatious and irrelevant. Accordingly, the averments complained of, are not of such a nature to merit striking out. In the circumstances, I will not consider this issue any further.

### **Rescission application**

[9] I now turn to the rescission application.

[10] On or about 27 May 2024, on one day’s notice, Polymeric filed the rescission application on an urgent basis seeking condonation in terms of rule 6(12) of the Uniform Rules, for noncompliance with the timeframes and procedures set out in the Uniform Rules. The urgent application was then adjourned to be dealt with together with the final winding up application. I shall return to this issue later in this judgment.

[11] The rescission application is brought in terms of rule 42(1)(a) of the Uniform Rules and in terms of s 354 of the Companies Act 61 of 1973.<sup>5</sup>

[12] The relevant part of rule 42 of the Uniform Rules reads 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’. (Own emphasis)

[13] Rule 42(1)(a) therefore requires that an affected party who was absent from the proceedings when the order was granted may apply to have the order or judgment rescinded if it is of the view that the order was erroneously sought or erroneously granted. Put differently, to be successful with this application in terms of rule 42(1)(a),

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<sup>5</sup> The founding affidavit in volume 9 of the papers at 737, para 8.

the jurisdictional requirements that an applicant must show is that: the order was granted in its absence, and the order was erroneously granted or erroneously sought.

[14] 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*,<sup>6</sup> the Constitutional Court noted:

‘It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.’ (Footnotes omitted.)

[15] In the premises, even when an applicant meets the minimum requirements, this court retains the discretion to vary or rescind the judgment or order, and that discretion should be exercised judicially. Therefore, I do not agree with the statement<sup>7</sup> made by Polymeric that, ‘this court is compelled to rescind the order’, once noncompliance with s 346(4A)(b) of the Companies Act has been established.

[16] Polymeric alleges<sup>8</sup> that it had the highest claim that ‘disappeared from the record’ in February 2024. Peculiarly, despite asserting that it is the biggest creditor, but for only writing letters, does not seem to take issue with this, until the filing of the rescission application. In the circumstances, although in the papers it is speculative<sup>9</sup> whether or not Polymeric is a creditor, using my discretion, I am going to give it the benefit of the doubt for the purposes of fulfilling the requirements for rule 42 of the Uniform Rules, and therefore, assume they are an affected party.

[17] In *Zuma*,<sup>10</sup> the Constitutional Court continued:

‘As an affected party, Mr Zuma has a direct and substantial interest in the order sought to be rescinded. He has locus standi to approach this Court for rescission in terms of

<sup>6</sup> *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 and others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (*Zuma*) para 53.

<sup>7</sup> Polymeric’s heads of argument paras 145 and 16.

<sup>8</sup> The founding affidavit in volume 9 of the papers at 789, paras 16 and 17.

<sup>9</sup> The founding affidavit seems to suggest that the claim was rejected by the Business Rescue Practitioner (“BRP”) but in the answering affidavit it appears that a claim was accepted by the BRP.

<sup>10</sup> *Zuma* para 54.

rule 42. However, of course, having standing is not the end of the story. Any party personally affected by an order of court may seek a rescission of that order. But these sorts of proceedings have little to do with an applicant's right to seek a rescission *and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met*. Litigants are to appreciate that proving this is no straightforward task. It is trite that an applicant who invokes this rule must show that *the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought. Both grounds must be shown to exist.*' (Own emphasis)

[18] On 12 April 2024, Polymeric<sup>11</sup> wrote a letter to Nano Inks indicating that it did not receive service of the provisional winding-up application, which Nano Inks disputes. Polymeric did not contest Nano Inks's dispute of the service. However, shortly before the provisional winding-up order was scheduled to be heard, it filed a notice to intervene and a notice to oppose. Despite this, the provisional winding-up order was granted on 16 April 2024. Without providing reasons, Polymeric does not oppose the final order but instead chooses to bring this rescission application.

[19] In *Zuma*, the Constitutional Court continued:

'[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words "*granted in the absence of any party affected thereby*", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.

[57] At the outset, when dealing with the "absence ground", the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even

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<sup>11</sup> The founding affidavit for the rescission application in vol 9 of the papers at 749, para 45; the answering affidavit in vol 9 at 855, para 20 read with page 816, and the founding affidavit for the winding up application in vol 1 at 29, para 39 read with page 92.

though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

[58] In *Lodhi 2*, for example, it was said that “where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously”. And, precisely because proper notice had not been given to the affected party in *Theron N.O.*, that Court found that the orders granted in the applicants’ absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[59] Similarly, in *Morudi*, this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced. This Court concluded thus:

“[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.”

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable. Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. *Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate.* Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application. *Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a).* And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted. I need say no more than this: Mr Zuma's litigious tactics cannot render him "absent" in the sense envisaged by rule 42(1)(a).' (Footnotes omitted and own emphasis.)

[20] Polymeric received the notice of the provisional winding-up order but chose not to participate in the proceedings, accordingly, it cannot claim absence due to a lack of notice. According to *Zuma*, Uniform rule 42 does not apply in this situation. Thus, Polymeric does not meet the requirement of 'an order granted in the absence of an affected person' under Uniform rule 42(1)(a).

[21] Even if I'm wrong, while it has not seriously been disputed that Nano Inks is both factually and commercially insolvent, at the very least, it is acknowledged that Nano Inks is commercially insolvent, which is the test for both a provisional winding up order and a final winding up order. Polymeric's critique, which in my view is speculative at best, of the business rescue practitioner is therefore, irrelevant to this application.

[22] The error advanced by Polymeric is that it's the Nano Inks' failure to provide a service affidavit as required in compliance with s 346(4A)(b) of the Companies Act.

[23] It has been established herein above that Uniform rule 42 allows the court to vary or rescind a judgment at its discretion, even if all criteria in rule 42(1)(a) are met.

[24] In *Van der Merwe v Bonaero Park (Edms) Bpk*,<sup>12</sup> the court did not rescind an order even though the jurisdictional facts required by rule 42(1)(a) were present. This case involved a provisional sentence action, which was granted eight days after the summons was served on the Nano Inks's *domicilium citandi et executandi*. According to rule 8, the minimum period is ten days. Both parties agreed that the order was erroneously sought or granted under rule 42(1)(a). The court used its discretion to refuse to rescind the order because, based on the facts presented, if it were rescinded and referred back for a provisional sentence hearing, the court would likely enter a provisional sentence. Rescinding the provisional sentence order would not serve the interests of justice, and accordingly, merely delay the inevitable.

[25] Similarly, in *Nkosi v Absa Bank Ltd*,<sup>13</sup> the court exercised its discretion against granting a rescission because it would have no practical effect and merely caused a delay. The court reasoned as follows:

'36. Accordingly, it is a judicial exercise of the discretion to refuse to rescind an order where the rescission will have no practical effect and merely cause delay. The Court roll is notoriously busy. Litigants who do not exercise their right to be heard when properly notified cannot expect as of right to be granted rescission based on a dilatory defence when all that the rescission is likely to achieve is delay.

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45. The conduct of the Applicant creates the impression that the rescission of the order will cause delay, but no more. The Applicant shows no real intention to take advantage of the pause created by the notice. He does not say what he would have done if he had received the notice. It will simply be another matter clogging this Court's roll. It would not be in the interests of justice to rescind the order.

46. Accordingly, I exercise my discretion to refuse to rescind the order.'

[26] Nano Inks is both legally and commercially insolvent. In exercising my discretion regarding rescission, I do not consider the issue of service relevant at this point and therefore will not address it. The issue of service would have been pertinent when the provisional order was requested. At that stage, addressing it would have

<sup>12</sup> *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 709D-F.

<sup>13</sup> *Nkosi v ABSA Bank Ltd* [2023] ZAGPPHC 431.



been appropriate. However, at the rescission stage, different considerations apply. For instance, if the order were rescinded, the BRP could correct the service issue and return to this court. Upon returning, the factual situation of Nano Inks' insolvency would remain unchanged, and therefore, the BRP would be entitled to the winding up order.

[27] Section 354 of the Companies Act reads 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 or set aside, make an order staying or setting aside the proceedings or for the continuance 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.'

[28] The application in terms of s 354 must be made by a liquidator, creditor or member. My reading of the text is that s 354 applies to "any liquidator, creditor or member". The BRP disputes that Polymerics is a creditor. In the circumstances, to acquire locus standi in terms of s354, Polymerics must provide proof in this application that it is a creditor. Unlike the position in rule 42 of the uniform rules, this court does not enjoy a discretion in terms of s354. However, as proof for the averment of being a creditor, Polymeric merely puts a self-created spread sheet. The spread sheet, in my view, is not sufficient evidence of Polymeric being a creditor, and therefore, on that score, Polymeric has failed to meet this requirement in terms of s 354.

### **Final Winding Up**

[29] The final winding up order has not been opposed. Nano Inks is clearly insolvent, both commercially and factually. Therefore, it must be placed in final winding up. Additionally, all procedural steps required by the Companies Act have been completed. In the premises, all the factors that must be met for a final winding up order, have been met for Nano Inks to be placed in final liquidation.

## Urgency

[30] Returning to the issue of urgency. As I have already mentioned, this matter was brought on a mere one day's notice. In terms of rule 6(12) of the Uniform Rules, in order to be heard as an urgent, it was incumbent on Polymeric to demonstrate to the court that it would not receive substantial relief if the matter is heard in the ordinary course. A further requirement is that urgency should not be self-created<sup>14</sup>. In other words, litigants should not wait for the last moment and bring the application when the application could have been brought much earlier. The provisional winding up order was granted on 16 April 2024. Polymeric has not indicated why they did not participate in opposing that application, nor has Polymeric satisfactorily explained why they did not oppose the final winding up order.

[31] In explaining the urgency, Polymeric indicates they wrote to the first respondent's attorney on 19, 23, and 29 April, and 6 May 2024. The response was received on 22 May 2024. Although these letters are mentioned as annexures in the founding affidavit, they are not included in the court file and do not appear in the indexed papers.

[32] It appears that while the BRP's attorneys ought to have replied earlier to Polymeric, it was apparent at least by 29 April 2024 that they should start preparing for court. The continuous writing of letters when it is apparent that the other side does not wish to litigate through letters, should have caused any prudent attorney to start drafting application papers much earlier. In the circumstances, I am of the view that the urgency in this matter was self-created and accordingly, this matter is deserving of a punitive costs order.

## Order

[33] In the result, I make the following order:

1. The application for rescission of the provisional order granted on 16 April 2024 under Case Number 4052/24P is dismissed with costs.
2. Nano Inks KZN (Pty) Ltd is hereby placed under final liquidation.

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<sup>14</sup> Rokwil Civils (Pty) Ltd and others v Le Sueur N.O and others [2020] ZAKZDHC 61, paras [10 to 22]

3. The costs of the liquidation application shall be the costs in the liquidation.
4. The costs for the rescission application including the costs for the intervening creditor's opposition shall be paid by Polymeric Africa (Pty) Ltd and such costs shall be paid on an attorney and client scale.

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NICHOLSON AJ

Date heard : 18 October 2024  
 Handed down : 4 March 2025

### **APPEARANCES**

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 in the winding up application  
 and the first respondent in the  
 rescission application:

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