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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case No: 054133/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 31 July 2025

SIGNATURE:

In the matter between:

DANIEL TERBLANCHE N.O.

FIRST APPLICANT

HILMI DANIELS N.O.

SECOND APPLICANT

and

S NGOMANE INCORPORATED

RESPONDENT

Coram: Groenewald, RJ (AJ)

Heard on: 28 July 2025

Delivered: 31 July 2025 - This judgment was handed down electronically by uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

[1] This is the return date in a winding-up application, where a provisional winding-up order was granted on 28 August 2024. The application for the winding up of Respondent is brought in terms of the provisions of **sections 344(f), 344(h) and 346 of the previous Companies Act, Act 61 of 1973** ("the previous Companies Act") and **section 81(1)(c)(ii) of the Companies Act 71 of 2008** ("the 2008 Companies Act").

[2] The Respondent is not a layperson, being an incorporated company of attorneys with its registered address located in Pretoria. The Respondent's deponent is Mr Simeon Ngomane which describes himself in the affidavits as a '*duly admitted attorney practising under the name and style S Ngomane Attorneys*'.

[3] The Respondent in the main winding-up application ("the Main Application") initially only filed a notice of intention to oppose, but failed to file an answering affidavit before the provisional order was granted. The notice was delivered several months after the Main Application had been served and long after the ten days afforded in the notice of motion had already expired.

[4] Subsequent to the granting of the provisional winding-up order on 28 August 2024, the Respondent proceeded to file its answering affidavit only on 29 November 2024. It is not unimportant that both the notice of intention to oppose and the answering affidavits were delivered mere days before the Main Application and the first return date was to be heard.

[5] There are three applications which this court is called upon to adjudicate upon, namely:

[5.1] **First**, the Main Application, wherein the Applicant seeks a final winding-up order in respect of the Respondent;

[5.2] **Second**, an application brought in terms of Rule 30A(2), read with Rules 6(5)(a) to (e) and 42(a) and/or the Common Law, which strikes at the provisional order which was granted on the 28th of August 2024. For convenience, this application will be referred to as the Rescission Application; and

[5.3] **Third**, an application ostensibly brought in terms of Rule 30A(2), read with Rule 7(1) and (4), which relates to the response to a Rule 7 notice delivered by the Respondent calling into question the authority and mandate of Van der Merwe & Associates to act on behalf of the Applicants in the Main Application. For convenience, this application will be referred to as the Rule Application.

[6] The Main Application is premised upon a common cause cost order ("the Cost Order") which was granted against the Respondent (Mr Ngomane being the First Applicant therein and *de bonis propriis* against the Respondent as the attorney in that case) on 17 November 2022, under case number 34251/21 of this Honourable Court. Mr Ngomane was also one of three applicants cited in the Cost Order, albeit ostensibly *nomine officio*.

[7] The relevant paragraph of the Cost Order reads as follows:

*"The Applicants and S Ngomane Attorneys are ordered to pay the costs de bonis propriis **jointly and severally** on the scale as between attorney and client which costs shall include the wasted cost of 3 and 17 August 2021."*

(Own emphasis applied.)

[8] The Respondent first sought leave to appeal the Cost Order, which was dismissed with costs on 16 February 2023. The order dismissing the application for leave to appeal provides that: *"The application for leave to appeal is dismissed with*

cost, to be paid by the applicants jointly and severally, the one paying, the other to be absolved". Leave to appeal was then sought from the Supreme Court of Appeal.

[9] On 21 September 2022, the Supreme Court of Appeal dismissed the application for leave to appeal with costs on the grounds that *'there is no reasonable prospect of success in an appeal and that there is no other compelling reason why an appeal should be heard'*.

[10] The Respondent then approached the Constitutional Court to reconsider the Cost Order of costs *de bonis propriis*, but, on the 4th of September 2023, that application to the apex Court was also dismissed with cost.

[11] On 21 November 2023, by agreement between the cost consultants of the Applicants and Respondent, the Taxing Master issued an allocatur in the amount of R200,000.00.

[12] It is worth mentioning that Van der Merwe & Associates acted as attorney on behalf of the Applicants in all of the preceding matters, including the respective applications for leave to appeal, which are referred to above. The Taxed Bill of Costs also refers to 'fees and disbursements due to Van der Merwe & Associates', and the invoice by counsel acting on behalf of the Applicants was directed to Van der Merwe & Associates. This was never disputed, nor was an objection raised during taxation to the contention that Van der Merwe & Associates were the Applicants' attorneys.

[13] The identity of the parties, the fact that the Respondent conducts his business within the jurisdictional area of this Honourable Court and that the Respondent's registered address is within the jurisdictional area of this Honourable Court are not in dispute. There can be no doubt that this Court is seized with the jurisdiction to deal with both the interlocutory and the Main Application.

[14] It is also not in dispute that the Applicants proceeded to tax their bill of cost, and the cost orders granted in favour of the Applicants are attached to the founding affidavit as annexures "B" to "E".

[15] It is further common cause that the Respondent made a payment of a portion of the taxed bill of cost. There is a dispute whether the Respondent is liable for the payment of the full bill of cost or only a pro-rata portion thereof. I shall deal with this issue below.

[16] It is not unimportant that the Respondent did not present any contradictory evidence to demonstrate that the Respondent is not insolvent or that the Respondent is in a position to make payment of the claimed amount, if such amount is in fact due. One would have expected the Respondent to make a frank disclosure of its financial position, to provide details of its assets and of its creditors. This was not done.

[17] On 24 November 2023, Van der Merwe & Associates, ostensibly acting as the Applicant's attorneys, delivered a letter of demand to the Respondent to make payment of the taxed bills of costs. On the 5th of December 2023, a further e-mail was dispatched, also by Van der Merwe & Associates, to the Respondent for warning that if payment is not made that the Sheriff would be instructed to execute the writ.

[18] On 5 December 2023, the Respondent sent a letter to Van der Merwe & Associates, where the following was recorded in paragraph 3 thereof:

"We however, hereby request indulgence to pay the full amount of the taxed bill of cost before or by the 30 April 2023 (sic). The reason for our request is because we need to raise some funds in order for us to be able to pay the taxed bill of cost in this matter".

[19] The content of this letter is not unimportant. Not only does it acknowledge that the Respondent accepted liability for the full amount of the taxed bill of cost, but also insofar as there was no challenge to the authority of Van der Merwe & Associates to act on behalf of the Applicants.

[20] The Sheriff proceeded to execute a writ of execution against the Respondent, and the return reflects that the Respondent only had assets sufficient to cover approximately R12 000 of the debt.

[21] On 8 August 2024, the Respondent sent a letter to Van der Merwe & Associates, not denying the indebtedness nor disputing Van der Merwe & Associates' mandate, but stating the following:

"Kindly take note that the fact that we do not answer each and every letter you addressed to us, that does not mean ignoring you. (sic) The fact of the matter is that it's a well-known fact that the owed amount needs to be paid and by then we are not in a position to settle that account. However, the day we get something we shall for sure pay."

[22] Ultimately, the Respondent paid R66 070 of the total Taxed Bill of R200 000.00. The Respondent contends that this is the amount for which it was liable for. How it arrives at this amount, which is slightly less than a third (R66 666.67) of the R200 000.00, is not properly explained in the Answering Affidavit.

[23] On 16 May 2025, the present winding-up application was launched and subsequently served upon the Respondent.

[24] On 15 August 2025, the Applicant filed a supplementary affidavit which was uploaded to Case Lines in apparent anticipation of the date for which the winding-up application was set down to be heard. The content of the supplementary affidavit expands further on the facts relied upon in the founding affidavit. The supplementary affidavit is a short document consisting of some 11 numbered paragraphs.

[25] On 15 August 2024, the Applicants, under circumstances where the time period afforded by the Rules to deliver a notice of intention to oppose had already expired and where, to that date, no opposition was noted, delivered a short supplementary affidavit.

[26] Only on the 22nd of August 2024, approximately 3 months after the issue of the liquidation application, the Respondent delivered its notice of intention to oppose. In other words, some seven calendar days after the supplementary affidavit was uploaded to Caselines. Albeit that the Respondent complained that the Respondent

was belatedly invited to the Caselines file by the Applicant, it is clear that the Respondent did have access to the case file before the matter was heard on the 28th of August 2024 by the Honourable Justice Francis-Subbiah.

[27] Albeit that the Respondent's counsel in argument continued to deny that the Respondent had access to Caselines before the granting of the provisional order, the objective facts demonstrate the contrary. Not only is this fact stated under oath by a member of the Applicants' attorneys, but the audit trail on Caselines (a screenshot of which is inserted below) demonstrates the date when the attorney, Mr Ngomane, was granted access to the Caselines File:

Mr Simeon Ngomane Invited Attorney 26 August, 2024 Miss Kim Marx Master Bundle
14:24SAST

[28] There is therefore no merit in the denial that the Respondent did not have access to the Caselines file. It must be kept in mind that the Respondent only belatedly delivered its notice of intention to oppose the application on 22 August 2024. The Respondent was invited to Caselines only four days later, on the 26th of August 2024. The Applicants cannot be blamed if the Respondent may have delayed accessing the Caselines folder.

[29] The Respondent did not attend court on the 28th of August 2024, nor did it seek confirmation from the Applicants that the matter would not proceed on that date. On that date, the following order was granted:

"1. The Applicants are granted leave to file their supplementary affidavit dated 14 August 2024 and it is admitted into evidence.

2. The Respondent is provisionally wound up and placed in the hands of the Master of High Court.

3. A Rule nisi is issued calling upon all persons who have a legitimate interest to put forth their reasons why this court should not order the final winding-up of the Respondent on 25 October 2024 at 10h00.

4. *This order must forthwith be served upon:*

4.1 *The Respondent's registered address.*

4.2 *The South African Revenue Service.*

4.3 *The Master of the High Court, Pretoria.*

4.4 *The Respondent's employees, if any.*

4.5 *The Respondent's employees' trade unions, if any.*

5. *Costs are costs in the administration of the estate on a party and party scale."*

[30] Only on 16 October 2024, the Respondent proceeded to deliver a notice in terms of Uniform Rule 7(1). The main application had been served on the Respondent on 26 May 2024. In other words, the Rule 7(1) notice was delivered **five months** after receipt of the winding-up application.

[31] On 23 October 2024, a response was delivered to the Rule 7(1) notice, which forms part of the subject matter of one of the two interlocutory applications which are referred to herein.

[32] The Respondent proceeded to deliver its answering affidavit in the winding-up application and dealt therein with both the founding and the supplementary affidavits delivered by the Applicants.

Sequence of dealing with the applications:

[33] Mindful of the three applications that are to be decided, it is prudent to first deal with the Rule 7 application. The result thereof will directly impact both the

Rescission Application and the Main Application. It must follow that if the Rule 7 Application is successful, the Main Application cannot proceed.

[34] If the Rule 7 Application is not successful, the Rescission Application is next in sequence, as the status of the supplementary affidavit and potentially of the provisional order may be affected by the outcome of that application. And lastly, if the Rule 7 Application is not successful, the Main Application is to be dealt within the ambit of the result of the Rescission Application.

[35] At the onset of the argument, the proposed sequence of dealing with the applications was debated with counsel. Both counsel agreed that all three applications would be argued at the same time, but subject to the qualification that if the Rule 7 Application succeeds, that it would, of course, impact whether the Main Application could be decided or not.

[36] For purposes of convenience, the parties will be referred to as in the Main Application.

[37] Whilst the Respondent's counsel initially filed short heads of argument, heads of argument in respect of both the Rule 7 Application and the Rescission Application were only uploaded to Caselines some 29 minutes before the matter was to be heard. The heads of argument were not served on the Applicants' attorneys.

[38] I asked Mr Shakoane SC whether he had informed his opponent, Mr Lotter, of the further heads of argument, to which he answered in the negative. Mr Lotter was not aware of the further heads of argument, and hard copies were only, following my request, provided to Mr Lotter. The Respondent also did not participate in the compiling of the joint practice note as required by the relevant directives of this Court. The way in which this was dealt with is unfortunate, to say the least.

[39] It is now prudent to deal with the Rule 7 Application first:

The Rule 7 Application:

[40] On 16 October 2024, the Respondent proceeded to deliver a notice in terms of Uniform Rule 7(1). The main application had been served on the Respondent on 26 May 2024. In other words, the Rule 7(1) notice was delivered **five months** after receipt of the winding-up application.

[41] On 23 October 2024, the Applicants delivered their response to the Rule 7(1) in the form of a document styled as *"Confirmation of authority a mandate to act, signed by the Second Applicant, who is the joint liquidator"*, recording and confirming that:

"1. VAN DER MERWE & ASSOCIATES ING (represented by Gert Van der Merwe) is authorised and mandate to represent the Applicants under case number 054133/2024.

2. VAN DER MERWE & ASSOCIATES ING (represented by Gert Van der Merwe) was duly authorised and mandated to represent the Applicants in the proceedings in which the cost orders were granted against the Respondent, specifically and including case number 34251/21.

3. VAN DER MERWE & ASSOCIATES ING (represented by Gert Van der Merwe) are instructed to represent the Applicants in all matters necessary to protect their interest and execute any orders obtained against the Respondent or any of its directors".

[42] It is not unimportant that the response was delivered where Van Der Merwe & Associates had, in all of the preceding litigation and subsequent applications for leave to appeal, represented the Applicants. They had also represented the Applicant in the process of taxing the bills of costs, and they represented the Applicants in the correspondence relating to the costs issue. Even the invoice from the counsel who had previously acted for the Applicants and formed an annexure to the Taxed Bill of Costs was addressed to Van der Merwe & Associates as the instructing attorney. Until the Rule 7(1) notice was delivered Van der Merwe & Associates' authority to act was never disputed by the Respondent.

[43] Dissatisfied with the response to its Rule 7(1) notice, the Respondent launched an application ostensibly in terms of Rule 30A(2), read with Rule 7(1) and (4) - this is the Rule 7 Application. The Rule 7 Application was delivered on 8 November 2024.

[44] In that application, which is found in section 19 on Case Lines, the Respondent, inter alia, seeks an order declaring that the Applicants in the Main Application failed to satisfy the court that Mr Gert Van der Merwe and the firm, Van der Merwe & Associates are properly authorised and mandated to institute the application proceedings for the liquidation of S Ngomane Incorporated or to act on behalf of the Applicants in the Main Proceedings. Ancillary relief includes a declarator that Mr Van der Merwe and the firm, Van der Merwe & Associates, may not act on behalf of the Applicants (in the Main Application) in the liquidation proceedings, that the institution of the liquidation application be declared unauthorised, invalid and set aside as well as a of alternative relief in respect thereof.

[45] Uniform Rule 7(1) provides as follows:

"Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

[46] The underlying purpose of Rule 7(1) is, on the one hand, to avoid cluttering the pleadings unnecessarily with resolutions and powers of attorneys whilst on the other hand, it provides a safeguard to prevent a cited person from repudiating the process and denying his or her authority in respect of issuing the process. There is no doubt that Rule 7(1) also applies in both action and application proceedings.

[47] Rule 7(1) makes it clear that, subject to sub-rules (2) and (3) [which deal with appeals], it is not necessary to file a power of attorney, but the authority to act may be challenged within the context of the rule.

[48] The Applicants made much thereof that during the preceding litigation, the Respondent never raised the authority of Van der Merwe & Associates as a bone of contention. In fact, the Respondent engaged in correspondence even post the cost order with Van der Merwe & Associates and sought an indulgence in respect of an extension to make payment without uttering a word in respect of Van der Merwe & Associates' authority to represent the Applicants. This is a relevant factor, but is by no means decisive.

[49] Arguably, the delivery of the Rule 7 notice could have been triggered by the anomaly which occurred when Van der Merwe & Associates initially launched an application for the winding-up of the Respondent in its own name. It is correctly pointed out in the papers, and it does not appear to be in issue, that the cost orders were granted in favour of the Applicants and not in favour of Van der Merwe & Associates. This apparent error was corrected (as Mr Lotter put it) when that first application was withdrawn, and the costs were tendered in respect thereof.

[50] In considering the matter, regard is not only taken of the surrounding facts but also specifically in respect of the response delivered to the Rule 7(1) notice.

[51] The Applicants directly raised the delay in the delivery of the Rule 7(1) notice. It is so that the delay in the delivery of the Rule 7(1) notice is not explained in the Rule 7 Application. The Rule was considered by Collis J in ***Kaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC (23143/2020) [2021] ZAGPPHC 668 (18 October 2021)*** where the Court dealt with a delay of 37 days (not five months as is the case here) in the delivery of the Rule 7(1) notice required an application for condonation. The applicant in ***Kaap-Vaal Trust*** neither explained nor requested leave from the Court to dispute the authority of the attorneys outside of the 10-day period. The Court held that where a litigant fails to adhere to any time limit provided for in any rule of court, Rule 27(3) specifically permits such litigant to seek condonation for its non-compliance. In that case, the Court dismissed the application on the basis that

the applicant therein couldn't be granted relief on the merits in circumstances where it, by itself, was in flagrant disregard of the rules of court.

[52] In answer to the Applicants' reliance on ***Kaap-Vaal Trust*** the Respondent referred to ***Masithela N.O. and Others v Master of the High Court Pretoria and Others (60899/2021) [2024] ZAGPPHC 287 (19 March 2024)***, but this case is clearly distinguishable as (recorded in par 39.7 of that judgment) in that case "*...no objection was taken by the Applicants that the Rule 7 challenge was out of time. In the Answering Affidavit filed on behalf of the Applicants in opposition to the Rule 30A(2) application no point, whether in limine or at all, was taken in respect of the late challenge in terms of Rule 7.*" The first time that this was raised was at the hearing of the Rule 30A(2) application, when senior counsel appearing on behalf of the Applicants, in passing, made mention that the Rule 7 challenge was filed at a very late stage. No specific challenge was made to argue that, as a consequence of the late challenge, the Rule 7 Notice was defective or void. Therefore, the delay point was not properly advanced on the papers, and on that basis, the point could not be entertained.

[53] It follows that each matter must be decided on its own merits. In the present matter, the delay point was pertinently raised both in the Answering Affidavit [the point was taken *in limine* in a distinct rubric under the heading "*Point in limine: non-compliance with the prescribed time frame in Uniform Rule 7*"] to the Rule 7 Application and extensively in the Applicants' heads of argument. The Respondent's long delay was inordinate, and there is no proper explanation for that delay. It follows that ***Kaap-Vaal Trust supra*** decision finds application, which is in itself dispositive of the Rule 7 Application.

[54] Even if I am wrong that the ***Kaap-Vaal Trust*** case applies, the Rule 7 Application also cannot succeed on the merits thereof. Ultimately, the sub- rule provides that where authority has been challenged, the requirement is that the person concerned shall satisfy the court that he is "*authorised so to act*".

[55] It is trite that this person concerned may do so by adducing any acceptable form of proof and not necessarily by the filing of a written power of attorney. In

Administrator, Transvaal v Mponyane and Others 1990 (4) SA 407 (W) at 409 it was held that:

"In my view there is nothing in Rule 7 in its present form that requires the authorisation of an attorney to be embodied in a document styled a power of attorney. The provisions of Rule 7 specifically requiring powers of attorney in appeals fortifies the impression that otherwise an attorney's mandate can be proved otherwise than by the production of a written power of attorney. I also think that Rule 7 should be viewed against the background of its original form.

...I have no doubt that the underlying intention of the recent amendment of Rule 7 was to make the Rule less cumbersome and formalistic. I therefore conclude that proof of the authority of the respondents' attorney is not dependent on the production of a written power of attorney."

[56] The sub-rule requires that the court must be satisfied that authority exists at the time when proof of it is proffered: there is nothing in the Rule which suggests that the court is required to investigate the validity of past acts in the context of authority to act.¹ Mr Daniels, the Second Applicant, signed the confirmation of authority and did so in his capacity as joint liquidator. The confirmation of authority is harmonious with the past conduct of Van der Merwe & Associates acting as the Applicants' attorneys.

[57] Having also independently considered the Rule 7 Application upon its own merits, the court concludes that Van der Merwe & Associates is properly authorised to represent the Applicants in these proceedings and on this further basis, also the Rule 7 Application stands to be dismissed.

[58] It follows that the Rule 7 Application stands to be dismissed with costs of counsel on Scale B.

¹ *Johannesburg City Council v Elesander Investments (Pty) Ltd* 1979 (3) SA 1273 (T) at 1280A; *Texeira v Industrial and Mercantile Corporation* 1979 (4) SA 532 (O) at 539F; *Morais v City of Cape Town* 1997 (3) SA 1097 (C) at 1101D.

The Rescission Application:

[59] As the Rule 7 Application has been disposed of, the next application which is to be dealt with is the Rescission Application.

[60] As part of the provisional order which was granted by the Honourable Justice Francis-Subbiah on the 28th of August 2024, she also proceeded to grant leave for the inclusion of the supplementary affidavit into evidence. The fact that the provisional order pertinently deals with leave to file the supplementary affidavit demonstrates that the Learned Judge had applied her mind to the issue of allowing the evidence contained in the supplementary affidavit and held that it should be allowed. This is not a further set of affidavits as provided for by Rule 6, as it was delivered before the answering affidavit. It is also not correct to state that the Applicants did not make out their case in the Founding Affidavit. The supplementary affidavit is harmonious with the case made in the Founding Affidavit and seeks to present further relevant facts.

[61] The Respondent takes issue with the provisional order and with the supplementary affidavit and contends that it was not served upon the Respondent prior to the granting of the provisional order.

[62] It is not disputed that at the time when the supplementary affidavit had been uploaded, the time period afforded by the Rule to deliver a notice of intention to oppose the Main Application had long since lapsed and the Respondent only belatedly filed that notice after the supplementary affidavit had already been uploaded to Caselines; and

[63] It is also so that the Respondent was in fact already invited to the Case Lines file before the date upon which the provisional order was granted. The Respondent did not appear when the Main Application was heard, nor did it address correspondence to the Applicants' seeking a postponement of the matter or arranging for time periods to deliver an answering affidavit.

[64] The Rescission Application is brought in terms of Rule 30A(2) read with Rule 6(5)(a)(2)(e) and 42(a) and/or the Common Law. The notice of motion includes both declaratory relief in respect of the status of the supplementary affidavit as well as prayers directed at the rescission and/or setting aside thereof.

[65] Insofar as declaratory relief is sought in respect of the status of the supplementary affidavit, it must be kept in mind that the introduction thereof and the status thereof are already the subject matter of the provisional order. That court granted leave for the admission of that supplementary affidavit, and it is not for this court to make declaratory orders contrary to the order which has already been granted. The exception would be in the case where the initial order was a nullity.² This is not such a case. The mere fact that the Respondent did not appear at court and that the provisional order was granted in his absence does not render the provisional order a nullity.

[66] The following relevant factors are to be considered:

[66.1] The Respondent failed to timeously file a notice of intention to oppose. Therefore, at the stage when the supplementary affidavit was uploaded, there was no indication that the Respondent intended to oppose the application;

[66.2] The Respondent was granted access to the Case Lines file within four days following receipt of its notice of intention to oppose, which only came to light on the 22nd of August 2024. In this regard, the Respondent is not a lay person and would most certainly not have been ignorant of the implications of belatedly filing the notice of intention to oppose;

[66.3] Upon consideration of the founding affidavit, there is no doubt that even in the absence of the supplementary affidavit, the provisional order would have been granted. Even if the contents of the supplementary affidavit are disregarded, it is clear that the provisional order would still have been granted;

² *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 {SCA}.

[66.4] In its answering affidavit, the Respondent, mindful that only a provisional order had been granted, has had the opportunity to address the contents of both the founding and the supplementary affidavit. The complaint of prejudice is therefore more perceived than real;

[66.5] The provisional order was granted on 28 August 2024, but the Rescission Application was only launched more than two months later in early December 2024. There is no explanation for this delay; and

[66.6] In addition, mindful that the Respondent seeks the rescission of a provisional winding-up order, it appears that it has failed to give notice of its application to interested parties.³ Mr Shakoane SC was asked if notice was given to the Master, SARS or creditors, and he answered in the negative. It is also not stated in the Rescission Application whether provisional liquidators have been appointed, and there is no indication that notice was given to any interested parties. The Respondent is silent about its creditors. It seems rather ironic that the Respondent complains about an order granted in its absence, yet fails to disclose whether there are other interested parties and does not give notice to those parties of the Rescission Application, which may, in turn, also affect those parties.

[67] There is something to be said about the delay in the delivery of the answering affidavit to the Rescission Application. The Applicants' attorneys provide a rather thin explanation for this delay, which Mr Shakoane SC, with good reason, criticised. That being said, the Respondent also delayed: its delivered its notice to oppose months after the time period provided for; the provisional order was granted on 28 August 2024, yet the Rescission Application was launched only in December 2024. Even the heads of argument in the Rescission Application and the Rule 7 Applications were only uploaded less than 30 minutes before this application was to be heard.

³ *Re Calgary and Edmonton Land Co Ltd* (1975) 1 All ER 1046; *Herbst v Hessels* 1978 (2) SA 105 (T) 109; *errace Bay Holdings (Pty) Ltd v Strathmore Diamonds (Pty) Ltd* 1976 (3) SA 664 (SWA). See also: *Machina Ltd v Rossouw* 1959 (2) SA 218 (O) at 219; *Abdurahman v Estate Abdurahman* 1959 (1) SA 872 (C) at 873F.

[68] Ultimately, both parties delayed in respect of the delivery of notices, affidavits and in respect of compliance with both the Rules of Court and the practice directives of this Court. It appears in the interest of justice to allow the respective affidavits.

[69] Under the circumstances, the Rescission Application also stands to be dismissed, with costs, including costs of counsel on Scale B.

The Main Application:

[70] In the Main Application, the Respondent raises several technical defences:

[71] Firstly, it launches an attack on the Deponent's *locus standi* to represent the Applicants. The Respondent contends that the Applicants do not have *locus standi* to pursue this application because it contends that Van der Merwe & Associates are not mandated to act on the Applicants' behalf. Essentially, this argument overlaps with the Rule 7 application, and the finding on that application disposes of this point. The Applicants' *locus standi* is linked to the indebtedness allegedly owed by the Respondent. If the Applicants establish that they are creditors within the ambit of the remaining provisions of the previous Companies Act, then they have, in their capacity as creditors, *locus standi* to bring this application.

[72] Secondly, the Respondent raises a material non-joinder point contending that the other parties to the cost orders should have been joined as parties to the present proceedings. This point overlaps with the defence in respect of the merits, which basically boils down to a main point that the cost order should be interpreted as meaning that each of the parties ordered to pay the costs in the Cost Order must pay a pro rata portion of the taxed costs. The Respondent contends that paragraph 2 of the Cost Order provides that the Respondents must pay the costs "*jointly and severally*" which the Respondent advances should be interpreted as having to be shared "*equally*" between all of the Respondents.

[73] There is no basis upon which to contend that the other Respondents in the Cost Order should be joined to this application. The issue at hand relates to the winding-up or not of the Respondent and not in respect of the status of the other

parties to those proceedings. The findings made herein have bearing upon the Respondent's position and therefore, the other parties, which the Respondent contends should have been joined, do not have the necessary material interest to justify the necessity to be joined by the Applicants. Ultimately, the central question on the merits is whether the Respondent should be wound-up or not. That is not an issue which would affect the parties which the Respondent contends should have been joined. The point is therefore untenable.

[74] Thirdly, the Respondent attacks the jurisdiction of this court to hear the application, but premises that attack upon a purported lack of locus standi and a material non-joinder. Both of these points stand to be rejected. In the first paragraph of the answering affidavit, the Deponent pertinently alleges that the Respondent's offices are situated at Suite 1[...], 1st Floor, 2[...] C[...] T[...] Building, Pretorius Street, **Pretoria**, Gauteng Province. Therefore, the attack on jurisdiction cannot succeed.

[75] Fourthly, the Respondent contends that there are material disputes of fact which make the adjudication of this matter upon application impossible and contends that a referral to trial or *viva voce* should be ordered.

[76] Based on the findings below, I conclude that there are no material disputes of fact which preclude this matter from proceeding on motion.

[77] This leaves the defence on the merits. The Respondent contends that the correct interpretation of the Cost Order would be that the Respondent was only responsible for its pro-rata share of the R200 000-00 cost order, which would amount to an amount of R66 070-00. In essence, the Respondent contends that it has paid what is due by it. How the Respondent arrives at the amount of R66 070-00 is not properly explained.

[78] The Respondent's contention that the Applicants have not proven that they actually incurred the agreed Taxed Amount is also without merit. It is a defence which should have been raised at taxation. The fact that the Respondent agreed to the amount puts an end to the issue.

[79] As a general principle in our Common Law, even co-debtors cannot be liable for more than their *pro-rata* share, save where there is evidence of an intention to create a joint debt. For this reason and for many years, as is demonstrated for example in the decision of ***Roelou Barry (Edms) Bpk v Bosch en 'n ander 1967 (1) SA 54 (C) at 59C***, the general proposition has been that where the court intended parties to be liable *in solidum* the Court would include words such as or similar to '*Jointly and several*'.

[80] Ultimately, a consideration of the Order must occur. As Nicholas AJA pointed out in ***Administrator, Cape and Another v Ntshwaqela and Others 1990 (1) SA 705 (A) at 715F- I***:

"[Trollip JA] said (at 304D - H) that the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it. "

[81] In ***Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd And Others 2019 (3) SA 441 (SCA)*** the Court held at par 16 referred with approval Administrator, Cape and Another supra and added that:

"...A part of the 'usual well-known rules' of interpretation, according to Olivier JA, is -

'dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasie is van dit wat gese is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is.'"

[82] The Respondent's interpretation only selectively focuses on the word "jointly" and ignores the inclusion of the word "severally". This approach cannot be correct. The inclusion of the word "severally", especially combined with "jointly" demonstrates the intention that more is meant than a *pro rata* liability. The Court's choice of words in the Cost Order was calculated and should be given effect to.

[83] From consideration of the Cost Order, it is abundantly clear that what was intended by the Honourable Acting Judge was that the parties ordered to pay the cost must do so jointly and severally. Therefore, the Applicants would be quite entitled to enforce their cost order against any one of the parties against whom the cost order was granted, either against them all jointly or against one. In this case, the Applicant has, as it is entitled to do, elected to enforce its cost order against the Respondent. Obviously, should the Respondent pay the full cost order, it would in turn be entitled to reclaim the *pro-rata* share from the other parties against whom the Cost Order was granted.

[84] This being so, it must follow that the Respondent's contention in regard to the interpretation of the Cost Order is untenable and stands to be rejected. The Respondent is grasping at straws to avoid the inevitable.

[85] On the Respondent's version, it has not even paid a full third of the taxed bill of costs. It has failed to demonstrate that it is able to make payment; in fact, based on the Respondent's own correspondence, it is clear that the contrary is true and that the Respondent is unable to make payment.

[86] Insofar as the Respondent has contended that this Court should exercise its narrow discretion in its favour, the following was stated in ***Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) at pages [12] and [13]***:

"[12] Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. Different considerations may apply where business rescue proceedings are being considered in terms of Part A of chapter six of the new Companies Act 71 of 2008. Those considerations are not relevant to these proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual circumstances only.

*[13] As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects the court a quo applied 'the wrong principle[s]'. There must be no room for any misunderstanding: the onus is not discharged by the respondent merely by claiming the existence of a counterclaim. The principles of which the court a quo lost sight are: (a) as set out in *Badenhorst and Kalil*, once the respondent's indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide."*

[87] Under these circumstances, and mindful of the acknowledgements made in correspondence by the Respondent itself in respect of its inability to pay, this court can only conclude that the provisional order should be made final.

The order:

[88] The following order is made:

1. The application in terms of Rule 30A(2), read with Rule 7(1) and (4) with notice of motion dated 3 December 2024, is dismissed with costs, including costs of counsel on Scale B;
2. The application in terms of Rule 30A(2), read with Rules 6(5)(a) to (e) and 42(a) and/or the Common Law, with notice of motion dated 2 December 2024, is dismissed with costs, including costs of counsel on Scale B;
3. The provisional winding-up order, granted on 28 August 2024, is confirmed, and the Respondent company, S Ngomane Incorporated, with registration number 2007/025777/21, is hereby placed under final winding-up in the hands of the Master of the High Court, Pretoria;
4. The cost of this application shall be costs in the administration of the winding-up and shall include the costs of counsel on Scale B.

RJ GROENEWALD (AJ)
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 31 July 2025.

For the Applicant : Adv GJ Lotter
Instructed by : Van der Merwe & Associates

For the Respondent: Adv G Shakoane SC
with
Adv M C Ntshangase

Instructed by : S Ngomane Inc

Matter heard on : 28 July 2025 - Court 6C

Judgment date : 31 July 2025