IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 3478 /2023

Reportable	**YES/NO**

In the matter between:

NAXA TRADING (PTY) LTD — **First Applicant**

NCEBAKAZI BHEKEZULU — **Second Applicant**

and

VOLTEX (PTY) LTD — **First Respondent**

SHROSBREE TRUSTEES — **Second Respondent**

Judgment

Cengani-Mbakaza AJ

Introduction

[1] This is an opposed application for the rescission for a final order of liquidation granted by this court on 14 May 2024. The impugned order reads thus:

1. The Rule Nisi be and is hereby made absolute.
2. The cost of this application shall be costs in the liquidation.

[2] The first applicant (Naxa) is a company duly registered in terms of the Company Laws of the Republic of South Africa. It has its address and principal place of business at No 2[…] W[...] Drive, Fortgale, Mthatha (the registered address). The company deals with plant hiring. The second applicant (Ms Bhekezulu) is identified as a businessperson, the sole director of the first applicant.

[3] The 1st respondent (Voltex) is a company, which has been duly incorporated with limited liability in accordance with the company laws of the Republic of South Africa. It has its registered address at Freestone Office Park, 1[...] P[...] Road, Sandton. Voltex is one of the largest suppliers of electric equipment and components in South Africa. It is a wholly owned subsidiary of Bidvest Group Limited, which is listed on the Johannesburg Stock exchange. Voltex trades under several trading styles and division including Atlas Cables, Cabstruct Johannesburg, Phambili interface and Techni-Lamp. The second respondent is a liquidator cited as an interested party in the proceedings.

The background facts

[4] The legal dispute between Voltex and Naxa stems from a disputed credit agreement (the agreement) concluded by both parties on 18 November 2021. Voltex claims that Naxa is indebted to it in the amount of R453 611.05 arising from the purchase of goods.

[5] Voltex avers that according to the agreement, Naxa would purchase goods from it on credit. As part of the agreement, the terms and conditions were incorporated thereto. Voltex asserts that it duly complied with all its obligations, the goods were delivered during the period of October 2021 to March 2022. However, Naxa failed to pay the stated amounts within 30 days from the date of Voltex's statements.

[6] On 23 August 2023, Volte's attorneys addressed a letter to Naxa, a statutory letter in terms of s 345 of the Companies Act 61 of 1973 (the Companies Act), demanding payment in compliance with the agreement. Naxa received the letter as per Sherrif's return of service dated 1 September 2023.

[7] Despite demand, Naxa failed to pay the amount allegedly owed. On 29 September 2023, Voltex filed an application to place Naxa under provisional winding- up. Voltex also applied that the service of the *rule nisi* be effected at the registered office of Naxa, by one publication in the Daily Dispatch newspaper and by registered post. The interim order was returnable on 14 November 2023.

[8] The application papers for the provisional winding- up were served at Naxa's registered address as per the Sherrif's return of service. The interim order was granted on 19 March 2024 and Naxa was placed under provisional winding- up. The order contained directives for service which were complied with.

[9] In compliance with the court's directives, the interim order was published twice in the Daily Dispatch newspaper on 3 April 2024 and on 26 April 2024. The interim order was further served on Naxa's registered address.

The interim order was further served upon the SARS at 3-3[...] P[...] F[...] Park, P[...] F[...] Road, Chiselhurst, East London, on 15 April 2024 and again on 25 April 2024. The interim order was further affixed to the notice board as per the court's directives.

[10] It is common cause that on 16 April 2024, the matter was postponed to the 30 April 2024. There was no opposition in all the mentioned dates and the final order was granted on 14 May 2024.

Naxa's case

[11] In support of the application for the rescission of the final court order dated 14 May 2024, Ms Bhekezulu asserts that the main application did not come to her attention and was not aware of it. She indicates that she only became aware of the court order when her attorneys of record informed her.

[12] Her attorneys undertook to investigate the circumstances that led to the granting of the final order and revert. She also instructed her attorneys to negotiate a settlement of the debt, with the aim of having the liquidation order rescinded by consent. Briefly, her attorneys of record uplifted the file in court and sent a letter to Voltex's attorneys negotiating a settlement. No response was received.

[13] Ms Bhekezulu avers that Naxa or its representative was never served personally with the rule nisi order. Instead, the return of service demonstrates that on 13 March 2024, the main application was served by way of affixing to the main door of the given address operating as Mangaliso guest house. The interim order was served again at the same address to a person who did not give his name. Naxa avers that the final order was therefore erroneously granted.

[14] In his argument, Naxa's counsel contended that the manner in which the sheriff served the main application was irregular. It was impermissible for the sheriff to affix a copy of the main application at the main door of a 'given address'. The form of service opted for by the sheriff, so it was argued, is only permissible in instances where a litigant has chosen *domicilium citandi et executandi*. Even in those instances, the duty is upon the sheriff to serve process by delivering or leaving a copy thereof in the manner by which, in the ordinary course, the process would come to the attention and be received by the intended recipient.

[15] Naxa's representative also asserts that the letter of demand was served to a domestic worker. She further avers that no agreement was concluded between Naxa and Voltex. Naxa never entered the doors of Voltex in any branch in Mthatha. In disputing the agreement, Ms Bhekezulu also claims that the signature appearing at page 24 of the purported agreement is not hers.

[16] She went to Ngangelizwe Police station to lay a criminal case of fraud. She gave police officers a list of Naxa's employees to investigate the case. It transpired that the agreement was allegedly entered into by one of Naxa's employees without her permission. According to Naxa, Voltex failed to do a proper verification before granting the credit. In a nutshell, Ms Bhekezulu contends that the terms and conditions of that particular agreement are not binding on Naxa.

Voltex's case

[17] In its opposition Voltex contends that given the fact that Naxa has been finally liquidated, it ought and should have joined the Master of the High Court and all its creditors and the liquidators who were appointed to attend to the

winding-up. These parties, so it asserted, have a legal interest in the outcome of the application for rescission of the final liquidation order.

[18] Voltex avers that Naxa has failed to show a bona fide defence and there are no prospects of success in the main application. According to Voltex, there is no single iota of evidence suggesting that Naxa is solvent; no documentary evidence was presented to demonstrate Naxa's financial position.

[19] Voltex disputes the allegations of fraud, asserting that in a telephonic conversation between the attorneys, a settlement offer was discussed. Moreover, a letter was dispatched to Voltex discussing the payment plan, and there was never any suggestion that the agreement emanated from fraud, which was eventually reported to the police.

[20] Voltex further argues that Naxa failed to provide a satisfactory and reasonable explanation for default in that despite numerous correspondences that were sent to Naxa, it failed to corporate. Voltex refers, inter alia, to a letter of demand dated 23 August 2023 which was sent to Naxa's email address. In summary, Voltex avers that the main application was properly served and the interim as well as the final orders were correctly granted.

The preliminary issues: non-joinder

[21] In its papers Naxa did not adequately address this issue. Notwithstanding this, it needs to be established whether the Master of the High Court and all the creditors have direct and substantial interest in the proceedings before this court. The other determining factor is whether these parties are likely to be affected by the outcome of the case. The question of prejudice is also a consideration. In *Transvaal Agricultural Union v Minister of Agriculture*

and Land Affairs[1], the Supreme Court of Appeal (SCA) adopted the following test:

> 'In Van Winsen, Cilliers and Loots Herbstein & Van Winsen's The Civil Practice of the Supreme Court of South Africa 4th ed at 172 the learned authors supply a useful summary of the approach of the Court in the Amalgamated Engineering case in determining, by way of two tests, whether a third party has a direct and substantial interest in the outcome of litigation. Concerning the two tests, the learned authors state as follows:
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> 'The first was to consider whether the third party would have locus standi to claim relief concerning the same subject-matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be res judicata against him, entitling him to approach the Courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.'

[22] It is discernible from the papers filed that after the liquidation order was obtained, Voltex took the necessary steps to implement the order. For obvious reasons, the master of the High Court became involved in the process. As a matter of principle, creditors are primary interested parties in a liquidation process. This is so because the liquidation process is a credit-driven process designed to sell a company's assets and distribute the proceeds among the creditors in accordance with their legally determined priority.

[23] In *casu*, the joinder of Ms Bhekezulu as proposed by Naxa's counsel is insufficient. Despite it being a rescission application, the failure to join the Master of the High Court as well as Naxa's creditors renders the application fatal. This proposition is fortified by the fact that the final order was already obtained and the next procedural steps had already taken place, and obviously the outcome of this application is likely to affect all the relevant parties.

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[1] 2005 (4) SA 212 (SCA) at para 66.

The applicants' locus standi

[24] The debate of non-joinder also raises the issue of the applicants' *locus standi*, as argued by Voltex's counsel. Despite this being vehemently opposed, it suffices to mention that the SCA's decision in *Dr WAA Gous (Johannesburg) v HR Computek (Pty) Ltd and Another*[2] provides context. It establishes that only a liquidator, creditor or member can bring a rescission application under s 354 (1) of the Companies Act.

[25] Section 354 of the Companies Act provides that:

'(1) The Court may at any time after the commencement of a winding-up, <u>on the application of any liquidator, creditor or member</u>, 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 <u>the creditors or members</u> as proved to it by any sufficient evidence.' (accentuation added)

Notwithstanding the aforesaid, I proceed to deal with main application in turn:

The legal framework governing the application for rescission

[26] Gleaning from Naxa's founding affidavit, the application is brought in terms Rule 42(1) of the Uniform Rules of Court. In the alternative, Naxa relies on Rule 31(2)(b). Rule 42(1)*(a)* provides that the High Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously ought or erroneously granted in the absence of any party affected thereby. In *Colyn v Tiger Food*

[2] (909/2023) [2025] ZASCA 103; 2025 (6) SA 89 (SCA) (15 July 2025)

Industries Ltd ta Meadow Feed Mills (Cape)[3], Jones AJA (with Olivier JA and Cameron JA concurring) held:

'[5] Rule 42 caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially.

[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.'[footnotes omitted].

[27] This principle was restated in *Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State and Others*[4] (Zuma),where the Constitutional Court (CC) stated:

'[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the discretion to rescind its order. The precise ruling 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.'

[28] Clearly, the purpose of Uniform Rule 42 is to correct expeditiously and obvious wrong judgment or order. A judgment is considered erroneously granted if, at the time of granting it, there were facts unknown to the court and these facts, if known, would have barred the granting of the judgment.[5] In *casu*, after consideration and in the absence of facts suggesting that the order was granted erroneously, I conclude that there was no mistake in the granting of the order dated 14 May 2024.

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[3] 2003 (6) SA 1 (SCA); see also *Theron NO v United Democratic Front (Western Cape Region) and Others*) 1984 (2) SA 532 (C) at 536G. and *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 862J - 863A.

[4] [2021] ZACC 28.

[5] *Rossiter &Others v Nedbank Ltd* (96/2014) 2015 ZASCA 196 (1 December 2015) at para 16.

[29] The next issue for determination pertains to whether Naxa has made a case for the rescission of the order under Rule 31(2)(b) of the Uniform Rules of Court. Rule 31(2)(b) which is also applicable to provides:

'A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit'.

[30] The legal position is that the applicant is required to provide a reasonable explanation for the default and demonstrate that it has a bona fide defence to the main case. Although gross negligence may be condoned, wilful default is fatal. Referring to various authorities[6], in his body of work[7], the learned author Harms, states that the bona fide defence needs to be stablished *prima facie* only and it is not necessary to deal fully with the merits of the case or to prove the case. It is trite that the court has a wide discretion in evaluating 'good cause' in order to ensure that justice is done between the parties.[8] A good cause can compensate for a poor explanation and *vice versa*.[9]

[31] In considering whether the default was wilful, the case of *Harris v ABSA Bank (Pty) LTD Volksas,*[10]serves as a guide. In this case the following was stated*:*

'Headnote: Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of

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[6] *Standard Bank of South Africa Ltd v El- Naddaf* 1999 (4) SA 779 (W) at 784; see also *Trapel Farms CC and Others v Rodel Financial Services (Pty) Ltd* 2855/2010) [2011] ZAKZPHC 59 (20 October 2011) at para19.

[7] Harms, Civil Procedure in the Superior Courts, Service Issue 52, Vol1, B-204.

[8] *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

[9] *Zealand v Milborough* 1991 (4) SA 836 (SE).

[10] 2006 (4) SA 526 (T).

the steps required to avoid [E] the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to refrain from filing a notice to defend or a plea or from appearing will ordinarily weigh heavily against an applicant required to establish sufficient cause. However, it is not correct [F] that, once wilful default is shown, the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. The mental element of the default, whatever description it bears, should be one of the several elements which the Court must weigh in determining whether sufficient or good cause has been shown to exist'.

[32] Rule 31(2)(b) is a sequel to Rule 31(2)(a) of the Uniform Rules of Court which provides:

'Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule 4 for default judgment and the court may. After hearing evidence, grant judgment against the defendant or make such order as it deems fit.'

[33] Given the circumstances, the reliance on Rule 31(2)(b) of the Uniform Rules of Court is misplaced, as none of the prerequisites listed in terms of this Rule were present when the liquidation application was launched.

[34] The next issue to consider is whether this application has prospects of success under common law. In *Zuma*[11], the CC emphasised the requirements for the rescission of the judgment in terms of the common law as follows:

'[71] The requirements for rescission of a default judgment are two-fold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.'

'Thus, the existing common law test is simple: both requirements must be met'.

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[11] Fn 4 above.

[35] It is undisputed that all the liquidation papers including the interim order were served at Naxa's registered address. On 31 August 2023, the letter of demand was served on an adult person at the address. Other documents including the notice of motion and founding affidavit were served on another adult person on 05 October 2023. Notably, there were indicators that Naxa Trading had vacated the address.

[36] An argument was raised that Voltex's manner of service was impermissible. This argument is detrimental to Naxa's case, given the fact that the address at which the sheriff effected service of the liquidation papers is, in fact, Naxa's registered address. This proposition is supported by the Companies and Intellectual Property Commission (CIPC) search report regarding Naxa Trading, as reflected at pages 105 to 110 of the court's index bundle of documents.

[37] Evidently, Naxa registered the said address for the purposes of receiving all notices and communications, as required by the company laws. I agree with Voltex's counsel that Naxa's omission to amend its registered address details was deliberate, showing a lack of regard for the legal process.

[38] Notably, in an affidavit that she made to the police, Ms Bhekezulu stated that she became aware of the frozen bank accounts on 15 April 2024, prior to a final order being granted on 14 May 2024. This suggests that Naxa and/or Ms Bhekezulu had personal knowledge of the liquidation application.

[39] Moreover, the interim order was served in accordance with the court's directives which were complied with. Therefore, in the circumstances, Naxa has failed to provide a satisfactory and reasonable explanation for the default.

[40] The final issue is whether Naxa has shown a bona fide defence which carries *prima face* prospects of success. A bona fide defence necessitates full disclosure of the nature, grounds and material facts relied upon to support the defence. Naxa's defence is predicated on fraud allegation, based on its purported lack of knowledge of the agreement. However, the presentation of the case number and supporting affidavit to the police is inadequate considering the following :

(a) Naxa avers that upon discovering that its accounts were frozen and could no longer operate, it became aware of the court order.

(b) Police obtained the statements in relation to the allegations of fraud on 22 May 2024.

(c) The next day, Naxa sent a letter to Voltex proposing settling the debt and rescinding the final order by consent. Notably, the letter had no mention of the fraud allegations and this issue was never raised subsequently.

[41] All these facts contradict the claim that the agreement was fraudulent. In my opinion, settling the debt implied acknowledgement of the agreement, undermining the allegations of fraud. Accordingly, Naxa has failed to establish a bona fide defence with reasonable prospects of success. Consequently, the application for the rescission of the order by default must fail.

Order

[42] The following order shall issue:

1. The application for the rescission of the order dated 14 May 2025 is dismissed with costs on Scale A.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the applicants	: Adv S Genukile
Instructed by	: Whitesides Attorneys Makhanda
Counsel for the Respondents	: Adv G W Brown
Instructed by	: Wheeldon Rushmere Makhanda
Date heard	: 10 October 2025
Date delivered	: 29 January 2026