REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NUMBER: 032520-2023

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES/NO

DATE

SIGNATURE

In the matter between:

LOVE HEALTH PARTNERSHIP (PTY) LTD	**FIRST APPLICANT**
and	
CONVATEC SOUTH AFRICA (PTY) LTD	**FIRST RESPONDENT**
JACQUES FISHER N.O	**SECOND RESPONDENT**
BLAISE KOETSIE N.O	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT, PRETORIA	**FOURTH RESPONDENT**
ALL KNOWN INTERESTED PARTIES	**FIFTH & FURTHER RESPONDENT**

Heard: 31 October 2025

Delivered: 08 April 2026

This judgment is handed down electronically by circulating to the parties or their legal representatives by email and by uploading the judgment onto CaseLines. The date and time for hand down of the judgment are deemed to be 14:00 on 08 April 2026.

JUDGMENT

MATLAPENG A.J

INTRODUCTION

[1] This is an application for the rescission of a final winding-up order granted on 5 September 2023[1] against Umsinsi Healthcare (Pty) Ltd ("Umsinsi").

[2] The application is brought in terms of Uniform Rule 42 (1)(a)[2], in the alternative, Section 354(1) of the Companies Act 61 of 1973 ("Companies Act").[3]

[3] The Applicant, being the sole shareholder of Umsinsi, seeks an order setting aside the liquidation proceedings on the basis that the order was erroneously sought and granted, alternatively that it falls to be set aside in the exercise of this Court's discretion.

BRIEF BACKGROUND

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[1] CaseLines: Founding Affidavit 021-9 para 13
[2] CaseLines: Founding Affidavit 021-9 para 14.1
[3] CaseLines: Founding Affidavit 021-9 para 14.2

[4] The Founding Affidavit establishes that Umsinisi did not oppose the winding-up application because, it was unaware of the proceedings.

[5] The gravamen of the Applicant's case, is that the application was not served at Umsinsi's registered address but at its erstwhile principal place of business.[4]

[6] The Applicant further contends that the alleged indebtedness, is disputed on a *bona fide* and reasonable grounds, and that more pointed, the winding-up, has not progressed in any material respect. The Applicant also contends that there are special and exceptional circumstances that exist which impel this Court to order the rescission of the order.

[7] The Answering Affidavit, does not meaningfully dispute the absence of proper service but rather seeks to justify the liquidation based on the alleged indebtedness.

[8] It is so that prior to the First Respondent issuing the liquidation application, Umsinsi's principal place of business and registered address was situated at [...] M[...] Street, Founders Hill, Lethabong, Gauteng.[5]

[9] It is also so that during November 2022, Umsinsi closed its principal place of business and relocated to the Western Cape with its registered address at 1[...] D[...] Street, Onrus River, Onrus, Western Cape where it continued with

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[4] CaseLines: Founding Affidavit 021-11 para 21
[5] *CaseLines: Founding Affidavit 021-10 para 16*

its business.[6]

[10] It is also so that on 14 March 2023, Umsinsi registered address was changed to 1[...] D[...] Street, Onrus River, Onrus, Western Cape with the Companies and Intellectual Property Commission ("CIPC"). [7]

[11] It is also so that the CIPC report attached to the Founding Affidavit in the main application, which is dated 26 September 2022, had the previous address mentioned above and not the current address which made the information outdated as the Founding Affidavit, is dated 4 April 2023.[8]

[12] The above facts, are not seriously disputed by the First Respondent as can be gleaned from the Answering Affidavit at paragraphs 5.3, 5.4.[9] well as paragraphs 21, 22, 23 of the Answering Affidavit wherein the First Respondent admits, and gives a bare denials regarding the relocation of Umsinsi and states that the relocation of the principal place of business, is not tantamount to changing the company's registered address. [10]

ISSUES FOR DETERMINATION

[13] This Honorable Court is called upon to decide on whether the winding-up order was erroneously sought or granted as contemplated in Rule 42 (1)(a) and whether the requirements of Section 354 (1) have been satisfied and

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[6] *CaseLines: Founding Affidavit 021-10 para 17*
[7] *CaseLines: Founding Affidavit 021-10 para 18*
[8] *CaseLines Founding Affidavit 021-10 para 19*
[9] *CaseLines: Answering Affidavit 023-5*
[10] *CaseLines 023-27 paras 21, 22 and 23*

finally, whether it is just and equitable to rescind the order dated 5 September 2023.

A DISCUSSION

[14] Rule 42 (1)(a) empowers a Court to rescind an Order that was erroneously sought or erroneously granted in the absence of a party affected by thereby. This was neatly summarised in the matter of *Colyn v. Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* where the Supreme Court of Appeal held that:

> *During the course of argument counsel drew our attention to conflicting approaches of the courts to the proper application of rule 42(1)(a). Bakoven Ltd v GJ Howes (Pty) Ltd,[11] and Tom v Minister of Safety and Security[12] hold that the 'error' must be patent from the record of proceedings and that the court is confined to the four corners of the record to determine whether or not rule 42(1)(a) is applicable. Stander v ABSA Bank Bpk[13] on the other hand permits external evidence of the 'error'. The conflict seems to me to obscure the real issue, which is to determine the nature of the error in question. This judgment concludes that what happened in this case did not amount to an error in terms of the rule, regardless of whether or not it manifested itself in the record of proceedings. It is consequently unnecessary for present purposes to say anything more about the conflict.*

[15] Section 345 states:

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[11] *1992 (2) SA 466 (E).*
[12] *[1998] 1 All SA 629 (E).*
[13] *1997 (4) SA 873 (E).*

"345 When a company deemed unable to pay its debts.

(1) A company or body corporate shall be deemed to be unable to pay its debts if-

(a) A creditor, by cession or otherwise, to whom the company is indebted in a sum of not less than one hundred rand then due-

(i) Has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) …"

[16] Similarly, *in Lodhi 2 Property Investment (CC) vs Bondev Developments (Pty) Ltd.*[14]

Nepgen J found support for his conclusion in Theron NO v United Democratic Front (Western Cape Region) 1984 (2) SA 532 (C). In that case an order had been granted against Theron in his absence after short notice of the application and although no papers of any kind had been filed and no papers had been served on him.[15] *The order was nevertheless granted on the basis of an assumption on the part of the judge that Theron had been given sufficient notice and that he had deliberately decided not to appear at the hearing of the application. In the application for rescission Vivier J found, on the facts placed before him, that these assumptions were wrong*[16] *and that the order had for*

[14] *2007 (6) SA 87 (SCA)*
[15] *At 533G-H and 534A.*
[16] *At 536C.*

> *that reason been granted erroneously. In my view the judgment cannot be faulted. Regard was had to evidence external to the record of proceedings as it existed at the time the order was granted in order to determine whether proper notice had been given. Whether Theron wanted to appear at the hearing was a relevant consideration in determining whether sufficient notice had been given. Vivier J in effect found that proper notice had not been given.*[17] *As a result the UDF was procedurally not entitled to the order sought when it was granted. The order was for that reason erroneously granted. In Stander the plaintiffs who obtained an order in their favour was, unlike the UDF in Theron, procedurally entitled to the order when it was granted and the fact that it subsequently transpired that the defendants were not in wilful default could not transform that order, which had validly been obtained, into an erroneous order."*

[17] The undisputed facts established that the winding-up application was not served at Umsinsi's registered address.

[18] It is so that proper service, is foundational to the exercise of jurisdiction and to the observance of the *audi alteram pattern* principle.

[19] The absence of proper service, constitutes a material fact which, had it been known to the Court, would have precluded the granting of the winding-up order.

[17] *At 535G and 536C.*

[20] **In** Rossiter v Nedbank Ltd[18] the Supreme Court of Appeal neatly summarised the consequences of non-service and held thus:

> *[16] The law governing an application for rescission under Uniform rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under the subrule. Generally a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. There can be no doubt that if the registrar had been made aware of the procedural defect in the rule 31(5)(a) notice, default judgment would not have been granted. In Lodhi 2 Properties Investments CC v Bondev Development (Pty) Ltd 2007 (6) SA 87 (SCA), Streicher JA held that if notice of proceedings to a party was required but was lacking and judgment was given against that party such judgment would have been erroneously granted. The following appears in par 24:*
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> > *'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*

[18] (96/2014) [2015] ZASCA 196 (1 December 2015) at para 16

> *judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given…'*

[21] It is so that in the present matter, the Applicant's registered address as per the official records of the CIPC, is 1[...] D[...] Street Onrus River, Western Cape.[19]

[22] It is also common cause that service of the impugned application, was affected at Founders Hill, Lethabong, a different address.[20]

[23] It is also so that the Sheriff expressly and unambiguously recorded that no one was present at the premises.[21] The return of service, does not establish that the address was the Applicant's registered office and that the process, came to the attention of the Applicant.

[24] The effect of defective service, was discussed in the matter of *Colyn v Tiger Food Industries* above where the Court correctly stated that an Order granted in the absence of proper notice, is erroneously granted and falls to be rescinded.

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[19] CaseLines: 021-34 Annexure "AJW3"
[20] CaseLines: 015-4
[21] Ibid

[25] The failure to serve at the correct registered address, renders the proceedings fatally defective.

[26] It is so that jurisdiction in respect of companies is determined by the registered office and in the alternative the principal place of business. It is common cause that the winding-up application was served in Gauteng therefore brought without proper regard to the Applicant's registered address.

[27] This raises serious concerns regarding the competence of the Court that granted the Order. The Respondent on the other hand, contends that it complied with section 354 of the Companies Act by sending the demand to the Applicant's address as provided for in the CIPC[22] as well as the Applicant's legal representatives.[23]

[28] However, Section 354 requires service at the company's registered office and not at the company's legal representatives who may or may not have instructions to represent the company.

[29] As at 14 March 2023 when the Section 354 demand was dispatched, the Applicant's principal place of business, was not at [...] M[...] Street, Founders Hill, Lethabong, Gauteng but at 1[...] D[...] Street, Onrus River, Western

[22] CaseLines: Answering Affidavit 023-6 para 5.4
[23] CaseLines: Answering Affidavit 023-6 para 5.5

Cape as per the change history of the Applicant.[24]

[30] It is so that a notice sent to attorneys, does not constitute service on the company and does not satisfy the statutory requirements impelled by Section 354 of the Company's Act. The Respondent's reliance on such notice, is therefore misplaced and legally insufficient.

[31] The evidence establishes that the Respondent knew, or reasonably ought to have known the Applicant's registered address. In those circumstances, the failure to effect proper service is not merely procedural, but indicative of a disregard for due process.

[32] In sum, the order was accordingly erroneously granted within the meaning of Rule 42 (1)(a).

[33] It is also so that a party seeking a winding-up order, bears a duty to ensure that the affected party receives proper notice of the proceedings. In the circumstances where the First Respondent knew (or was unaware of the change of address) that Umsinsi had changed its registered and/or principal place of business, it was incumbent upon it to verify the correct registered address before effecting service.

[34] The failure to do so, reflects a lack of diligence inconsistent with the gravity of liquidation proceedings.

[24] CaseLines: 021-37 Annexure "AJW3"

[35] It is so that Section 354 (1) confers a discretion upon the Court to set aside winding-up proceedings where it is satisfied that they ought to be stayed or set aside.

[36] In *Ward and Other vs Suit and Others on In Re: Gurr vs Zambia Airways Corporation Ltd* [25] **t**he Court held:

> *The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events. (Meskin: Henochsberg on the Companies Act 747; see also Joubert: LAWSA vol 4 First Reissue par 185 (M S Blackman).) In the case of the former, the onus on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances. This has been emphasised by the courts of various Provincial and Local Divisions not only in relation to s 354 and its predecessor (s 120 of Act 46 of 1926) but also in relation to s 149 (2) of the Insolvency Act 24 of 1936 which affords a similar discretion to a Court to rescind or vary a sequestration order.*

[37] It is so that that discretion, must be exercised judicially, having regard to all the relevant circumstances.

[25] 1998 (3) SA 75 (SCA) at para 11

[38] Indeed, there are special and exceptional circumstances that exist on these facts which cumulatively constitute circumstances which are firstly, the absence of proper service, second the lack of knowledge of the proceedings on the part of the Applicant, thirdly the absence of opposition by the liquidators or the creditors of Umsinsi fifth the lack of progress in the winding-up and finally, the existence of a *bona fide* dispute regarding the alleged indebtedness on the part of Umsinsi, which have been demonstrated *inter alia* in the Founding Affidavit[26] and not seriously challenged by the First Respondent in the Answering Affidavit.[27]

[39] It is so that winding-up proceedings, are inappropriate where the indebtedness is disputed on a *bona fide* and reasonable grounds. It is also so that the Answering Affidavit, does not resolve the dispute conclusively and this dispute, cannot be characterised as illusory or contrived.

[40] It is also so that the evidence indicates that the winding-up has not progressed in any material respect and that no liquidator, creditor, or interested party opposes the relief sought by the Applicant in rescinding the order. In sum, there is no evidence of prejudice that would result from the rescission.

[41] Had the Court been aware that the Applicant was not served at its registered address and that the Section 354(1) notice was defective, it would not have granted the winding-up Order.

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[26] CaseLines: Founding Affidavit 021-13 -paras 30-32 as well as Annexure “AJW5”
[27] CaseLines: Answering Affidavit 023-30 paras 27-28

[42] The Applicant has demonstrated a *bona fide* defence namely the lack of proper service, the absence of jurisdiction and the non-compliance with statutory requirements. These defences, are not merely technical, but go to the root of the proceedings.

CONCLUSION

[43] The Applicant has established that the winding-up order was erroneously granted within the meaning of Rule 42 (1(a) and that there are special circumstances that exists within the meaning of Section 354 (1) and that it is just and equitable to rescind the order.

[44] The cumulative effect of the defective service coupled with the jurisdictional defects as to whether the Order was sought and granted and the non-compliance with Section 354(1) of the Companies Act, renders the winding-up Order erroneously granted.

[45] In sum, the Applicant has established both the grounds under Rule 42(1)(a).

[46] The First Respondent contends that the rescission application was brought out of time. The Court must consider the length of the delay, the explanation for the delay and the prospects of success.

[47] The Applicant's explanation is that upon becoming aware of the proceedings

due to the defective service, the Applicant acted promptly by investigating the matter and reached out to the First Respondent.[28]

[48] The Applicant further contends that there is no real prejudice in bringing these proceedings as the liquidation has not progressed and there are no real creditors.[29]

[49] In challenging the reasons for the delay, the First Respondent contend that they brought the impugned Order to the attention of the Applicant on 7 November 2023[30] and agreed to hold discussions with the Applicant.[31]

[50] The delay of six months from becoming aware of the impugned Order to the launching of the rescission application, is not excessive and reasonably explained by the Applicant. Moreover, as explained above, the impugned Order was granted in the incorrect Court as the Court having jurisdiction was the Western Cape High Court.

ORDER

[51] The following order is made:

31.1 The final winding-up order granted on 5 September 2023 against Umsinsi Healthcare (Pty) Ltd is rescinded and

[28] CaseLines: Founding Affidavit 021-20 paras 52-55
[29] CaseLines: Founding Affidavit 021-21 para 57
[30] CaseLines:: Answering Affidavit 023-15 para 8.3
[31] Caselines: Answering Affidavit 023-16 paras 8.9-8.13

set aside.

31.2 The First Respondent is ordered to pay the cost of this application on Scale A.

MT Matlapeng

Acting Judge of the High Court, Gauteng Division, Pretoria

<u>Appearances</u>

Applicant's Counsel:	Adv M De Olivier
Applicant's Attorneys:	Strauss Daly Inc
First Respondent's Counsel:	Adv M Jacobs
First Respondent's Attorneys:	Coombe Commercial Incorporated

Attorneys