NOT REPORTABLE

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

CASE NO. EL115/2024

In the matter between:

THE HUSSLERS ELECTRICAL CC	Applicant
and	
VOLTEX ELECTRICAL CC	First Respondent
(Registration No. : 1964/133004/23)	
SOUTH AFRICAN REVENUE SERVICES	Second Respondent
MASTER OF THE HIGH COURT, MAKHANDA	Third Respondent

JUDGMENT IN RESPECT OF APPLICATION
TO SET ASIDE OR STAY A FINAL LIQUIDATION ORDER

HARTLE J

<u>Introduction:</u>

[1] Absent challenges by any party showing cause on the final return date why a provisional winding up order should not be made final, this court on 14 May 2024 granted a final liquidation order against the applicant.

[2] Long after the fact, on 12 September 2024, the present application was issued to rescind the final winding-up order, alternatively, to "*stay the liquidation process pending the establishment of alternative arrangements to pay creditors by the applicant*."[1]

[3] The cause of action in the notice of motion is ostensibly founded on the provisions of section 354 of the Companies Act, No. 61 of 1973[2] ("the Companies Act"), which section reads as follows:

> "354. Court may stay or set aside winding-up.
>
> (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."

[4] The applicant who brings the present application is in this instance the close corporation itself that was hit by the final winding-up order and is in the process of being wound up. The deponent to the founding affidavit is the sole

[1] In the founding affidavit the opening narrative is that this is an application, first in terms of section 354 (1) of the Companies Act, No. 61 of 1973, read with section 66 of the Close Corporations Act, No. 69 of 1984, to stay or set aside the winding-up of the applicant and to discharge it from liquidation, alternatively it is one for recission of the final winding up order, also *in terms of the statutory provisions*.

[2] Although the 1973 Companies Act was repealed and replaced by the Companies Act 71 of 2008, section 354 of the 1973 Companies Act continues to be applicable by virtue of Item 9 of Schedule 5 of the 2008 Companies Act.

member and a 100% "*shareholder*" of the entity and although he indicated that he was entitled to make the affidavit '*even in* (his) *personal capacity*', it is plain from the tenor of his founding affirmation (and in a later replying affidavit) that he makes the application on behalf of the close corporation itself that is desirous of putting a hold on the liquidation proceedings or entirely reversing the formal process of its dissolution underway by virtue of the final liquidation order. Either way the applicant's desire is to discharge the close corporation from liquidation.

[5] As for the pleaded grounds on which the applicant relies for its entitlement to the relief sought, well at least in its founding papers, its member complains equivocally that the entity was not served with any of the papers prior to the orders of liquidation (both provisional and final) being granted by this court, but also that it was not "*properly served*" with the application papers because, although it was represented by an attorney, the first respondent flouted the provisions of rule 4 (Aa) of the Uniform Rules of Court (Sic)[3] by failing to serve the liquidation papers on its attorneys well knowing that they "*represented the Applicant during the last court appearance*".

[6] The member adds the twist that the first respondent, knowing that the applicant was legally represented, "*flagrantly*" avoided proper service of its papers upon the applicant's attorneys (presumably he intended to mean service in terms of Rule 4 (Aa)) after it was supposedly afforded an opportunity by the court to remedy this shortcoming on 5 March 2024 when the liquidation

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[3] This service provision which the applicant complains was ignored provides as follows:

> "4. (1) Service (a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners—
>
> ….
>
> (Aa) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."

application was postponed *sine die*, and thereafter "*reinstated*" the very same application on an *ex parte* basis thereafter. What the member seeks to suggest is that the first respondent obtained the provisional order on 30 April 2024 after it "*deliberately*" failed to disclose to the court when the latter order was granted that the Applicant was duly represented by its attorney at the previous court appearance who, it is common cause, was indeed physically absent from court on the day when the provisional liquidation order was granted.

[7] The applicant asserts that in the light of the "*above backdrop*" the final liquidation order which was granted on 14 May 2024[4] (also in the applicant's absence) is "*susceptible*" to a rescission order as the first respondent erroneously sought it and this court erroneously granted the same.[5]

[8] In the context of both orders supposedly having been granted in its absence,[6] the applicant identifies itself as "*directly a party affected thereby*".

[9] As an aside this appears to constitute a veiled reliance on the provisions of Rule 42 (1)(a) of the Uniform Rules of Court[7] for the relief prayed for (but with the twist of alleged malice), despite the fact that the provisions of section 354 (1) of the Companies Act are expressly referenced as constituting its cause of action.

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[4] Elsewhere it asserts that *both* orders were erroneously granted in the absence of the applicant.

[5] Notably, despite these serious allegations against the first respondent concerning the supposedly improper circumstances under which the provisional order was granted, the applicant only asks for a recission of the final winding-up order.

[6] See footnote 4.

[7] Rule 42 provides in regard to rescission of orders or judgments that: "-(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;…"

[10] It is apposite to repeat what the applicant asks this court to do in the light of this claimed factual premise on which it relies for the relief sought:

> "I therefore apply, as advised, that this Honourable Court exercise its discretion to set aside a winding up orders on the basis that they ought not to have been granted at all without a proper service upon the applicant, and stay the entire liquidation process by reason of subsequent events, to wit, the applicant's current employment status as a subcontractor in an electricity installation project."

[11] No real explanation is furnished by the applicant for its tardy challenge to the final winding-up order. It is merely stated as a coincidental fact that the member, who doesn't relate the peculiar circumstances, only became aware of its granting on 25 July 2024 whereupon an instruction was issued to its legal representatives to lodge the present application on an "*urgent basis*".

[12] Notwithstanding the recognized urgency, the application was, on the face of it, only issued on 12 September 2024.

[13] Nowhere in the founding affidavit is it suggested that there was not a substantive basis for the liquidation order to have been granted in the first instance. The essence of the complaint is the claimed lack of service, or "*proper service*", on the applicant of the liquidation application. In other words, the applicant does not say on what basis it would have opposed the grant of the final winding-up order but for the suggested procedural irregularity.[8]

[8] I am aware of the authorities that suggest that an applicant for rescission on the basis of Rule 42 (1) (a) is not required to show good cause if the court finds that the impugned order stands to be set aside on this basis once a procedural error is established. In *Lak Investments Company N.O (Pty) Ltd v Pressure Advance Technology CC* (55018/2011) [2014] ZAGPPHC 25 (20 February 2014),which was a similar application to the present one, the court found (at [12]) that the need to establish good cause fell away immediately it was established by the company seeking the rescission of a winding-up order that there had been a lack of proper service of the liquidation application on it and the employees and/or trade union concerned. In the present scenario the applicant's professed cause of action is all over the place.

[14] By way of background information, the liquidation application was launched at the behest of the first respondent, as a creditor, against the applicant on 26 January 2024 and was premised on its claim that the applicant was unable to pay its debts within the meaning of section 69 (1)(a) of the Close Corporations Act No. 69 of 1984. Indeed, at the time, the applicant was alleged to have been indebted to the first respondent, a supplier of electrical equipment and components, in the sum of R1 102 57,13. This amount represents the balance owing in respect of goods sold and delivered to it in during April to August 2019, inclusive of interest and attorney and own client fees incurred after the fact.[9]

[15] Of further relevance to the applicant's state of solvency at the time, it appears from the founding affidavit put up in the liquidation application that the applicant, represented by its sole member, had personally and on the close corporation's behalf respectively, signed an acknowledgment of debt in which each of them had vouched for the money and undertaken to pay three instalments of R10 000,00 each from August 2023 and, after October 2023, the full outstanding balance then remaining. Not disputed in the present application is the fact that the member only paid one instalment owing under the acknowledgment of debt on the date on which it was signed, namely on 4 September 2023, this notwithstanding the hype created before the undertaken was given that it had put out a tender for business that it was confident it would win and which, so it assured the first respondent's attorneys at the time, would restore its solvency.

[9] The extent of the applicant's indebtedness was indicated in a certificate of balance put up by the first respondent in the liquidation application, dated 1 November 2023. The initial judgment debt was in the sum of R917 351,17. The first respondent obtained default judgment against the applicant for this amount in the East London magistrate's court on 28 December 2020. It sought in vain to execute the order against the applicant's property.

[16] The sole member further seeks to convince this court, in his founding affidavit made on 1 August 2024, and without reckoning with the time that has passed or the peculiar status of the winding-up, that if the close corporation was afforded respite through an order staying the liquidation process, it would be able to make alternate arrangements to pay its creditors for the duration of a sub-contract which it casually suggests it latterly concluded with an engineering entity to instal electricity in July 2024, this despite the final liquidation order that by its legal effect, precludes any trade by the close corporation after its granting except with the knowledge and acquiescence of the officially appointed liquidators.

[17] The member seeks to justify this bargain, in the interests of its nine registered employees acceptedly hard done by as a result of the final winding-up order, as constituting "*subsequent circumstances to the satisfaction of the solvency test and ability of the Applicant to pay its debts…*", whatever this is supposed to mean.

[18] Also vaguely asserted by the member is that if granted the proposed stay of the liquidation proceedings, the applicant would be "*searching for other business opportunities*."

[19] As a further incentive, the applicant bizarrely proposes that the business opportunity available to it will give the second respondent : *"…an advantage of collecting and receiving more VAT from the Applicant if the Applicant is granted an opportunity to defray its debts from the income the Applicant will be generating as a sub-contractor in an electricity installation project*."

<u>The grounds of opposition to the application:</u>

[20] Not surprisingly the first respondent opposed the application.

[21] First and foremost, given the obvious intimation that the applicant's case is premised on the provisions of section 354 of the Companies' Act, it raises the preliminary objection that the applicant has no *locus standi* under the section's provisions to have brought the application. It argues in this respect that the cited applicant is not referenced in the section as one of the three parties who can seek a stay or setting aside of winding-up proceedings under its ambit.

[22] Further, although not pointedly raised as an objection, the first respondent has drawn attention to the fact that the co-liquidators, officially appointed by the Master on 14 June 2024, were not cited in, nor served with, the present application. This conundrum was sought to be remedied by the first respondent filing a supplementary affidavit by one of the joint liquidators, Mr. Gary Shrosbee, who has helpfully provided some insight into the status of the winding-up process.[10]

[23] In my view (and as an aside since nothing really turns on it, given the approach I adopt herein), the liquidators have at least a perfunctory interest in the present application since they have been vested with the legal authority to wind up the close corporation in respect of a regulated process that has

[10] In *Praetor and Another v Aqua Earth Consulting CC* (162/2016) [2017] ZAWCHC 8 (15 February 2017) ("*Praetor*") The court (at paragraph [5]) was not persuaded that the liquidator was a necessary party to the proceedings in a similar application despite recognizing that the order sought in terms of section 354 of the Companies Act would have the effect of divesting the liquidators of their office. Ironically though, what rendered it unnecessary for the liquidator to be joined in the court's view, is the fact that it is customary in matters of this nature, if the court is so inclined to grant the rescission application, for a rule to issue before any order is to be made with absolute effect. It needs to be emphasized that such a practice does not prevail in this Division. The court went on to justify the non-joinder as follows: "*Having regard to the wide range of interests potentially affected by such orders there are good reasons for that practice, and the applicants' counsel indicated that he did not wish to advance any reasons why it should not be followed in the current matter. It means that if the application were to succeed, the liquidator would in any event have an opportunity to oppose the confirmation of the order or to make submissions concerning the terms upon which it should be confirmed before it became absolute. As it was, the parties' legal representatives approached the liquidator extracurially at the court's request to ascertain his position. In response, the liquidator informed the applicants' attorneys by letter, dated 13 February 2017, that he abided the judgment of the court. The liquidator's letter was put before me after the hearing by the applicants' counsel.*"

indisputably already been set in motion and which process is under threat of being terminated, with consequences, if the process, or the final liquidation order, as the case may be, is set aside or rescinded.

[24] The member's stated failure to have co-operated with the liquidators in the winding up process, which I relate in more detail below, is another reason why they should have been copied in. In my view the fact that the applicant sought to give them a miss in a scenario where their views are expected to be canvassed under the provisions of an application under section 354 of the Companies Act is a matter for concern.[11]

[25] As for the merits of the present application, the first respondent refutes the notion that it failed to serve the applicant with the liquidation application or that there was improper service in any respects.

[26] It points out, significantly in my view, that there can be no question that there was *not* a substantive basis for the winding up since, even on the applicant's own version, it was at least commercially insolvent at the commencement of the winding-up proceedings.

[27] It contends further - assuming that its objection that the applicant has no legal standing to have launched the application is favourably received by this court, that there is in any event a lack of any basic information or collateral that supports the applicant's supposed case for a stay of the process on the basis pleaded.

[11] The Master of the High Court, Makhanda, although cited as a party to the present application was coincidentally not served with the application either. If he had been served he would no doubt also have called attention to the fact that the liquidation process was already well underway and that he had issued a certificate of appointment to the co-liquidators in whose hands the control of the insolvent estate vests. He may also have drawn attention to the fact that the liquidators were complaining against the member that he was not co-operating with their official processes.

<u>The issue of costs:</u>

[28] The first respondent was constrained to oppose the present application in any event to deal with the issue of costs claimed against it. In this respect the applicant seeks the court's censure by an award of punitive costs, due to the claimed lack of service of the liquidation papers on the close corporation.

[29] The first respondent conversely asks, concomitant with its denial that the final winding-up order falls to be assailed on the basis that it should never have been granted by reason of a claimed defect in the procedure, for an order of costs on an attorney and client scale. It prays that such costs be paid by the member of the applicant jointly and severally with his attorney, the one paying, the other to be absolved.

[30] The reason for the special costs award sought against the member (or attorney representing him/the applicant) is plausibly explained by the first respondent: If a costs award is granted against the close corporation - an estate which is in liquidation and by necessary implication insolvent, it would reduce any surplus of funds that would be payable to creditors. This anomaly is explained as follows: "*Should the estate of the Applicant pay the costs, it would indirectly be the creditors that are paying for the legal costs which they have opposed, in other words, the First Respondent would be paying twice: once for its attorneys and again for those of the Applicant by receiving less at the end of the winding-up*".

[31] In addition, a punitive costs order is warranted, so says the first respondent, because the member has not fully or honestly cooperated in the winding-up and has been mischievous, and late without proper explanation therefor, in its baseless impugning of the final winding-up order. The first

respondent further complains that the applicant has misled the court in the manner in which it has framed and slanted its case.

[32] The first respondent concludes that it would not be just and equitable that the body of creditors, by means of the estate of the applicant, be held liable for the applicant's "*hopeless application*." Hopeless it is, as I will shortly demonstrate.

[33] As for the proposal that the applicant's attorneys should be mulcted with the costs, the first respondent points out that the litigation background fell within the peculiar knowledge of the applicant's legal representative, who as an officer of the court and advisor to the applicant, should have revealed the various correspondences and attendances highlighted in the first respondent's answering affidavit which entirely dispel the notion that either winding-up orders (provisional or final) were taken in the so-called absence of the applicant or in circumstances where the court should not have granted the order.

[34] Ironically, in justifying why he should not pay the costs personally, the applicant's attorney makes capital of the fact that the liquidators have not been joined in the application, whereas that failure is of the drafter's own making. The lack of their joinder is, however, no deterrent to the costs order which I intend to make herein.

The input on behalf of the liquidators:

[35] Mr. Shrosbree who provided an affidavit "*in support of the First Respondent's opposition*" raised the concern that the estate of the applicant could ill-afford to run up costs of litigation. This was offered as the reason for

his election not to have sought the formal intervention of himself and his co-liquidator in the present application.

[36] As anomalous as it is that the liquidators have not been joined, Mr. Shrosbree (who also takes a shot at suggesting that the applicant does not have the *locus standi* to pursue the relief it seeks) confirms that neither he nor his co-liquidator were engaged or consulted on the supposed sub-contract that is tipped to bring the close corporation out of its state of insolvency. He points out the obvious, which is that since the date of the provisional order, the business and the estate of the applicant fell into the hands of the Master, and once the Master had appointed him and his co-liquidators, into their hands. Therefore neither the applicant nor the member, as "*a matter of law*" are in his view supposed to enter into any further contracts without the express consent or supervision of either the Master or the liquidators since they are in control of the estate.[12]

[37] He is further in much the same position as this court. The "*exactness*" of this supposed tide turning contract remains "*unclear*" and "*unknown*" and, more conspicuously, is not evidenced by any document recording its terms.

[38] Such of the pithy detail as has been provided by the applicant concerning its ability to bring itself out of its state of insolvency is also rendered confusing by the conflicting reports of the duration of the supposed subcontract or electrical project that the member claims has come its way.

[39] There is no information regarding its precise nature or, more importantly, the expense involved in giving effect to its vague terms. Additionally, no

[12] Amongst the legal implications of the granting of a liquidation order, and I highlight only those relevant for present purposes, are that the entity's assets are effectively placed under custody of the appointed liquidator and trade ceases except for necessary activities relating to the winding-up as determined by the liquidator(s) appointed by the Master of the High Court. The powers of the directors/members to manage the entity ceases upon the granting of the final order and they must relinquish control of its affairs to the liquidator(s) appointed by the court.

assurance is given that the supposed further trading would benefit or prejudice the historic creditors.

[40] In the absence of anything defining, I am inclined to go along with the forensic insight of Mr. Shrosbree that: "*There are also no financial statements; explanations of its past conduct and operations and why it was in financial trouble in the first place; what (if any) is its expected income or cash flow for the near future so that it could be said that the winding-up process must be stayed, or why it would be undesirable or unnecessary to continue with the winding-up process; or how much does the Applicant intend on paying towards both the immediately new creditors in trading and those who form part of the body of creditors at the date of its provisional winding-up (or the effective date of liquidation, which is the date the liquidation application was issued on 26 January 2024).*"

[41] He also states that as early as 28 May 2024 (which puts paid to the member's assurance that he only became aware of the final liquidation order in July 2024), he wrote to the member enclosing the provisional and final winding-up orders, and provided the standard statutory documents that the member was expected to complete. On 29 July 2024 he addressed the applicant's attorney, Mr. Skosana, about the member's failure to have engaged with the joint liquidators and to have complied with his statutory obligations to submit the required documentation and provide information regarding the close corporation. Mr. Skosana was informed that Mr. Shrosbree had already reported these failures to the Master. He documents instances where the member failed to take his calls or to attend a formal enquiry despite saying he would. He laments the difficulty in getting the member's assistance in winding-up the close corporation "*efficiently and effectively*" and the latter's failure to engage with them, or take them into his confidence concerning important

financial information and documentation required. He charges the member with not having placed the liquidators in a position to fully take custody and control of the business and affairs of the close corporation and even of failing to disclose the whereabouts of its plant and machinery that would vitally be necessary in his view to the question of the feasibility of continuing with any form of contract.

[42] Significantly, what he does confirm is the factual insolvency of the applicant, with no evidence of any prospects of a timely turn around, and the discovery through the winding-up process of further contingent liability to the second respondent for unpaid UIF contributions including penalties and interest; a substantial assessed loss not properly accounted for before, and substantial overdue licence fees in respect of vehicles owned by the applicant.[13]

[43] On the issue of costs he expresses the caution that there is no surplus of funds from which any of the present legal costs could be paid, without taking from the body of creditors and reducing their possible distributions directly.

The conduct of the litigation:

[44] The answering and supplementary affidavits of the first respondent were delivered on 29 October 2024.

[45] No replying affidavit was initially filed and since the applicant failed to prosecute the application, the first respondent, in the interests of the bringing an end to the litigation, enrolled the matter for hearing and took charge of getting the matter disposed of since then.

[13] The total estimated assets of the applicant are said to be in the paltry sum of R385 000,00 against its total estimated liabilities in the sum of R2 363 234,00.

[46] Given the first respondent's request for an adverse costs order (jointly and severally) against both the member in his personal capacity and his attorney, a consent order was issued by this court on one of the occasions of the matter's enrolment on 5 June 2025, seemingly at the applicant's request, in terms of which the member and attorney were prevailed upon to show cause (strangely by way of a rule *nisi*) why they should not be mulcted with costs as prayed for by the first respondent.

[47] Ultimately on 24 June 2025 (after the first respondent had filed heads of argument in anticipation of moving the liquidation order on an uncontested opposed basis on the motion court roll) the applicant put up affidavits which in effect also purported to constitute a very late reply to the first respondent's answering affidavit. The applicant did so without applying for condonation. This caused the first respondent to take the point during argument that the replying affidavit was not properly before the court. The applicant also purported to raise certain objections in the affidavit[14] and dealt with new material therein that had not previously been mentioned in the founding papers.[15]

[48] Amongst the latter, the applicant seems to complain latterly that service of the liquidation papers was effected on an address that is not the applicant's principal place of business. In truth however, the first respondent served the liquidation application papers and the provisional order on both the principal and registered addresses of the close corporation. This puts paid to the

[14] There were two objections. The first is that the first respondent did "*not comply with Rule 6 (5)(e) as provided for in Rule 30A*" (this in respect of the contention by its counsel that the request that the applicant pay the costs of the application on a punitive basis, raised in the answering affidavit, in effect introduced a whole new 'application', as it were that had to follow its own trajectory) and that such "*conduct is an irregular step within the ambit of Rule 30 of the Rules of Court"* (sic). The second is that the Rule *Nisi* formulated to deal with the costs implications, collapsed for want of being properly extended on a return date that fell on a public holiday. Nothing turns on these and the parties agreed in any event that they were unnecessary to be determined by the court.

[15] The trite proposition hardly bears repeating that an applicant must make out his case in his founding affidavit. It is impermissible for him to raise a new case in the replying affidavit.

suggestion that the close corporation was in the dark regarding its knowledge of the liquidation application and what was expected of it to do if it wished to oppose the application.

[49] Also complained of is that when the papers were served there were "*missing pages*", which were only supplemented later without condonation having been sought, purportedly pushing out the *dies* for the filing of its answering affidavit in the liquidation application and thereby supposedly compromising its right to answer the founding affidavit. As an aside, this is evidently nothing more than a red herring and an opportunistic *ex post facto* reconstruction of the critical chronology of events. The first respondent plausibly referred to the explanatory, or procedural, affidavit filed prior to the granting of the final liquidation order in which the first respondent's then attorneys had been required to explain the absence in the court file of the original papers when the matter was called on the motion court roll on 16 April 2024.[16]

[50] Rather recklessly, the member in the replying affidavit, while offering no explanation to the court for his failure to have cooperated in the winding-up process, also purported to cast aspersions on the liquidators as being "*on a spree to generate income for themselves*" at the expense of the applicant, its creditors and the latter's employees, and accused the first respondent of having received a clandestine payment of R184 684,90 from them on 21 February 2025. The copy

[16] Counsel for the applicant was present in court on this occasion when the matter was postponed to 30 April 2024. The presiding judge, having noticed that pages 2 to 13 were copies mixed up in the set of original papers, was evidently constrained to ensure that the original papers were before court before a provisional order could issue. The first respondent was tasked with ensuring that the glitch be fixed by the next appearance date. Sensibly, no costs order was made. It appears that the state of the founding affidavit was attempted to be fixed but the original missing pages could not be found. The first respondent's attorney responsibly filed the explanatory affidavit, and the applicant's attorneys were copied in on this affidavit. The matter proceeded on 30 April 2024 in the absence of the applicant (electively so it appears) when the provisional liquidation order was granted. I assume that the court was happy to accept that the papers before it were "*not entirely the original*" but were in fact a true copy of the founding affidavit which the attorney assured the court in her explanatory affidavit had been served on the close corporation and interested parties.

of an interbank payment put up by the applicant which the member suggested pointed to wrongdoing by the liquidators in this respect, hardly constitutes proof of the supposed fact relied upon by the applicant.

[51] As for the rest, the replying affidavit purported to vaguely assert that the applicant satisfies "*an insolvency test*"(Sic) and is able to pay its debts but quite evidently its commercial insolvency is nowhere convincingly allayed in any of the evidential material put up by it in its papers. To the contrary, the member's purported compromise with SARS and other creditors at the time of filing its belated replying affidavit is itself an admission of the close corporation's insolvency.

[52] Before argument commenced on the merits of the application counsel had resolved that the late replying affidavit be admitted provided that the *in limine* objections framed in the affidavit itself fell away with the costs associated by the points taken being in the cause. That appeared to me to be a fair concession in the interests of finally determining the application.

The legal principles:

[53] As indicated above, the applicant has framed its cause of action on the basis of the provisions of section 354 of the Companies Act. It seeks, purportedly in terms of the section, in the first place, a rescission of the final winding-up order and, in the alternative, a stay of the winding-up proceedings.[17]

[54] In *Storti v Nugent*[18] ("*Storti*") the court found that the provisions of section 354 (1) of the Companies Act do not apply to a situation where a

[17] The relief described is as claimed in the notice of motion, but is confused in the founding papers as I have demonstrated elsewhere.
[18] 2001 (3) SA 783 (WLD).

rescission of a final winding-up order is sought on the basis that the order should not have been granted. It was suggested that its provisions were rather intended to apply to the situation where supervening events render it necessary or desirable to stay or set aside the proceedings.[19] The court held that if the winding-up order itself were assailable, it fell to be rescinded under the common law.[20] In that respect an applicant, so the court said, would need to bring himself "*within a rescission under the common law*" that involves establishing '*sufficient cause'*.[21]

[55] This in turn involves two essential elements, namely: The applicant must present a reasonable and explanation for his default, and on the merits must have a *bona fide* defence which, *prima facie*, carries some prospects of success.[22]

[56] The authors in Juta's *Commentary on the Companies Act*[23] point out that although there is merit in the court's reasoning in *Storti* for a distinction to be drawn between the two scenarios, it did not reflect in its judgment upon the Supreme Court of Appeal's findings in *Ward and Another v Suit and Others In Re: Gurr v Zambia Airways Corporation Ltd*[24] ("*Ward*"), which judgment represents the law in this respect, especially as to section's utility to vindicate both situations, namely: where the order should not have been granted in the first instance, and where supervening events render it necessary or desirable to stay or set aside all the proceedings implicated in the winding-up.[25]

[19] At 805 H-I.
[20] At 795 E-F and 807 A-B.
[21] At 807 A - C.
[22] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764 I – 765 D. This has been confirmed by *Storti* as the prevailing test, confirmed more recently by the Supreme Court of Appeal in *Dr WAA Gouws (Johannesburg) (Pty) Ltd v HR Computek (Pty) Ltd and Others* (909/2023) [2025] ZASCA 103; 2025 (6) SA 89 (SCA) (15 July 2025) at [22].
[23] Blackman, Jooste, Everingham, Volume 3.
[24] (51/96) [1998] ZASCA 16; [1998] 2 All SA 479 (A); 1998 (3) SA 175 (SCA) (23 March 1998).
[25] At 14-222 to 223.

[57] The nature of the court's discretion to set aside a winding-up order, the onus on the party seeking such relief, and the considerations which are required to be put forward in pursuit of such a remedy available to the delineated parties who may bring an application in terms of section 354 of the Companies Act has been famously summarised in *Ward* as follows:

> "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. (See Herbst v Hessels NO en Andere **1978 (2) SA 105** (T); Aubrey M Cramer Ltd v Wells NO **1965 (4) SA 304** (W); Abdurahman v Estate Abdurahman **1959 (1) SA 872** (0.) There is nothing in the section to suggest that the court's discretionary power to set aside a winding-up order is confined to the common law grounds for rescission. However, in the Herbst case, supra, Eloff J expressed the view (at 109 F- G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the court to sit in appeal upon the merits of the judgment in respect of those proceedings….
> It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed. (Cf Aubrey M Cramer Ltd v Wells NO, supra, at 305 H.)"[26]

[58] The approach regarding an application to set aside a winding-up order on the basis of subsequent events is especially nuanced. In *The Commissioner for the South African Revenue Service v Nyhonyha and Others ("CSARS v Nyhonyha")*[27] the Supreme Court of Appeal, in setting the record straight that the discretion the court is expected to exercise under the section's provisions is not tantamount to an unlimited one, opined as follows in this respect:

[26] https://www.saflii.org/za/cases/ZASCA/1998/16.html at paragraphs 11-13.
[27] (1150/2021) [2023] ZASCA 69 (18 May 2023).

> "[22] I agree with the authors of Henochsberg on the Companies Act 61 of 1973 5 ed at 748 that where, as is the case here, the setting aside of a winding-up is sought on the basis of subsequent events, the test is whether the facts show that the continuance of the winding-up would be unnecessary or undesirable. In Ex parte Strip Mining (Pty) Ltd: In re Natal Coal Exploration Co Ltd (In liquidation) (Kangra Group (Pty) Ltd and Another intervening) 1999 (1) SA 1086 (SCA) at 1091I, this court stated that the expression 'proof to the satisfaction of the Court' refers to 'the normal standard of proof of the facts which are to lead the Court to hold that the winding-up "ought" to be set aside'. Thus, the test for setting aside a winding-up under s 354 on the basis of subsequent events, is whether the applicant has proved facts that show that it is unnecessary or undesirable for the winding-up to continue. This does not involve a choice between permissible alternatives. The test is either satisfied or it is not.
> [23] It follows that the decision of the court a quo did not constitute the exercise of a true discretion. It also follows that the statement in Klass v Contract Interiors CC (In liquidation) and Others 2010 (5) SA 40 (W) para 65 that 'the court's discretion is practically unlimited', is wrong. The tabulation of applicable principles in the same paragraph of Klass, should also be read subject to this judgment."

[59] The principles referenced in *Klass v Contract Interiors CC* referred to in the excerpt above, now to be read subject to *CSARS v Nyhonyha*, are conveniently repeated below as follows:

> "[65.1] The court's discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties in interest, such as the liquidator, creditors and members.
> [65.2] The court should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims.
> [65.3] Where the claims of the liquidator and all creditors have been satisfied, the court should have regard to the wishes of the members, unless those members have bound themselves not to object to the setting-aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.
> [65.4] In deciding whether or not to grant a setting-aside order, the court should, where appropriate, have regard to issues of 'commercial morality', 'the public interest' and whether the continuation of the winding-up proceedings would be a 'contrivance' or render the winding-up 'the instrument of injustice'."

[60] What the above judgments focus upon is the peculiar reach and application of the remedy provided by the section, rather than on the issue of *locus standi*, the assumption being that the statutory remedy is patently available only to the specified parties identified in the section, i.e. "*any*

liquidator, creditor or member". (In *Ward* the applicant, a liquidator, qualified as such a party). However as pointed out in *Storti*, whereas a company, represented by its board of directors, has no *locus standi in judicio* under the section, it has never been in doubt that the company has *a right* to rescind or appeal a winding-up order, or to oppose an application for winding-up.[28] In this respect our courts recognize that a company, represented by its directors, maintain residual rights to seek a rescission order under the same repository of powers that would allow them to challenge a winding-up order by way of an appeal.[29]

[61] In *Kets Group (Pty) Ltd v Business Partners Limited*[30], the court - in confirming that a company through its directors has the authority without the cooperation of the liquidators to seek the rescission of winding-up orders, reminds us of the progressive approach adopted by our courts in affording standing to directors exercising their residual rights who, logically, should not be "*at the mercy*" of the liquidators should they need to challenge such orders on valid grounds.[31]

[62] Some confusion arose more recently regarding certain judgments which suggested that section 354 of the Companies Act was the only gateway as it were (the legislated basis for rescinding a winding up order, including orders alleged to have been erroneously made or granted), through which winding-up orders could be impugned. It was suggested that a company being wound up had no *locus standi* to do so, either because it is not recognized in the section as

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[28] At 795 G-I.
[29] *O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk* 1979 (1) SA 553 (T) at 558A; *Praetor and Another v Aqua Earth Consulting CC*, *Supra*, at paragraph [4]; *WN Attorneys Incorporated v Victor NO and Others* [2024] ZAGPPHC 74 at paragraph [9].
[30] (2487/2023) [2024] ZAECMKHC 131 (3 December 2024)
[31] At paragraph [35].

one of the indicated applicants, or because its directors cannot do so through a resolution by a defunct board once placed under a winding-up order.

[63] These judgements were evidently in conflict with the approach adopted by the courts in *Storti*, *Praetor* and *O'Connell Manthe & Partners* which, contrariwise, recognize the residual rights of directors of companies being wound up to challenge winding-up orders in terms of the common law.

[64] In *HR Computek (Pty) Ltd v Dr WAA Gouws (Johannesburg) (Pty) Ltd and Others*[32] the High Court ruled that the *dicta* suggesting that the rescission of winding-up orders is only permissible in terms of section 345 of the Companies Act are not correct. It dismissed an *in limine* objection to the company's standing through its directors to challenge a winding-up order on the basis of alleged fraudulent misrepresentation as well as the company's claim that it was unaware of the application and had, in those circumstances, been deprived of an opportunity to oppose the winding-up application. The High Court promoted the *Storti* and *Praetor* views taken that directors of companies retain the power to cause companies to rescind such an order without the co-operation of the liquidators.

[65] This much is apparent from it explanation that:

> "The reasoning in *Praetor* is sound. There is no reason in logic why the company cannot, through its directors, and without the co-operation of its liquidators, apply to set aside the liquidation order that had been granted in its absence. After all, it is able to appeal against the grant of such an order in that manner and to take all the necessary steps to oppose the confirmation of a provisional liquidation order. The SCA in *Ward* did not preclude a company from doing so, and perhaps more fundamentally, did not deal with that issue at all. The *dicta* in *Impac* and *Ragavan*, and other matters, to the contrary, or suggesting the contrary, are, with respect, not correct, and are, in any event, *obiter*."[33]

[32] (2019/38193) [2023] ZAGPJHC 844; 2023 (6) SA 268 (GJ) (12 July 2023)
[33] At [24].

[66] On appeal to the Supreme Court of Appeal against the High Court's dismissal of the objection to the company's legal standing, the court in *Dr WAA Gouws (Johannesburg) v HR Computek (Pty) Ltd and Others ("Gouws v HR Computek")* [34] unequivocally confirmed the principle that directors of a company in pursuit of their fiduciary duties to the company in relation to the opposition of the final winding up order are not divested of their right to do so by the provisions of section 354 (1) of the Companies Act simply because they are not identified in the section as one of the qualified parties having *locus standi* to commence such proceedings. To the contrary, a wound up company, represented by its directors, has standing, apart from the section, to challenge such an order, and it need not be assisted by the relevant liquidator appointed to oversee the winding up process in impugning the order.

[67] This conclusion, that the directors will continue to have standing, so the court observed, substantiates the principle that the company continues to exist even in the face of a winding up order.[35]

[68] It further observed that its confirmation of the dismissal of the legal standing objection aligns with the legal concept that directors retain their residual powers to challenge and or appeal the winding up order on behalf of the company, which powers, by analogy, extend to the right to apply for rescission of winding up orders in accordance with the common law or Rule 42.[36]

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[34] (909/2023) [2025] ZASCA 103; 2025 (6) SA 89 (SCA) (15 July 2025).
[35] At [21], citing *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100; 2015 (5) SA 57 (SCA) (1 June 2015), at paragraph [10] where the court observed that: "*The reasoning of the court a quo was motivated by an erroneous premise that upon liquidation Bloempro ceased to exist; that it was 'stripped of its original legal status'. The correct position is that upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. As to when liquidation commences, in terms of s 348 of the Companies Act 61 of 1973 (the 1973 Act) liquidation of a company by the court is deemed to commence on presentation to the court of the application for the winding up and continues until the affairs of the company have been finally wound up and the Master's certificate to that effect is published in the Government Gazette, thus dissolving the company. Similarly s 82 of the Act provides for existence of a company until deregistered by the Commission.*"
[36] At [21].

[69] In my view, by parity of reasoning, a director of a company or close corporation impacted by a winding-up order in the exercise of their residual right would also have the necessary *locus standi* to seek its stay. The court's power to grant such a remedy is not to be found in section 354 of the Companies Act, however, but rather in its inherent powers to grant the stay of its orders.[37]

[70] A company in liquidation, as an "*affected party*", may also bring a challenge under the ambit of Rule 42 (1)(a) of the Uniform Rules of Court.[38]

[71] Self-evidently the residual interests of the directors of a company facing off a liquidation differ from those of the delineated role players mentioned in section 354 (1) of the Companies Act (referenced by the Supreme Court of appeal as the "*the section 354 (1) applicants*")[39] and it is no cause for surprise that a company in such a situation will mount its challenge under a different legal framework.[40] The test, and requirements to be established under each for the grant of relief, will no doubt have elements in common, but be dependent on the peculiar reason for the rescission/stay and remedy prayed for.[41] Considerations generally applicable to applications of this nature would also

[37] *Commentary on the Companies Act*, *Supra*, at 14-221.See also *Kets Group Proprietary v Business Partners Limited* (3540/2023) [2024] ZAECMKHC 65 (7 May 2024) where the court notionally appreciated that a stay, in effect of the "*execution*" of a liquidation order, might be appropriate pending a later application for related relief.
[38] *Gouws v HR Computek, Supra*, at [14].
[39] At [17] - [19].
[40] At [17]. The court in [16] concludes that section 354 (1) articulates clearly and unequivocally that a liquidator, creditor or member has *locus standi* to bring an application to stay or rescind the winding up in terms of its provisions. This aligns with the insolvency proceedings which are initiated by creditors and members of the company. Also in this band of role players in the liquidation process is the liquidator who is tasked with the oversight of the whole process. The interest of each of the three role players arises strictly in terms of the section's provisions. [17] The section does not however take away the inherent right acquired in terms of the common law for the company in liquidation. This right provides the company with an opportunity to challenge its winding up, where, as the case was in this matter, it should never have been placed in liquidation for a variety of reasons, including fraudulent conduct.
[41] *Ward, Supra*. For example, special and exceptional circumstanced are required under the section to justify the setting aside of the winding-up order which are perhaps on a par with the obligation on the company to prove "*sufficient cause*" under the common law. The jurisdictional test will be different if the company (or a creditor or member for that matter as an affected party) brings an application under Rule 42 (1) (a).

apply. Both company and section 354(1) applicants alike would, for example, have to furnish a satisfactory explanation for not having opposed the granting of the winding-up order. Other relevant considerations would include the delay, if any, in bringing the application and the extent to which the winding up has already progressed. [42]

The in limine objection by the first respondent that the applicant lacks locus standi to seek a rescission or stay of the final liquidation order:

[72] That brings me to the *in limine* objection raised by the first respondent and repeated by Mr. Shrosbree as a reason for this application to be dismissed on a standalone basis.

[73] I have highlighted above the distinct difference between a recission application brought by a company through its directors exercising their residual rights and one brought under the section to point to the unfortunate upshot that the applicant has misconceived its appropriate cause of action and or has poorly framed its case.[43]

[74] I am satisfied that it does not have standing *under the section* to have made out the case it seeks to establish as it has framed its prayers in the notice of motion.

[75] That does not necessarily mean that it is the end of the road for it.

[42] Commentary, *Supra*, at 14-220 – 226 and the cases cited therein.

[43] As for the contention that the applicant should have predicated its case on the provisions of Rule 42 (1) (a), it appears that its counsel was misled by *dicta* in the cases which the SCA in *Gouws v HR Computek* noted were incorrectly determined. Mr. Sellem, for example, referred this court to a decision of the Gauteng Local Division in *Blue Bulls Company (Pty)Ltd vs Mega Burst Oils and Fuels (Pty)Ltd* (2021/18739) [2022] ZAGPJHC 314 (21 April 2022) which mistakenly suggests that even applications in terms of rule 42 have to be brought within the ambit and under the purview of section 354 of the Companies Act to succeed. This judgement was furnished to the court in support of his submission that Rule 42 is not applicable in this case. In fact he quite emphatically disavowed that the provisions of the rule were of any relevance.

[76] It is clear that it notionally does have standing to seek a rescission of the final winding up order, but this is where the situation gets messy.

[77] Although arguments were impliedly made on its behalf in a poor attempt to justify the setting aside of the winding-up order on the basis that the applicant was not served with the liquidation application, I am certainly not satisfied that any basis has been made out for a stay of the winding up process in terms of this court's general powers to grant a stay. That is in any event clearly not what the applicant has prayed for. It relies on the section, pertaining to which it does not have the requisite standing. But even if I had to generously assume for the present moment that the member was instead advocating for himself as a role player pertinently envisaged under the section,[44] there is in my view simply no evidence of the kind or standard that would satisfy this court that the winding up order, and process initiated thereby, is unnecessary or undesirable, or that the proceedings should be stayed, pending a vague and unconvincing pledge that the member will trade the close corporation out of its state of insolvency.

[78] I equally find it hard to read in a case that the member may have intended to make under the provisions of section 354 of the Companies Act in his role as a member of the close corporation. Even such an application would require the party seeking relief to advert to special and exceptional circumstances justifying the setting aside of the liquidation order of which (for the reasons I relate under the next chapter), there are evidently none.

<u>The claimed improper service as the basis for the setting aside of the winding-up order:</u>

[44] Mr. Sellem did seek to convince the court, contrary to the case made out on the papers, that the member has indeed intended to approach the court in his capacity as a '*member*' within the meaning of section 354 of the Companies Act rather than on the basis of his residual right under the common law.

[79] What the applicant does not say about the circumstances under which the liquidation order came to be granted is that its attorneys filed a notice to oppose the application on 5 March 2024 and can hardly claim to have been "*absent*" when either the provisional or final winding-up orders were granted.[45]

[80] The first respondent rejects the notion that the matter was postponed *sine die* on 5 March 2024 so that it could purportedly "*effect a proper service of its papers upon the applicant*" or that it thereafter reinstated the same application on an *ex parte* basis and repeated its error of improper service.

[81] To the contrary the first respondent has provided a point by point exposition (vouched by relevant pleadings or correspondence) of its handling of the liquidation application indicating how the applicant's attorney was kept apprised of every enrolment culminating in the granting of the orders after he filed a notice to oppose on the eve of the application's first appearance. (The first respondent plausibly explains that the application was necessarily postponed at this juncture because it had become opposed and not for the sinister reason suggested by the applicant). Despite this trajectory over a lengthy period, the applicant yet failed to file an opposing affidavit.

[82] Contrary to the limited case made out in the founding affidavit that the first respondent failed to serve the application papers on its attorney, the service requirements of a liquidation application are dictated by the provisions of section 346 (4A) (a) of the Companies Act, as follows: [46]

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[45] In *Zuma v 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), at paragraph 61 it was held that: '*where a litigant, given notice of the case against him 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)'*.
It is not even clear if the Rule underpins the present application, since everything was quite indiscriminately thrown into the mix, but if that was the intention, the application must fail too for want of establishing that the orders were granted in the applicant's absence within the meaning of Rule 42 (1) (a).

[46] This section remains in force for insolvent liquidations under the 2008 Companies Act.

"(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application—

- (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
- (ii) to the employees themselves by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises...
- (iii) to the South African Revenue Service; and
- (iv) to the company, unless the application is made by the company."

[83] Leave aside the objective proof that the applicant's attorney was copied in at every turn, there can be no question in my view that the first respondent followed the requirements of service substantively, which was vouched for by official returns of the sheriff and service affidavits as required by this Division in applications of this nature. It also adopted the customary method of obtaining a provisional order before seeking its confirmation, with publication of the order in a local newspaper also properly vouched for.[47]

[84] It is therefore not understood on what basis the member can assert that the first respondent did not properly serve any of its papers upon the applicant prior to obtaining the court orders which is the only factual premise upon which it sought to rescind the final liquidation order.

[85] If it intended to lay emphasis on a physical absence when the orders were granted, such absence was further, self-evidently, elective on its part. The evidence in this respect is overwhelming that the applicant was not interested in opposing the liquidation application.

[47] Mr. Sellem during argument complained that his client had not "*seen*" the advert in the newspaper, yet acknowledged that the first respondent had in fact caused it to be published.

[86] On the contrary, the inference is irresistible, coupled with the member's conduct after the fact, that he may, as suggested by the first respondent, have connived to create a forced absence from court as a basis upon which to later impugn the final winding-up order.

[87] The applicant has further in any event failed to furnish a reasonable or acceptable explanation for its default (of filing an answering affidavit or opposing the application in line with the notice given of its intention to resist the winding-up) neither has the member troubled himself to explain the delay in bringing the present application. He has also astutely avoided engaging with the status of the winding-up, which a member exercising a residual right is responsibly expected to do, and has not taken the court into his confidence regarding his reported lack of cooperation with the liquidators.

<u>Conclusion:</u>

[88] To return to the applicant's narrative of what this application is about, its sole member has dismally failed to prove its entitlement to any of the orders it has sought.

<u>Costs:</u>

[89] There is no question that the effect of the abortive application under the provisions of section 354 of the Companies Act is that the applicant must bear the costs.[48]

[48] *Praetor, Supra*, at paragraph [2]. The applicant here must similarly take responsibility for the fact that it framed its application on the basis of section 354 of the Companies Act whereas it had no legal standing to do so under the section.

[90] Further and in any event the applicant has failed to make out a case for a rescission under the common law, or Rule 42 (1) (a) as it hinted might be of application.

[91] I am inclined to agree with Mr. Kotze who appeared for the first respondent that unless the member is ordered to bear the costs personally and on an attorney and client basis, the insolvent estate and the first respondent in turn, together with other creditors, will be prejudiced. The anomaly of not ordering the member (who bears a fiduciary responsibility to the close corporation not to cause it financial harm which he has done by launching the abortive, alternatively hopeless application) was set out in *Voigt and Others ; In re: Gcanga and Another v Magistrate of the Magistrate's Court, East London and Others*[49] as follows:

> "[54] The legal expense of this entire exercise on the part of the applicants in their representative capacity in having to vindicate the interests of the Close Corporation (in liquidation) will have to come from the estate's coffers to its detriment unless this cost to it is reimbursed by an appropriate costs order. Whilst the members may well have acted upon advice, it still remains appropriate not as a tool to penalize them, but as a measure to absolve the Close Corporation (in liquidation) of any shortfall, to order them to pay the costs of the application on the scale of attorney and client out of their own pockets."

[92] The sentiments apply equally in the present scenario.

[93] The first respondent has plausibly explained why the reserved costs of 15 October 2024 should be borne by the applicant. The applicant has offered no comment in this respect.

[94] Finally I mention that although the applicant's attorney was called upon as an officer of the court to explain why a costs order should not be granted

[49] (EL 457/2023) [2024] ZAECELLC 39.

against him *de bonis propriis* I cannot necessarily impute to him the reason for the failed application or find that the absence of critical information was deliberately withheld. It may be equally so that the papers were just poorly and sparsely drafted. As for the stance adopted in them, the member purported to act in a fiduciary capacity. He owes a professional approach to the close corporation as its sole member in providing the instructions which he did. He is not a lay person in this respect. He must personally bear the burden of meeting the attorney and client costs necessary to indemnify the insolvent close corporation so that the creditors are not prejudiced.

<u>The Order:</u>

[95] I the result, I issue the following order:

1. The application is dismissed.
2. The member of the applicant, Mr. Ayabonga Mapoloba, is personally directed to pay the costs of the failed application, including the reserved costs of 15 October 2024.
3. The costs orders above shall be on an attorney and client scale.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 October 2025

DATE OF JUDGMENT : 14 May 2026

<u>*Appearances:*</u>

For the applicant : Mr. T Sellem instructed by S J Skosana Attorneys, East London (ref: Mr. S J Skosana).

For the first respondent : Mr. D Kotze instructed by Bate Chubb & Dickson, East London (ref: Ms Venter).

For the second and third respondents : No appearance.