



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

CASE NO.: D11077/2023

In the matter between:

REDINK RENTALS (RF) LIMITED	First Applicant
TOWER INVESTMENTS(PTY) LTD	Second Applicant
REDINK RENTALS SECURITY (SPV) RF (PTY) LTD	Third Applicant
and	

EDUCOR HOLDINGS (PTY) LTD	First Respondent
A1 CAPITAL (PTY) LTD	Second Respondent
DAMELIN (PTY) LTD	Third Respondent
INTEC COLLEGE (PTY) LTD	Fourth Respondent
LYCEUM COLLEGE (PTY) LTD	Fifth Respondent

JUDGMENT

Olsen J:

[1] In 2021 Redink Rentals (RF) Limited and Tower Investments (PTY) Ltd (the first and second applicants) launched proceedings for the winding-up of Educor Holdings (PTY) Ltd (the first respondent) and A1 Capital (Pty) Ltd (the second respondent). In each of those cases the applicant claimed *locus standi* as creditor,

and the claim was challenged. The applications were argued on 14th April 2023. Judgment was reserved. Prior to its delivery, and on 2nd May 2023, a written settlement agreement was concluded which resulted in the winding up proceedings being withdrawn. In the present proceedings the applicants seek to enforce the provisions of the settlement agreement. The issue is whether it should be permitted to do so in the face of opposition from the respondents.

[2] The applicants in the proceedings for the winding up of Educor Holdings (Pty) Ltd joined A1 Capital (Pty) Ltd, Damelin (Pty) Ltd, Intec College (Pty) Ltd and Lyceum College (Pty) Ltd as interested parties (the latter three being the third, fourth and fifth respondents in the present proceedings). In the result all five of the present respondents were parties to the settlement agreement.

[3] The settlement agreement itself records that a company known as Redink Rentals Security (SPV) RF (PTY) Ltd should as a matter of caution also be party to the settlement agreement. It has by reason of that fact been cited as the third applicant in the present proceedings.

[4] In terms of the settlement agreement the respondents (called the “debtors” in the written agreement) acknowledged that they were indebted to the first and second applicants (called the “creditors” in the agreement) in the amount of R76 million. The debtors undertook, jointly and severally, to pay that debt ‘in full and final settlement of any and all claims, costs and interest that the creditors may have against the debtors, including but not limited to the two winding-up applications’. The debt would be paid off in instalments, the first of which was R4,6 million which had to reach the account of the first applicant by no later than 3rd May 2023. Against payment of that instalment the creditors’ attorney had to advise the judge that the proceedings were settled, and withdraw the winding-up applications. The instalment was paid and the two applications were withdrawn.

[5] The agreement made provision for the payment of 11 further monthly instalments of varying amounts, the final one being payment of R36,9 million due on 31st March 2024.

[6] The agreement provided that should the debtors default on any payment undertaking the balance of the debt would immediately become due and payable. However written notice of ten business days to rectify such a breach of the payment terms would have to be furnished. Clause 8.2 was to this effect. It is not disputed that the respondents did default. The requisite notices were given. On occasions extensions of time were allowed. Requisite notices having been given, the respondents remained in default on 4th October 2023 when the applicants launched the present proceedings in which they seek judgment for payment of the balance of the capital due, R63 508 000, together with interest and costs.

[7] There is no dispute about the facts set out above. Enforcement of the settlement agreement is resisted on the grounds that

- (a) the apparent and intended consensus of the parties was afflicted by a common error which rendered the agreement void; and
- (b) if the agreement was not void, the applicants employed the wrong form of proceeding or process in order to enforce the agreement.

[8] Both of these grounds of opposition are constructed around the same two, or perhaps three errors. It is convenient to furnish an account of them before proceeding to deal separately with each of the grounds of opposition.

[9] Clause 3 of the settlement agreement provided for the provision by each of the debtors of a written consent to judgment for the debt. This was said to be as “further security for the debt”.

[10] Clause 4.3 read as follows.

“Subject to the creditors complying with clause 8.2 of this agreement, should there be any default in the payment undertaking, the creditors shall be entitled in terms of the provisions of Rule 41(4) of the Uniform Rules of Court to, on 5 (five) days’ notice to the debtors, lodge the consents to judgment with the registrar for judgment on the balance then due.”

[11] What might be called the primary error in these provisions is that a confession to judgment of the type which is the subject of Rule 31(1) is a document in

which a defendant confesses “in whole or in part to the claim contained in the summons.” No summons was involved here. The settlement arose out of the motion proceedings in which the winding-up of two of the five respondents was sought. It is with respect to confessions of the type referred to in Rule 31 that the procedure of submitting the confession to the Registrar (or to a Judge) is provided by Rule 31(1)(c).

[12] The second error flows from the first. Clause 4.3 speaks to a right to lodge consents to judgment with the registrar in terms of the provisions of Rule 41(4). Rule 41(4) has to do with the enforcement of settlement agreements, and it allows an application for judgment on a settlement agreement to be made under that rule in order to enforce it. There is no provision in Rule 41(4) for the submission of a confession to judgment to the Registrar (or to a Judge). That second error is repeated in clause 8.3 which reads as follows.

“If the debtors fail to rectify a breach of this agreement by them, the creditors shall, subject to the creditors complying with clause 8.2, be entitled to lodge the written consent to judgment with the registrar as provided by Rule 41(4) of the Uniform Rules of Court.”

[13] The third error, which hinges more around the scope of operation of Rule 41(4), is that the subrule may only be employed to enforce a settlement agreement (by applying “for judgment in terms thereof on at least five days’ notice to all interested parties”), if the proceedings which were settled had not been withdrawn. As already mentioned, in terms of the settlement agreement, once the respondents had paid the first instalment (as they did), the applicants were obliged to withdraw the winding up proceedings, which they did. By reason of that withdrawal Rule 41(4) ceased to apply.

The Procedural Objection

[14] The applicants launched their application in October 2023 utilising the long form of notice of motion, allowing the respondents the full periods set out in Rule 6 to deliver any notice to oppose the application, and thereafter to deliver answering affidavits. The notice of motion recorded that an order for payment of a sum of R63 508 000, together with interest thereon, was sought. The notice of motion

recorded nothing concerning either of Rules 41 or 31. The notice of motion reflected an ordinary application in terms of Rule 6(1).

[15] The respondents assert that the errors I have described above were common errors. If that is the case, one assumes that the advice given by the attorneys to their clients concerning the provisions of the settlement agreement was on each side to the effect that the confessions to judgment which were signed by the respondents had the utility ascribed to them in the contract (i.e. they could be used in the case of any default whatsoever); and that there was some relationship between the procedure for securing judgment on confession and Rule 41(4) of the Rules. It is plain from the history of the applicants' attempts to enforce the agreement prior to launching this application that the applicants' attorney remained of that view for at least some time.

[16] The founding affidavit delivered by the applicants set out the provisions of the settlement agreement in the usual form. It recorded the respondents' unconditional acknowledgement of debt and undertaking to pay, and the instalments the respondents were to pay in discharge of their obligations. It recorded that 10 days' written notice to cure a breach had to be delivered in terms of the settlement agreement if the respondents defaulted, and that the winding up proceedings had been withdrawn following payment of the first instalment. The affidavit recorded the acceleration clause and that the applicants "shall be entitled to lodge the written confessions to judgment with the registrar, as provided for by Rule 41(4) of the Uniform Rules of Court". Copies of the settlement agreement and the confessions to judgment were annexed to the founding affidavit.

[17] The founding affidavit then dealt with the respondents' breaches of the agreement, requests for indulgences and the furnishing of notices with regard to the breaches in terms of clause 8.2 of the settlement agreement (i.e. ten business days' written notice). In the course of the exchanges directed at getting the respondents to meet their obligations, a number of notices were delivered by the applicants' attorney, addressed to the respondents attorneys and to the registrar of this court. The notices were entitled "Notice in terms of Rule 41(4)". The material paragraph of each notice reads as follows.

“Kindly take notice that the first and second applicants hereby give five days’ notice to the debtors to make payment in the sum of ... failing which the first and second applicants shall lodge the debtors’ signed confessions to judgment with the registrar for judgment on the balance due.”

[18] I am quite unfamiliar with such notices. The full text of Rule 41(4) is as follows.

“Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days’ notice to all interested parties.”

As I understand the position, when an application must be made on notice to a party, what is required by the Rule is that the application should be delivered to the party. Whilst Rule 6 would obviously apply, all the respondent would be entitled to is 5 days’ notice of the date of set down. (That construction reflects the policy of encouraging settlement followed by our courts. See *Eke v Parsons* 2016 (3) SA 37 (CC) at paragraphs 21 to 23.) The applicants’ attorneys obviously thought otherwise. Counsel who appeared for the respondent said he was in respectful agreement with the approach adopted by the applicants’ attorneys. I have not researched this issue any further. As the proper construction of Rule 41(4) is a side-issue in the determination of the present proceedings, I make no decision on it. The threatened course of action under the so-called notices in terms of Rule 41(4) was not carried out. The confessions to judgment were not submitted to the Registrar. Instead, as I have said, the applicants launched an application using the long form of notice of motion in terms of Rule 6, furnishing the respondents the standard periods set out in Rules 6(5)(b)(iii) and (d)(ii).

[19] Paragraph 2 of the founding affidavit in the application read as follows.

“I am duly authorised by the applicants to depose to this affidavit in support of the relief sought in this application for default judgment pursuant to a settlement agreement, as provided for in Rule 31(1)(c) and read with Rule 41(4).”

I can think of no explanation for the fact that these references to Rules 31(1)(c) and 41(4) were made, except inadvertence, error and/or inattention on the part of the lawyer who drafted the founding affidavit. Quite clearly, and despite the fact that the plaintiffs' attorney may still have been unaware of the errors in the contract referred to above, the notice of motion recorded in the clearest terms that those provisions were not actually sought to be employed.

[20] Nevertheless the respondents delivered a notice of intention to oppose the application and a notice which purported to be in terms of Rule 30(2)(b). The notice drew attention to paragraph 2 of the founding affidavit, contending that the application constituted an irregular step because the relief under the rules referred to in paragraph 2 of the founding affidavit was in law not available. The notice ignored altogether the fact that the notice of motion made no reference to any claim for relief under those rules, and the fact that there had been no submission of confessions to judgment either to the Registrar or to a Judge. The notice was a purely technical device.

[21] The applicants offered no response to the notice in terms of Rule 30(2)(b). By notice of motion issued in December 2023 the respondents launched an application to have the applicants' application declared an irregular step, and set aside. I will refer to the present application as the "main application", and to the respondents' application as the "counter-application", as it came to be known.

[22] Further papers were delivered in the counter-application, and both it and the main application were enrolled for hearing on 28th February 2025. At the commencement of that hearing the learned judge was advised that the first and fourth respondents had been deregistered. Affidavits were provided explaining that the applications for re-registration of those respondents had been made, but that they remained in deregistration. Counsel for the applicants and respondents agreed that in those circumstances the main application should be adjourned. Counsel for the respondents argued that the counter-application should also be adjourned, while counsel for the applicant argued that it should be heard.

[23] The judge decided that there was no need to adjourn the counter-application. It was based on the founding affidavit attested to by the respondents' attorney who could supplement or amend the application in need. He could do so

“regardless of whether the first and fourth respondents were before court or not, save that a costs order may not be given against the two non-existing respondents. Furthermore, the applicants are not seeking a substantive order for the performance of any action by the first and fourth respondents, but an order that the application on a procedural issue be dismissed.”

(See paragraph 6 of the judgment.)

The learned Judge heard the argument and found that there was no merit in the complaint upon which the counter-application was founded. It was ordered that “the respondents' application is dismissed.”

[24] The respondents applied for leave to appeal against that order. It was refused on 4th July 2025. The main application was set down for hearing on 5th August 2025, but removed from the roll as the respondents had applied to the Supreme Court of Appeal for leave to appeal against the order made in the counter-application. The application for leave to appeal was dismissed by the Supreme Court of Appeal on 2nd October 2025.

[25] The main application was set down for hearing on 17th of February 2026, but was adjourned as, on that day, the respondents delivered their answering affidavit accompanied by an application to condone its late delivery.

[26] A few days before the main application was to be heard before me (22nd July, 2026), the first and fourth respondents served an application to rescind the original order granted, they say against them, in the counter-application. (I believe that these papers were not yet filed at court. The applicants' attorneys delivered a copy to my registrar in case they should feature in the respondents' argument.) Those papers reflected no date for hearing and were thus incomplete. Counsel for the respondents advised me that he felt obliged to disclose that the set of papers just served had been prepared by counsel shortly after the order of the Supreme Court of Appeal had been handed down (ie October 2025), but that he was unable to explain why they had not been signed and issued at that time. He nevertheless said that, whilst he was not

asking for the main application to be adjourned, he was suggesting that it was appropriate that the main application be adjourned so that the application for rescission could be heard once all its papers were delivered; whereafter, if rescission were granted, the counter-application of the first and fourth respondents would have to be argued and ruled upon. These submissions were made without any notable embarrassment on counsel's part, over the fact that the very same application had been ruled upon at least with respect to the other three respondents, and that the Supreme Court of Appeal had refused leave to appeal against that ruling.

[27] I find it necessary to express the view that counsel's proposal as to the "appropriate" procedural course merely serves to reinforce the complaint made by the applicants repeatedly, that the respondents have sought to delay the final adjudication of the main application by whatever means possible. In doing so they have followed procedures or processes which, to put it at its lowest, must be the product of advice received from their lawyers. Rule 30 unfortunately provides such a device. If a defendant or respondent seeking to delay proceedings can identify an irregular step, or something which might be passed off as one, such a party may afford written notice to its opponent, when 10 days has elapsed after becoming aware of this step, to cure the cause of complaint within another period of 10 days. As a device for delay the Rule is efficient. Up to 20 days delay may be achieved if the opponent elects to cure the alleged deficiency or irregularity upon which the defendant or respondent relies. If the opponent chooses not to cure the defect, presumably because it is not conceded that there is any irregularity involved, the employment of Rule 30 becomes a ruthlessly efficient device for achieving delay. A further 15 days may elapse before the application in terms of Rule 30(1) to set aside the irregular step is launched. There must then be time for answering affidavits and replying affidavits, before the case joins the roll of opposed applications. The efficiency of this delay mechanism arises because in terms of Rule 30(2)(a) the party employing the mechanism is not permitted to take any further steps to advance the proceedings "with knowledge of the irregularity". A defendant need not deliver a plea, and a respondent need not deliver an answering affidavit. In this particular case the delay achieved thus far is three years.

[28] It is in the light of the foregoing, and for the further reasons which are set out hereunder, that I conveyed to counsel for the respondents that I did not agree with

the proposition that the main application should be adjourned in order to allow the two respondents who were deregistered at the time when the Rule 30 application was argued, but which had now become reregistered, to follow the same course which had been employed by the three respondents who were registered at the material time, in order further to delay a decision in the main application.

[29] No application in terms of Rule 30(1) serves before me. However to accede to counsels request that the main application be delayed I would have to conclude that some merit might be found in proposed proceedings in terms of Rule 30. I see none. There was no “irregular step”, in the sense in which that term is used in Rule 30(1). There is no complaint that the notice of motion had not been signed; or that it incorporated truncated time limits without the support of a certificate of urgency; or that the founding affidavit had not been attested to. In reality the so-called procedural complaint raised by the respondents amounts to this. Because the deponent to the founding affidavit had stated that the applicants were seeking judgment “pursuant to a settlement agreement, as provided for in Rule 31(1)(c) and read with Rule 41(4)”, everything else in the affidavit which supported the claim set out in the notice of motion should be disregarded; and that in consequence of that the affidavit did not support the relief sought in the notice of motion which made no mention of Rule 31 or Rule 41. That is a complaint that the content of the affidavit does not support the relief sought in the notice of motion. Delivering such an affidavit is not an irregular step. If the founding affidavit does not support the relief sought in the notice of motion, that may constitute a recipe for the failure of the application. The question as to whether the application should succeed or fail, because the founding affidavit does or does not support the relief sought, is to be decided upon adjudication of the main or substantive application.

[30] I revert to what might be called the ‘recission application’ contemplated by the first and fourth respondents. It rests upon the proposition that when this court made the order dismissing that application at a time when those two respondents were deregistered, the judgment was intended to close the door on the first and fourth respondents as well as the other three. I am not convinced that it was. As it turns out, and as is apparent from what I said earlier, the answering affidavit delivered extremely late by the respondents again raises the procedural issue at which the application in

terms of Rule 30 was directed. Indeed, counsel for the respondents has argued that the applicants conceded in the proceedings in which leave to appeal the order in the Rule 30 application was sought, that the judgment of this court on the issue was not appealable because it could be revisited in the main application. On that basis it could be, and was, argued before me again.

[31] In my view there is no merit whatsoever in the so-called “procedural complaint”. The proceedings launched in the main application were ordinary motion proceedings for the enforcement of an undisputed debt. The fact that the deponent to the founding affidavit thought that the relief the applicant sought was “provided for in Rule 31(1)(c) and read with Rule 41(4)” is neither here nor there. An error like that cannot vitiate the entire procedure when all allegations necessary in order to sustain the claim set out in the notice of motion (which defines what the case is about) are contained in the founding affidavit. There is in any event a signifier in the founding affidavit that, despite his misunderstanding of the impact of Rules 47 and 31 on these proceedings, the deponent to the founding affidavit realised that the application actually launched was not dependant on any such provisions which he believed to be applicable. He states:

“A copy of this application will be served on the respondents, although not strictly required in terms of the settlement agreement or in law.”

[32] Furthermore, the settlement agreement itself sanctions the proceedings reflected in the notice of motion in the main application. Clause 8 deals with the subject of default. Clause 8.1 is the acceleration clause. Clause 8.2 requires 10 business days’ written notice to rectify a breach. Clause 8.3 is the one which erroneously provides for the lodgement of consents to judgment with the registrar. Clause 8.4 then provides as follows.

“This agreement does not prevent any of the parties from utilising its remedies, which are available in law.”

[33] On the subject of the procedural issue raised by the respondents, the judgment in *Massey-Ferguson (SA) Ltd v Ermelo Motors Ltd* 1973 (4) SA 206 (T) is instructive. That case also concerned the enforcement of a settlement agreement in terms of which the defendant acknowledged its liability for payment of a sum, and

undertook to make payment in instalments; and defaulted in payment of those instalments. The defendant argued that the plaintiff had followed a wrong procedure relying, as it did, on Rules 6(11) and 41(4). Then, as now, Rule 6(11) dealt with “interlocutory and other applications incidental to pending proceedings”, and provided that they may be brought on notice, supported by the required affidavits, and set down at a time assigned by the registrar or directed by a Judge. The plaintiff’s notice of motion read as follows.

“Take notice that application in terms of Rule 6(11) read with Rule 41(4) of the Uniform Rules of Court will be made...”

The defendant argued that the application was not an interlocutory application nor one incidental to pending proceedings; and that the court should not condone “a wrong procedure”. In my respectful view the manner in which learned Judge dealt with that argument was entirely correct, and should be followed.

“*Mr Preiss* may be right in that the present application is not incidental to pending proceedings in the sense contemplated in Rule 6(11) because it is not subordinate or accessory to while at the same time being distinct from the main proceedings, but a reference in the notice of motion to a wrong sub-rule does not vitiate the entire proceedings, if the correct procedure has substantially been followed. The applicant could simply have brought this application under subrule 1 which provides:

‘Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.’

The reference to Rule 41(4) is not, in my view, wrong. The written settlement has not being carried out. More than four days’ notice has been given to the respondents and the applicant is entitled to apply for judgment.”

Rule 6(1) currently reads to the same effect as it did in 1973. Applications are “brought by notice of motion”. A founding affidavit is a document which “supports” the notice of motion. If an erroneous reference to a Rule in a notice of motion can be overlooked because it does not vitiate proceedings which are otherwise in order, then it is all the more clear that a similarly erroneous reference to procedural rules in an affidavit cannot be regarded as vitiating the proceedings.

[34] Finally, *Eke v Parsons* lays down the general approach to the type of objection raised by the respondents in the present matter. That case concerned a settlement concluded between the parties after the plaintiff had applied for summary judgment on a money claim against the defendant. The parties agreed that if the defendant should default the plaintiff would be entitled to set down his summary judgment application again, and indeed supplement his papers in that application by delivery of a further affidavit. The settlement was made an order of court. The defendant defaulted. The plaintiff supplemented his papers and brought the application for summary judgment before the court. It was upheld. One of the defences or objections raised by the defendant was that what was placed before the court was properly identified or characterised as a second application for summary judgment, something which Rule 32 did not sanction. The issue as to the viability of a “second summary judgment application” was dealt with in paragraphs 39 to 42 the judgment of Madlanga J. The last two of these paragraphs read as follows.

“[41] Where the parties themselves, through a settlement agreement reached with legal representatives present on each side, prefer to dispense with the strictures of a rule and request that the court recognise this preference by means of a consent order, for one party suddenly to perform a volte-face and demand strict adherence with that selfsame rule borders on the ludicrous. Justice between the two litigants demands that their settlement agreement, which was made an order of court, must be given effect. After all, a court’s duty is to do justice between litigants. In this instance justice demands that Mr Eke be held to his bargain.

[42] In the circumstances of this case, it matters not that Rule 32 does not provide for the enrolment of a second summary judgment application. Mr Eke’s contentions in this regard cannot succeed. Substance must be put ahead of form.”

(See also *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278.)

[35] Of course the facts in *Eke v Parsons* are not replicated in this case. Nevertheless the case involved the enforcement of a settlement agreement, and an objection to such enforcement based on technical grounds related to the provisions of the Uniform Rules of Court. Even if I saw any merit in the respondents’ contention that

the erroneous reference by the deponent in the founding affidavit to inapplicable Rules undermines the efficacy of the notice of motion and the applicants' claim (which I do not), this would be an instance where justice demands that the respondents be held to their bargain by enforcement of the settlement agreement.

The Defence on the Merits

[36] As already stated the respondents' contention is that the settlement agreement was void from the outset by reason of common error. The defence is pleaded as follows in the respondents' answering affidavit.

“[42] It was essential from the applicants' perspective that in the event of a breach they would have the right to rely on Uniform Rules 31(1)(c), and 41(4).

[43] Without the problematic clauses and the said reliance upon Uniform Rules 31(1)(c), and 41(4), there would have been no settlement agreement.

[44] It follows on this version that the common error of the parties went to the root of the settlement agreement, rendering it impossible of factual and lawful performance in the event of a breach, and completely vitiated the apparent consent of the parties.

[45] The result was that the settlement agreement was and is void *ab initio*.

[46] In this regard, if a contract is entered into on the basis of a common assumption as to a past, present or future state of affairs, and that assumption turns out to be unfounded, the contract will be void. What is required in order to render a contract void is a common assumption which turns out to be unfounded.

[47] These requirements are satisfied on the common cause facts.”

[37] This defence flounders both on the facts and the law. Dealing with the factual evidence first, the respondents' case is set out in paragraphs 42 and 43 of the answering affidavit. The deponent to that affidavit furnishes no evidence which might explain how he might have acquired the knowledge which justifies him making the bold statement that the applicants would not have concluded the contract if they knew that the remedy of submitting consents to judgment to the registrar was unavailable. The

applicants were entitled to deal with that in reply. The deponent to the replying affidavit points out that the deponent to the answering affidavit did not sign the settlement agreement on behalf of the first respondent, of which he was a director. Speaking on the applicants' part, the deponent to the replying affidavit complained that the assertions in the answering affidavit are unsubstantiated, and said this regarding the intention of the applicants.

"As the representative of the applicant who was involved in instructing their legal representatives in the drafting of the settlement agreement, I can categorically state that the only material terms with which the applicants were concerned was how the respondents were going to repay the applicants the amount owed."

[38] The respondents did not seek leave to file a fourth set of affidavits in order to deal with this aspect of the replying affidavit, which, as I see it, was the only admissible direct evidence on the question as to whether as a matter of fact the applicants would have seen the non-availability of the remedy of submitting consents to judgment to the registrar as a right or privilege without which they would not have concluded the settlement agreement. However, given the test applicable in law to this enquiry, such evidence given after the event concerning the intention of a party is relevant, but is not necessarily decisive.

[39] Strangely enough the answering affidavit incorporates footnotes, and with regard to the allegations in paragraph 46 (i.e. the statements of law contained therein), the affidavit refers to two judgments. The one is *Williams v Evans* 1978 (1) SA 1170 (C) at 1174 and 1175. The case concerned agreements which anticipated that a bank would grant one of the parties an overdraft facility. The bank declined the request. The respondent alleged that the contracts were void because the common assumption failed, and because the contract would not have been concluded but for the assumption. The applicant sought an order declaring the contracts enforceable, and denied that the grant of the overdraft facility was a necessary condition for the enforceability of the contracts. The court referred the matter to trial to because of the factual dispute concerning the status of the common but unrealised assumption concerning the grant of the overdraft facility. The second judgment referred to is

Dickinson Motors (Pty) Ltd v Oberholzer 1952 (1) SA 443 (A) at 450. Scheiner JA said the following at page 450.

“In *Huddersfield Banking Company Ltd v Henry Lister & Son Ltd*, 1895 (2) Ch. 273, Lindley, L.J., states the proposition,

‘That an agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so.’

This seems to me to express in clear language a principle which is inherent in all developed systems of law.”

The proposition endorsed by Scheiner JA is in effect that, if the correctness of what turns out to have been a common mistake was treated by the parties (expressly or tacitly) as a state of affairs which must exist in order to render the agreement enforceable, only then does the mistake render the contract invalid or unenforceable. Both judgments contradict the proposition advanced in paragraph 46 of the answering affidavit – in particular the last sentence of it.

[40] In *Wilson Bayly Holmes (Pty) Ltd, v Maeyane and others* 1995 (4) SA 340 (T) at 344B, Nugent J put the test for the consequences of a common mistaken belief that a certain state of affairs exists as follows.

“What determines whether the contract is invalid is whether the parties have agreed, expressly or tacitly, that this should be the consequence if the state of affairs does not exist.”

The learned Judge went on to make the observation that in some cases “the belief that the state of affairs exists will be merely incidental to the parties’ intention to create a binding relationship.”

[41] In *Van Reenen Steel (Pty) Ltd v Smith N.O. and Another* 2002 (4) SA 264 (SCA) the court considered the questions discussed above, and concluded by endorsing as correct, and in conformity with authority and principle, the passage from *Wilson Bayly Holmes* quoted above.

[42] In argument before me counsel for the respondents accepted that it is not simply a question as to whether a common error existed. With reference to *Van Reenen Steel*, counsel argued (and I quote from his heads of argument) “that the enquiry is one of construction: whether the parties intended the agreement to operate only upon the existence of the assumed state of affairs.”

[43] In support of an outcome favouring the respondents I was referred by counsel to the judgment of the Labour Appeal Court in *Volkswagen (SA) (Pty) Ltd v Koorts and others* [2011] ZALC 5. It was argued that it was held in that case that a contractual provision “founded upon an unavailable legal mechanism” was sufficiently fundamental and prominent, and that the parties would not have contracted in the same form had they known of the true legal position. The only paragraph in the judgment of the Labour Appeal Court to which I was referred is paragraph 17. In that paragraph Landman AJA furnished a summary of the arguments put forward by the appellant. Those arguments were rejected. With reference to *Wilson Bayly Holmes* and *Van Reenen Steel*, the court found that the true test is what I have set out above. With regard to the position of the parties, the provisions of the contract, and applying the test just referred to, the court examined the question as to whether the parties would still have contracted as they did, if they had realised prior to concluding the contract that their belief as to the availability of a certain legal remedy was erroneous. The conclusion was that they would have contracted as they did – i.e. the existence of the preferred legal remedy was not a condition which had to subsist for the contract to be enforceable.

[44] I do not know the source from which counsel for the respondents acquired his belief that the decision in *Volkswagen* was the opposite of what it in fact was. There is no room at all for mistake if one reads the judgment. I must conclude that counsel had not read the judgment. Objectively speaking, the argument constituted an attempt to mislead the court. I do not for a moment suggest that counsel actually intended to do so. But the lesson is nevertheless clear.

[45] There is a material difference between the common error in *Volkswagen*, and the one here. *Volkswagen* concerned an agreement to submit issues to arbitration. The common mistake made by the parties was their understanding that

they could by agreement clothe a court which might be called upon to review the arbitrator's decision with the power to do so on wider grounds than the law permits. There was a genuine mistake as to the availability of a remedy. Here there is no mistake about the remedy: it is a judgment of the court rendering the claim executable. The mistake in this case concerned only the procedure by which that remedy may be acquired.

[46] The parties in the present case were embroiled in litigation over the question as to whether winding up orders should be granted. Judgment had been reserved. They then decided that settlement was preferable. From the respondents' perspective the risk that winding up would eventuate was avoided. In exchange they had in effect to abandon their argument or contention that the applicants in the winding up proceedings had no *locus standi* because nothing was owing to them. On the side of the applicants, they would avoid the risk of failure in the winding up proceedings, and gain the advantage of an unconditional acknowledgment of liability coupled with a payment regime with which they could live. That is what they elected to do.

[47] It was not argued and could not be argued that the respondents would have been advantaged in any way if indeed the remedy of submitting their confessions to judgment to the registrar was available. From their perspective the availability of that remedy was, if anything, disadvantageous.

[48] The applicants made a measured decision to abandon winding up proceedings in exchange for an unconditional acknowledgement of debt and enforceable undertakings to pay. A lot of money was involved – over R70 million. In my view the notion that the applicants would not have made that choice if they had known that they would have to launch ordinary motion proceedings to enforce the settlement agreement in the event of default, as opposed to submitting the confessions to judgment to the registrar, verges on the ludicrous. That conclusion is furthermore consistent with:

- (a) the existence of clause 8.3 of the settlement agreement which in effect reserved the right of both parties to pursue remedies not immediately contemplated in the settlement agreement;

- (b) the factual evidence presented by the deponent to the replying affidavit;
and
- (c) the fact that, even though the applicants' attorneys seem to have believed that the confessions to judgment were viable at the time when the present main application was launched, an election was made to pursue enforcement by launching an ordinary application in terms of Rule 6.

Conclusion.

[49] I conclude that the relief sought by the applicants must be granted.

[48] It appears that no order has yet been made on the respondents' application for condonation of the very much delayed delivery of its answering affidavit. In its replying affidavit the applicants' deponent stated that the applicants do not oppose the application for condonation because that would only assist the respondents "in their continual attempt to frustrate the applicants in having the main application determined". As dissatisfied as I may be concerning the quality of the application for condonation, I believe that it should be granted if for no other reason than the one identified by the applicants.

[50] Although the settlement agreement provides that payments are to be made into the bank account of the first applicant, the acknowledgment of debt made by each of the respondents is in favour of the first and second applicants who are defined as the "creditors". It seems that where the agreement makes provision for payment to be made to the first applicant, that is intended merely to be a payment mechanism, and not to define the beneficiaries of the obligations undertaken by the respondents which are expressly stated to be in favour of the "creditors".

[51] I accordingly make the following order.

1. The respondents' application for condonation of the late delivery of their answering affidavit is granted, and the costs of the application for such

condonation shall be paid by the respondents, their liability being joint and several.

2. The respondents are ordered to pay the first and second applicants the sum of R63 508 000, together with interest thereon at the rate of 11.75 percent per annum from 4th October 2023 to date of payment, their liability being joint and several.
3. The costs of the application, including the costs of two counsel where incurred, shall be paid by the respondents, their liability being joint and several. Such costs shall include any that may have been reserved earlier. Counsels' fees may be taxed on Scale C in respect of Senior Counsel, and otherwise on Scale B.



Olsen J

Case Information:

Date of Hearing:
Date of Judgment:

22 July 2026
17 September 2026

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