

BANK OF NAMIBIA**8TH RESPONDENT**

Neutral Citation: *Metropolitan Bank of Zimbabwe (Pty) Ltd v Bruni* HC-MD-CIV-MOT-GEN -2018/00062 [2018] NAHCMD 97 (17 April 2018)

CORAM: MASUKU J

Heard: 19 March 2018

Delivered: 17 April 2018

Flynote: Rules of Court – rescission of judgment in terms of Rule 103 – requirements thereof – whether the court, in determining the applicability of rule 103, is confined to the record of proceedings – Rule 128 – authentication of documents – whether documents not authenticated but attached to affidavits that need not be authenticated are admissible in evidence - Appeal to Supreme Court – Civil procedure – effect thereof on liquidation proceedings – amendment of notice of motion – approach thereto – whether appeal has an effect of stay of proceedings – *locus standi in judicio* – whether a shareholder has a right and interest in orders granted *ex parte* by virtue of shareholding in the company in liquidation. Company Law – the distinction of the role and duties of provisional and final liquidators discussed – Legal Ethics – duties of legal practitioners to the court, especially in *ex parte* proceedings.

Summary: The applicants brought an application for rescission of an order of this court granting the liquidators, who are the respondents certain powers in respect of recovery of money and assets of the company and payment part of deposits to clients of the Bank in liquidation. The orders were granted *ex parte* with the applicants, who are shareholders of the Bank unaware of the proceedings and not having been cited nor served therewith.

Held – that the applicants, by virtue of their shareholding had rights and interests which could be affected by the granting of the order in question *ex parte*.

Held further – that in applications under rule 103, the applicant has to show that the order sought to be impugned was granted in the applicant's absence and in error and that the applicant is affected thereby.

Held – that in some cases, such as the present, the requirements of an error and that the order affects the applicant may coalesce and that once the order is granted in absence of such a party, whereas that party may be affected thereby may be indicative of the application having been granted in error.

Held further – that in applications for amendment of notices of motion where the amendment is merely formal and seeks to change the name, without any *mala fides* on the part of the applicant; prejudice, to the opposite party, the courts normally grant such orders subject to the applicant paying the costs occasioned thereby.

Held – that there appears to be a difference in the duties and functions of provisional and final liquidators and that there are some functions which are the exclusive preserve of the latter, the former being largely restricted to maintaining the status *quo*.

Held further – that courts should avoid being highly technical but should, in dealing with matters, avoid an approach where serious matters are dismissed on highly technical issue to the detriment of deciding the matters on their real merits.

Held that – in urgent applications, the court may overlook the non-authentication of documents attached to affidavits, which are executed in countries, which are otherwise exempt from authentication.

Held – legal practitioners, as officers of the court, have an abiding duty to assist the court on all procedural and legal questions that arise, particularly in matters brought *ex parte*.

After reviewing all the matters that arose, the court formed the view and concluded that the applicants had established that they had an interest in the orders sought and granted and held that because they were not served with the papers, their interest notwithstanding, the order sought was issued in error within the meaning of rule 103. The order was thus rescinded and set aside.

ORDER

1. The order granted by this Court on 2 February 2018, pursuant to the *ex parte* application by the Liquidators, is hereby rescinded and set aside.
2. The costs occasioned thereby are ordered to be costs in the liquidation and shall be consequent upon the instruction of one instructing and two instructed Counsel.
3. There is no order as to costs regarding the hearing on 28 February 2018.
4. The applicants are ordered to pay the costs, if any, occasioned by the amendment of the citation and description of the Second Applicant as prayed for in the Applicants' replying affidavit.
5. The Registrar of this Court is ordered to cause a copy of this judgment to be served on the Master of the High Court, who is specifically ordered to consider and if so advised, to act upon the issue raised in raised paragraphs [123] to [127] of this judgment, including the compliance with the provisions of Section 370(1) (a) of the Companies Act No. 28 of 2007, if that has not been complied with thus far.
6. This interlocutory application is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] On 23 January 2018, the 1st and 2nd respondents, hereafter referred to as 'the Liquidators', approached this court *ex parte* and on an urgent basis, seeking certain relief. Their application was, however, as set down by them, only heard on 2 February 2018.

[2] The matter served before my Brother, Mr. Justice H. Angula D.J.P., who, after listening to argument advanced on the Liquidators' behalf, granted an order, whose contents will be reproduced below. Because of the centrality of the order issued to the instant application, I find it necessary quote some *ipsissima verba*, below. It reads as follows:

'1. The Applicants' non-compliance with the forms and service provided for in the Rules of the High Court of Namibia is condoned and leave is granted to the applicants to bring this application *ex parte* on an urgent basis as envisaged by Rule 73(1) as read with Rule 73(3);

2. The Applicants are hereby authorised to launch this application and to seek the relief more fully set out in the notice of motion and to proceed in this Court and in the appropriate Division of the High Court of South Africa and the High Court of Zimbabwe for the relief more fully described in the notice of motion in terms of s 392(7) read with section 393(3), alternatively section 392(7) read with section 392(5), 392(6) (1) (a) and 393(3) of the Companies Act 29 of 2004;

3. The applicants are authorised to institute and proceed to the final determination thereof, such proceedings as may be required to be instituted in this Court and any Court of competent jurisdiction in South Africa and/or Zimbabwe

and/or any foreign country, and where required to apply for recognition of the appointment of the applicants as the provisional and/or final liquidators of the company, in any foreign country.

4. The applicants are authorised to institute and proceed to the final determination, such proceedings as may be necessary in this Court and in the appropriate Divisions of the High Court of South Africa and/or Zimbabwe and/or any foreign country which is, or was, the property of the company, or in respect of any claim against any person in any foreign country (subject to the laws of that country) for the recovery of all movable and/or immovable property and funds in bank accounts situated in South Africa and/or Zimbabwe and/or any foreign country which is, or was, the property of the company, or in respect of any claim against any person in any foreign country.

5. The applicants are authorised to institute and proceed to the final determination thereof, such proceedings as may be necessary in this Court and in any Court (of competent jurisdiction in South Africa and/or Zimbabwe or any other foreign country) in achieving the proper and effective winding up of the company.

6. The applicants, without limiting the generality of the foregoing, are authorised to institute and proceed to the final determination thereof in this Court and in the High Court of South Africa and/or Zimbabwe or any Court of competent jurisdiction in South Africa and/or any other foreign country:

- 6.1 any proceedings for injunctive or interdictory relief and/or any liquidation proceedings permitted by the laws of South Africa, Zimbabwe or any foreign country, whether such proceedings are similar proceedings as envisaged in section 424 of the Companies Act, 2004 or not'
- 6.2 any proceedings for an order against any party to produce to the applicants all documents, papers or other records relating to or having any connection with the winding up of the Company;
- 6.3 any proceedings for restraining the disclosure of any order granted by this Court or a Court in South Africa and/or Zimbabwe and/or any other foreign country and any evidence pursuant thereto.

7. The Applicants are authorised and directed, in terms of section 392(7) to effect payment of the deposit liabilities of the Company (in liquidation) up to an amount of N\$25,000.00 (Twenty Five Thousand Namibian Dollars) in terms of the preference provided for in section 6(2)(c) of the Determination of Payment of Claim dated 15 June 2017 by the Bank of Namibia in terms of section 59 of the Banking Institutions Act, 1998, published in Government Gazette No. 158 No. 6322 dated 15 June 2017 as envisaged in section 6 of the determination and generally, for the aforesaid purposes, to do all such things and/or cause to be done all such things as may be necessary to give effect to this authority.

8. The costs of this application shall be costs in the winding up of the Company. Alternatively be reserved (save for any opposition).'

[3] Dissatisfied with the granting of the above order, the applicants approached this court on an urgent basis, as stated above, seeking in essence, an order rescinding and setting aside the aforesaid *ex parte* order in terms of the provisions of rule 103 of this court's rules.

[4] In the main, the applicants claim that the said order was erroneously sought or erroneously granted in their absence, although they were affected thereby. It is the sustainability of that question that will loom large and become the main focus of the judgment, subject of course to the determination of certain preliminary points *in limine* raised by the Liquidators, as shall be apparent as the judgment unfolds.

Background

[5] On 11 July 2017, My Sister, Prinsloo J, issued a provisional winding up order in respect of an entity known as the Small and Medium Enterprises Bank, hereafter referred to as 'SME Bank'. The provisional winding order was granted at the instance of the Bank of Namibia, the 8th respondent herein. The applicants were appointed as provisional Liquidators of SME Bank in terms of the said court's order.

[6] On 18 and 19 October, 2017, after lengthy argument, as the liquidation was vigorously opposed by the applicants, Prinsloo J reserved judgment and delivered the final liquidation order on 29 November 2017. Reasons for granting the final liquidation order were handed down on 4 December 2017 by the learned Judge. The applicants, who had strenuously opposed the liquidation of the Bank, noted an appeal against the final liquidation order to the Supreme Court on 15 December 2017. It is unnecessary, for purposes of this judgment, to visit the grounds of appeal.

[7] It is during the pendency of the appeal (an issue that is contested by the Liquidators in this matter) that the Liquidators then approached this court, as aforesaid, seeking the relief stated earlier in para [2] of the judgment. The applicants, it would seem, were desirous of being given powers by this court to institute proceedings and carry out related activities in Namibia and beyond, with the intention for recovering whatever assets and funds that belonged to the SME Bank in liquidation that they could trace in the hands of third parties.

The parties

[8] The 1st applicant is Metropolitan Bank of Zimbabwe Limited, a public company which is duly registered and incorporated in terms of the company laws of the Republic of Zimbabwe. Its place of business is situate at Metropolitan House, 3 Central Avenue, Harare. The 2nd applicant, World Eagle Properties (Pty) Limited, on the other hand, is a private company, duly incorporated and registered in terms of the company laws of the Republic of Zimbabwe. Its principal place of business is situate at 23 Tamar Road, Vainona, Borrowdale, Harare, Zimbabwe.

[9] The 1st and 2nd respondents, Messrs. Bruni and McLaren, who as stated in preceding paragraphs of this judgment, are the joint provisional Liquidators of SME Bank, who were appointed by an order of this court referred to in paragraph 5 above.

[10] The 3rd respondent is Namibian Financing Trust (Pty) Limited, a private company duly registered and incorporated in accordance with the company laws of this Republic. Its principal place of business is situate at 2 Barbie Street, Suiderhof, Windhoek. The 4th Respondent is the Mater of the high Court of Namibia, whose offices are situate in the High Court Building on Luderitz Street, Windhoek.

[11] The 5th respondent is the Government of Republic of Namibia, which in the instant proceedings, is represented by the Office of the Government Attorney, whose offices are situate on the 2nd Floor, Sanlam Building, Independence Avenue, Windhoek. The 6th and 7th respondents are Government Ministers, namely, the Minister of Industrialisation, Trade and SME Development and the Minister of Finance, respectively. Both Ministers, are represented by the Office of the Government Attorney, described above.

[12] The 8th respondent is the Bank of Namibia, a juristic person provided for in terms of the provisions of Article 128 of the Constitution of Namibia, read with the provisions of s. 2 of the Bank of Namibia Act.¹ Its place of business is situate at 71 Robert Mugabe Avenue, Windhoek.

[13] It is apparent from the applicants' founding papers that they do not seek any relief from the 3rd to the 8th respondents in this application. I can confirm in that regard, that the said respondents did not support or oppose the relief sought by the applicants. Shorn of the frills, it then becomes clear that the real protagonists in this matter are the applicants and the joint Liquidators.

Common cause issue

[14] It is important to mention at this nascent stage of the judgment that it is common cause that the Small and Medium Enterprises Bank Limited (SME Bank), has a number of shareholders, who are also cited as parties to the present proceedings. The Government of the Republic of Namibia, the 5th respondent, is the major shareholder, holding 65% of the shares. The 1st

¹ Act 15 of 1997.

applicant holds 30% of the shares whereas the 2nd applicant holds the balance of 5% of the shares.²

[15] The question whether the applicants, by virtue of their shareholding, have a direct and substantial interest in the order sought to be impugned in these proceedings, is a separate matter and which is vigorously denied by the Liquidators. It is, in any event, a matter that this court will decide as the judgment unfolds on its merits, if the court goes beyond the points *in limine* raised on behalf of the Liquidators.

Application for amendment

[16] Before dealing with the issues that arise, particularly those raised as points of law *in limine*, the applicants filed an application for amendment of the notice of motion, which is opposed by the Liquidators. This amendment is to correct the name of the 2nd applicant World Eagle Properties (Pty) Ltd, as recorded in the papers, to 'World Eagle Investments (Pvt) Ltd.

[17] The explanation furnished by the applicants is that an error was committed in the papers in recording the correct name of the 2nd applicant. In this regard, it is contended that this was probably a work copying and pasting, as it were, as the applicants simply lifted the names of the parties from the papers filed initially by the 8th respondent in the winding up application. The applicants overlooked the fact that the 2nd applicant's name had been incorrectly captured in those papers and they continued with that wrong name in the present application.

[18] There is no denying that the application for amendment came very late in the day and after the replying affidavit had been filed. In the circumstances,

² See para 73.1-73.3 of the Applicants' Founding Affidavit. The allegation of the shareholding as alleged in the founding affidavit is not denied by the Liquidators in their answering affidavit at para 33 (p168 of the record). All they take issue with is the allegation that the applicants have a direct and substantial interest in the order granted by this court that is sought to be impugned in this application.

it is plain that the Liquidators were not afforded sufficient time to consider the effect of the amendment.

[19] That notwithstanding, one has to have regard to the explanation given for the amendment and its nature and likely effect on the proceedings. Key, for consideration, is whether properly construed, the respondents would be prejudicially affected by the granting of the amendment or they would suffer an injustice and in a manner that is not possible to compensate for with an appropriate order as to costs.

[20] Having regard to the nature of the application and the explanations tendered therefor, I am not persuaded that there is any real prejudice that would enure to the Liquidators if the application for amendment is granted. Mr. Heathcote did not appear to seriously object to the amendment and could not, therefor point out any real prejudice to his clients, as a result of the amendment applied for, even particularly so late in the day. Nor was it sought to be argued that the moving of the amendment was *mala fide*.

[21] The rules of this court, dealing with applications for leave to amend, state clearly that applications for amendment may be made at any stage of the proceedings up to judgment. In the context of the rule, this application, though late, has and one would say in a seemingly contradictory tone, come soon enough as the stage of judgment had not been reached in this case.

[22] In support of the granting of the application, the court was referred to the case of *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co. Ltd Intervening)*,³ where the court expressed itself as follows on this issue:

‘The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application is *mala fide* or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back in the same position as they were when the notice of

³ 1994 (2) SA 363 (C) at 369F-G.

motion which it is sought to amend was filed. A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant, should, in my view usually be granted subject to the considerations mentioned of prejudice of the respondent . . .’

[23] In a later case, *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*,⁴ the Supreme Court of Appeal of South Africa, reasoned the matter as follows, referring in part, to *Devonia*:

‘Broadly stated, it means that, in the absence of prejudice to the other side, these applications are usually granted . . . As pointed out in *Devonia Shipping* at 369H, the risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer, than in the case where it is sought to substitute a different party. But the criterion remains the same; will the substitution cause prejudice to the other side, which cannot be remedied by an order for costs or some other order, such as a postponement?’

[24] Two things are apparent from a proper reading of the application for the amendment in this case. First, it is clear that a mistake was made and was perpetuated in the name of the 2nd applicant in this application. The name, it would seem, was used as a result of an error and all that is sought by the applicants is to correct the name, without changing any matter of substance. It is only a formal amendment, for lack of a better term. According to the authorities, such an amendment, subject to what I say below, is normally granted without much ado.

[25] Second, I am of the view that regard had to the nature and effect of the amendment, there is no injustice that will be visited on the Liquidators as a result thereof and also, it has not been shown that the respondents will suffer prejudice and one that cannot be compensated with an appropriate order as to costs. I am accordingly of the considered opinion that the application for amendment should be granted and the applicants should pay costs occasioned by the amendment, if any.

⁴ 2011 (1) SA 35 SCA at para 14.

Points in limine

[26] In their answering affidavit, the Liquidators raised certain points of law *in limine*. Although these were not raised as such in the answering affidavit, it is prudent, on account of the issues they raise, to treat them as such for purposes of this judgment. The first issue raised is that the applicants have no *locus standi in judicio* to institute the current proceedings for the reason that no proper resolutions instituting these proceedings are placed before court.

[27] The issue of whether the matter is indeed urgent does not, when one has regard to the answering affidavit, merit attention at this stage. I say so for the reason that it appears that because on the date of the initial hearing, the parties were put to terms to file answering and replying affidavits, which were indeed filed. Any steam that the parties may have accumulated for arguing urgency, seems to have evaporated in the interregnum as a result of the order allowing a full set of papers to be filed. This would then have served to limit any prejudice the Liquidators in particular, would have been subjected to, thus rendering the issue of urgency largely academic, for purposes of this judgment and I so rule in that regard.

No confirmatory affidavit by 2nd respondent

[28] I must, before dealing with the issue of *locus standi* address an issue raised by the applicants' counsel in the heads of argument. It amounted to this – only the 1st respondent filed an affidavit in opposition to the applicants' application and for that reason, the other joint Liquidator, the 2nd respondent, not having filed even a confirmatory affidavit, the opposition is defective as both Liquidators have to act jointly in whatever enterprise they engage in.

[29] I will not devote much time to this argument. I say so for the reason that it is plain from reading the Liquidators' papers that the 2nd respondent, although he did not depose to the answering affidavit, did, however, file a confirmatory affidavit, making common cause with the positions and

averments made by his co-Liquidator on oath. This confirmatory affidavit is to be found at page 178 of the record of proceedings. I can only assume that the applicants' legal practitioners, due to the attendant pressure and the voluminous documents filed, did not properly scrutinise the documents filed of record. This is to be expected, as it is oft stated that to err, is human. I shall say no more of this argument therefor.

Locus standi in judicio

[30] As indicated earlier in the judgment, the main point *in limine* raised by the respondents' legal team is that the applicants have no *locus standi in judicio* to bring the proceedings because the appeal that they lodged against the judgment of Prinsloo J has since lapsed. In this regard, the Liquidators relied on an affidavit of Mr. Charles Visser, the legal representative of the 8th respondent. I turn to the contents of the said affidavit in a jiffy.

[31] In his affidavit, Mr. Visser, deposes that he is the legal practitioner of record for the 8th respondent under Case No. HC-MD-CIV-MOT-GEN-2017/00227. He proceeded to confirm the allegations by the 1st respondent. The latter deposed that the final liquidation order was granted on 29 November 2017 and accordingly, the record of proceedings had to be filed with the Supreme Court on 28 February 2018, but same was only filed on 2 March 2018, and thus outside the time periods stipulated in terms of Rule 8(2) (b) of the Supreme Court Rules. It was in this regard pointed out further that there was no agreement among the parties to an extension of time for the late filing of the said record.

[32] The applicants' argument, in reply, is a horse of a different colour. They depose that the record of proceedings was filed within the time limits imposed by the Supreme Court Rules. In this regard, it was pointed out that the time for lodging the record must be reckoned to run, not from the delivery of the final order, but rather, from the date of the handing down of the reasons for the order, which it is common cause was done by Prinsloo J on 5 December 2017.

[33] I am in agreement with the applicants in regard to this argument. I say so for the following reason. Rule 8(2)(c), of the Supreme Court, referred to above provides that:

'The record referred to in subrule (1) must be filed –

*

(b) in all other cases, within three months from the date of the judgment or order appealed against or, in cases where leave to appeal is required, within three months after an order granting the leave to appeal;'

[34] In the instant case, it is clear that the judgment (not the order) appealed against, was issued on 5 December 2017. Three months from that date, on an ordinary calculation, takes the date of lodgement of the record to 5 March 2017. In the circumstances, it appears to me that the record was lodged on time. This is not a case where an order was merely issued by the court but a fully-fledged judgment and in which case one could only know the basis of the appeal after receiving the reasons and it is from that date that the calculation of the time to file the record should be reckoned to run and I so hold. That time is in any event, the one with the most beneficial interpretation for the appellants in that case.

[35] In the circumstances, I find it unnecessary to refer to the alternative argument raised by the applicants, to the effect that if the record is filed out of time, then the applicants would be at large to file an application for condonation before the Supreme Court. I say so because that application would not have been made and what the outcome, if at all lodged would be, is a matter that would, at the present moment, be confined to conjecture or surmise, a realm that I will not venture into as we cannot and should not second-guess what the Supreme Court would do, faced with an application for condonation.

[36] The basis for the application would have to be placed before that court, which would make the determination, based on the reasons advanced. It is

accordingly inappropriate to have regard to any application for condonation that would have to be made and whose fate would solely lie with the sagacity of Supreme Court Justices in any event. That is a precarious expedition to embark upon and I decline the invitation.

[37] I accordingly come, to what I consider an inexorable conclusion that this point of law should fail. I hold that there is no basis for contending that the appeal has lapsed in the circumstances. It seems to me to be alive and well and we should allow the Supreme Court, at the appropriate time, to deal with the issues in contention before it. According to the provisions of Rule 9 (4) of the Supreme Court, it would appear that because the appeal is alive, the suspension of the order, pending appeal, would, ordinarily, be deemed to be in force and not thereby considered lifted.

Effect of an appeal in liquidation proceedings

[38] Another issue that arose and loomed large during argument related to the effect an appeal has on a final liquidation order. The primary question raised was whether it is appropriate for this court to have issued the order it did relating to SME Bank in the premises where an appeal was lodged by the applicants against the final liquidation order. It must, in this regard be accepted that the rule that applies, is that an appeal normally has the effect of staying the proceedings until the matter is finally adjudicated by the Supreme Court. Does this normal rule apply in cases where a final liquidation order has been issued by this court and the correctness of the final liquidation order has been submitted to the Supreme Court for determination?

[39] The Liquidators in this matter, adopted the position that the noting of an appeal does not have the effect of staying the proceedings in the context of a liquidation. This, it was argued, is based on the provisions of s. 150(3) of the Companies Act. That provision provides the following:

‘Where an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall

nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realised without the written consent of the insolvent concerned.'

[40] This question came for comment in *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd and Others*.⁵ In that matter, an application had been brought to stay or suspend the winding up of a company pending the determination of an appeal that had been lodged.

[41] In dealing with this question, the court stated the following in the *Choice Holdings* case:

'The reason for s 150 (3) will be found in the judgment of Innes CJ in *Foley v Hogg's Trustee* 1907 TS 791, in which it was held that an appeal noted by an insolvent against a final order of sequestration did not suspend the operation of the order or divest the Master or the provisional trustee of the estate. The *ratio* of the judgment was that, as a general rule, an appeal did not alter the nature of the judgment, "it only stays execution and sequestration is in itself a species of execution." The learned Chief Justice continued:

"It [a sequestration order] operates automatically to vest the estate in the Master, or in the provisional trustee when he is appointed; and the order when given is really in the position of a judgment executed by statute and involving certain statutory consequences. I do not think the operation of those consequences can be interrupted or suspended by noting an appeal."

[42] The learned Judge in the *Choice Holdings* case proceeded to state that the *ratio* quoted above was overtaken by the provisions of rule 49 (11) of the Uniform Rules of Court, which provides that operation and execution of the order shall be suspended and also by later judicial pronouncements in cases most notably the *locus classicus* judgment of *South Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.⁶

⁵ 2001 (2) SA 768 (W).

⁶ 1977 (3) SA 534 (A) at 544h-545A.

[43] At p. 771, the learned Judge stated that if the ordinary rule that the mere noting of an appeal serves to stay execution, bizarre results would eventuate in sequestration. It must be noted that the judgment in question dealt with sequestration orders and does not deal directly with liquidation orders. I therefore find it unnecessary, for present purposes, to decide the applicability or otherwise of s. 150 to the current matter.

[44] I say so for the reason that what may be determinative of the current matter, is the circumstances in which the order that is sought to be rescinded, was granted. If the applicant succeeds in showing that the order was erroneously sought or granted within the meaning of the rule in question, that will be the end of the matter, regardless of the issue of the effect of the noting of the appeal.

[45] The question of the applicability of s. 150 (3) may, in my considered view, appropriately fall for determination in the future and in relation to a liquidation proper. In that scenario, the issue may be properly dealt with. I accordingly express no opinion on this matter for current purposes. In that context, the effect of the payment of the statutory amount to depositors and whether it amounts to realisation of the estate can be confronted head-on.

Authority to bring proceedings

[46] Another issue raised by the Liquidators, related to the question of authority to bring the proceedings. The argument advanced in this regard, was mainly that the resolutions filed at the end of the day were not authenticated as required by the rules of this court. I will deal with this issue as the judgment unfolds.

[47] What I do need to do, however, is to deal generally with the issue of authority and how the courts have dealt with same. In the instant case, the deponent to the founding affidavit, Mr. Enock Kamushinda alleged that he had been authorised to bring the proceedings in question as evidenced by resolutions that he attached to his affidavit. The correctness of his deposition

was challenged by the Liquidators in their answering affidavit. In reply, the deponent admitted that the affidavit attached to the application was incorrect as it related to the earlier application in connection with the challenge of the liquidation proceedings.

[48] The applicants then undertook to file the correct resolutions after the replying affidavit had been filed, as same were not in hand at the time. This was eventually done by the applicants. In response, Mr. Heathcote argued that the court should have no regard to the resolutions filed for the reason that they were not properly authenticated in terms of the rules of this court. Should the Liquidators' point of law in this regard be upheld? I turn to answer that question below.

[49] In *Baeck and Co SA (Pty) Ltd v Van Zummerman and Another*,⁷ Goldstone J stated the following:

'In the present case Keller alleged that he had authority to represent applicant. If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in the replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach. Indeed, it is not disputed that the applicant could start again on the same basis, supplemented as needs be, to establish the authority of Keller.'

[50] I am of the considered view that a similar approach should be adopted in the instant case. There has not been any prejudice alleged, let alone shown by the Liquidators in the applicants seeking to establish their authority in reply and I so find.

[51] This is not, however, the end of the matter. Mr. Heathcote relied, for his argument, on the case of *La Rochelle (Pty) Ltd v Nathaniel and Others*.⁸ In that case, the court per Parker J threw out the application for non-compliance

⁷ 1982 (2) SA SA 112 (W)

⁸ 2010 (1) NR 260 at para 22.

with the provisions of the then rule 63, that dealt with the authentication of documents executed outside Namibia, which Mr. Heathcote relies on in the present case.

[52] The relevant provision, in the present rules is rule 128 (1) and (2), which provide the following:

‘(1) In this rule, unless the context otherwise indicates –

“document” means any deed, contract, power of attorney, an affidavit, a solemn declaration, an affidavit, a solemn declaration or attested declaration or other writing;

And

“authentication” means, in relation to a document, the verification of any signature thereon.

(2) A document executed in any country outside Namibia is, subject to subrule (3), considered to sufficiently authenticated for the purpose of use in Namibia if it is duly authenticated in that foreign country by –

(a) a government authority of that country charged with the authentication of documents under the law of that country; or

(b) a person authorised to authenticate documents in that foreign country, and a certificate of authorisation issued by a competent authority in that foreign country to that effect accompanies that document.

(3) Subrule (2) does not apply to an affidavit or a solemn or attested declaration purporting to have been made in Australia, Botswana, Canada, France, Germany, Lesotho, New Zealand, South Africa, Swaziland, the United Kingdom, Zambia, or Zimbabwe before a commissioner of oaths or by whatever name called appointed as such in terms of the law of that country.’

[53] There is no doubt that the affidavits in question, and to which the resolutions were attached, were executed in a country in terms of which the

rules recognise as not requiring authentication. The question for determination, as argued by Mr. Heathcote, is whether the court should throw out the resolutions for the reason that they were not authenticated in terms of the rules, although attached to an affidavit that does not, itself require authentication?

[54] Having regard to the provisions of the above subrule, there is no denying the fact that the affidavits were executed in a country that enjoys an exemption in terms of the rule in question, namely, in the Republic of South Africa. I am of the considered view that Mr. Heathcote's argument should not be upheld. I say so for the reason that the resolutions, are not filed on their own, but are attachments to an affidavit, a document sworn to under oath and which is exempted from authentication in terms of the rules of court. If the resolutions were being filed on their own, different considerations may well have applied.

[55] If I am incorrect in the view espoused immediately above, it is my further view that to adopt Mr. Heathcote's argument in the circumstances, particularly where there is an urgent matter involved, would result in the court being too formalistic, technical and fastidious in its approach. Other than the fact that the resolutions are not authenticated, there is nothing to indicate that the applicants are bringing the applications unauthorised and therefor on a frolic of their own. It might be too formalistic of the court to throw out proceedings, in urgent applications, especially in circumstances such as these, where the affidavits, to which the resolutions are attached, comply with the requirements of the rules.

[56] In *Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors*⁹, Tebbutt JA dealt with the case in which a resolution had not been timeously filed but only in reply. He proceeded to deal with the matter as follows:

'The learned Judge *a quo* appears with respect to have overlooked the current trend in matters of this sort, which is now well- recognised and firmly established, *viz* not to

⁹ (23/2006) [2006] SZSC 11 (21 June 2006).

allow technical objections to less than perfect procedural aspects to interfere with the expeditious and, if possible, inexpensive decisions of cases on their merits. . . In the latter case (i.e. *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) (SA) 81 (SE) the Court held that (at 95F-96A, par 40):

“The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrance of unnecessary delays and costs.”

[57] The court proceeded to bring the issue to roost in the local atmosphere by saying the following at para [42]:

‘The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some judges to uphold technical points *in limine* in order to avoid grappling with the real merits of a matter. It is an approach that this Court feels should be strongly discouraged.’

[58] One could be forgiven for one moment, for thinking that the excerpt in para [54] above, was drawn from rule 1 (3) of our rules of court. This rule provides the following:

‘The overriding objectives of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable . . .’ (Emphasis added).

[59] I am accordingly of the view that pursuing the issue in question, without in anyway being seen to trivialise the provisions of rule 128, was, in the peculiar circumstances, where the applicants sought to bring the matter as one of urgency, was highly formalistic and would have had the deleterious effect of running up costs and consuming valuable court time on issues that may have been interesting, captivating and probably attractive but not moving the case an inch towards resolving what are the real issues that have literally gripped the attention of this great Country, namely, the future of SME Bank of Namibia.

[60] It is in these limited conditions, understanding as I should, that the court was not made for the rules, but the rules for the court, not to serve as the mistress but the handmaid of justice, that I will allow the resolutions filed to obtain. This ruling, in this peculiar case, should not be cited as authority for a proposition that the provisions of rule 128 may be disregarded willy-nilly. That is not the purpose of this reasoning in this matter.

Rescission of judgment in terms of Rule 103

[61] The last question and possibly the most important question that needs to be answered at this juncture, is whether the applicants have made out a case for this court to exercise its powers contained in rule 103 to rescind or vary the order complained of and fully captured in the nascent stages of this judgment.

[62] Perhaps the appropriate starting point would be the provision in question itself. Rule 103 (1), provides the following:

'In addition to any the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

(a) erroneously sought or erroneously granted in the absence of any party affected thereby; . . .'

[63] The provisions of rule 103 (2) stipulate that a party who applies for relief under this rule must make application therefor on notice to all parties whose interests may be affected by the rescission or variation, as the case may be. In this regard, the provisions of rule 65, dealing with applications, are incorporated by reference, and are to apply. The question for determination is whether or not the applicants have complied with the provisions of this subrule and it is to that question that I presently turn. If I find that they did, then *cadit quaestio*, their application must be granted. If not, their application must be met with a refusal.

[64] The above rule has been the subject of judicial comment for quite some time in this jurisdiction and others. What I should perhaps point out is that there are two distinct circumstances in which this court may rescind or vary its order granted in the absence of a party affected thereby under the rule in issue.

[65] The first, is where the court does so of its own motion, namely, at its own instance or on its own initiative. This would be if the court, after issuing an order or judgment, realises that it granted same erroneously or that the order was sought erroneously in the absence of a party affected by that order or judgment. In this instance, it would seem to me, the court would, out of the abundance of caution, and in line with the celebrated principle of hearing the other side, call the parties affected – the one which initiated the application and those affected thereby, and express its discovery of the error, coupled with the wish to rescind or vary the order. The parties would ideally have to be afforded an opportunity to address the court on that matter.

[66] The converse situation, where the court unilaterally rescinds or varies the order, without any notice to the parties affected, particularly the one who moved the application, may be liable to challenge, in my view. For a party, who moved an application, which was granted, to be suddenly served with an order varying or rescinding same, without being afforded an opportunity to address the court in relation thereto, would, in my view, be the cradle of injustice, regardless how confident the court is of the impropriety of its order or judgment previously granted. The benefit of submissions by the affected parties is invaluable as they may present perspectives which the court, in its manifold wisdom, may have overlooked or taken for granted. I say this merely *obiter* as it does not arise in the present case.

[67] The second scenario, is where the court is moved by a party allegedly affected by an order or judgment granted in its absence to vary or rescind same. This is the issue for determination in the present matter. Counsel for the applicants referred the court, in his heads of argument to a plethora of

cases where the application of this part of the rule has been the subject of determination by the courts. I will not traverse all the judgments so helpfully referred to the court. Reference to a few key ones will do.

[68] In *Mutebwa v Mutebwa*,¹⁰ Jafta J (as he then was), dealt with the provisions of Rule 42 (1) of the South African Rules, which are *in pari materia* with our rule 103. In dealing with the application of the said Rule, the learned Judge reasoned as follows:¹¹

‘[15] The prerequisite factors for granting rescission under this Rule are the following: Firstly, the judgment must have been erroneously sought or granted; secondly, such judgment must have been granted in the absence of the applicant; and lastly, the applicant’s rights or interest must be affected by the judgment.

[16] Once those three requirements are established, the applicant would ordinarily be entitled to succeed, *cadit quaestio*. He is not required to show good cause in addition thereto. . .

[17] Although the language used in Rule 42 (1) indicates that the Court has a discretion to grant the relief, such discretion is narrowly circumscribed. The use of the word “may” in the opening paragraph of the Rule turns to indicate the circumstances under which the Court will consider a rescission or variation of the judgment, namely that it may act *mero motu* or upon application by an affected party. It seems to me that the Rulemaker could not have intended to confer upon the Court the power to refuse rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby, a rescission of the judgment should be granted.’

[69] Before I can return to deal with the implications of the requirements of the rule, as unpacked in this judgment, there is a further issue that the learned Judge addressed in the judgment, namely whether the exercise of the court’s discretion is confined solely to errors that only appear on the record of

¹⁰ 2001 (2) SA 193 (TkH).

¹¹ *Ibid* at para [15] – [17].

proceedings, as recorded in *Bakoven Ltd v G J Howes (Pty) Ltd*.¹² There, the court stated that erroneously granted means that the error committed by the court must be in the form of a mistake of law which appears on the record of proceedings itself.¹³

[70] Whilst agreeing with correctness of the general proposition, the learned Judge inclined to the view that the court cannot in all instances be confined to the record of proceedings as intimated in the *Bakoven* case. In this regard, Jafta J. expressed himself thus at p. 201:

'I agree that the error should appear on the record but only in cases where the Court acts *mero motu* or on the basis of an oral application made from the Bar for the rescission or variation of the order. For obvious reasons, in such cases the Court would have before it the record of proceedings only. The same interpretation cannot, in my respectful view, apply to cases where the Court is called upon to act on the basis of a written application by a party whose rights are affected by an order granted in its absence. In the latter instance, the Court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored and it is not irregular to adopt such a procedure in seeking rescission. In fact, it might be necessary to do so in cases where no error could be picked up *ex facie* the record itself. In my view, the failure to show that the error appears on the record of proceedings before Kruger J cannot constitute a bar to the applicant being successful under Rule 42(1) (a). It is not a requirement of the Rule that the error appear on the record before rescission can be granted. Therefore, I do not, with respect, agree with Erasmus J's conclusion that the Rule requires the applicant to prove the existence of an error appearing on the record and that the Court considering rescission is, like an appeal Court, confined to the record of proceedings. . .

[22] There is nothing in the language used in the Rule which indicates that the error must appear on the record of proceedings before the power conferred could be exercised. The contention that the Rule is confined to cases where the error appears on the record cannot, in my opinion, be correct. Such an interpretation places an unwarranted limitation on the scope of the Rule. Decided cases show that relief may be granted under this Rule if: (i) the Court which made the order lacked competence

¹² 1992 (2) SA 466 (E), per Erasmus J.

¹³ *Ibid* at p. 471E-F.

to do so; (ii) at the time the order was made the Court was unaware of facts which, if then known to it, would have precluded the granting of the order; or (iii) there was an irregularity in the proceedings.'

[71] I am in full and unqualified agreement with the views expressed by the learned Judge in the foregoing excerpt. In particular, I am of the considered view, for reasons he has advanced that a court, in exercising its powers and discretion in terms of the rule, is not necessarily bound to the record of proceedings before it. There is nothing in our relevant rule of court, that even remotely places the limitation sought to be imposed by Erasmus J, as articulated by Jafta J.

[72] I can also add in this regard, that our Supreme Court appears inclined to the approach advocated above and this is exemplified by the court's reasoning in *Labuschagne v Scania Finance and Others*,¹⁴ where the Supreme Court adopted the approach of the Supreme Court of Appeal of South Africa in *Lodhi 2 Properties Investments CC and Another v Bondev (Pty) Ltd*¹⁵ and reasoned that the approach of the court in *Bakoven*, was narrow.

[73] As will be evident, there are, in this case, facts averred on affidavit, from which it is submitted that the court erred in granting the order in the absence of the applicants. That, in my view is a perfectly permissible approach, fully justified by the nature and character of this case, therefor suggesting that limiting the exercise of the court's discretion to the record would result in an injustice that was not resident in the mind of the Rulemaker.

[74] The questions that I need to closely consider in deciding on the present matter, particularly the applicability of rule 103, are neatly summarised by Jafta J in his aforesaid judgment and they are the following:¹⁶ (a) whether the order in this case was erroneously granted; (b) whether the order was granted

¹⁴ (SA 45-2013) [2015] NASC (7 August 2015).

¹⁵ 2007 (6) SA 87 (SCA).

¹⁶ *Ibid* at p. 199 para [15].

in the absence of the applicants; and (c) whether the applicants rights or interests were affected by the order so made.

[75] In this regard, there is one question that hardly courts any controversy, if at all and I can deal with it summarily. This relates to the fact that there is no question or contention that the order in question was issued in the absence of the applicants. To this extent, I am of the firm view that the applicants stand on *terra firma*. The balance of the questions draw discordant responses and I deal with them in turn below.

Was order erroneously granted and were the applicants' rights or interests affected by the granting of the order in their absence?

[76] Whereas this enquiry stands independent of the other two mentioned in the judgment, I am of the considered view that in the context of this case, this requirement, together with that of the rights or interests of the applicant being detrimentally affected tend to coalesce. In this regard, it may be impossible to make a concrete finding regarding the erroneous nature of the order, standing alone but it is possible that once the court finds that the order was granted in the absence of the applicants and that the said order detrimentally affected the applicants' rights and interests, then it can, in those peculiar circumstances, be held that the order was therefore erroneously issued.

[77] I therefore find that in the peculiar setting of this case, it is necessary to first establish whether or not the applicants' rights and/or interests were detrimentally affected by the issuance of the order in their absence and it is to that enquiry that I presently turn. This will eventually place me in a comfortable position, depending on the conclusion returned, to state without equivocation, whether the said order was in the circumstances, erroneously granted.

[78] As intimated in the earlier portions of this judgment, what cannot be disputed, is that the applicants are shareholders, albeit a minority in the SME Bank. It was Mr. Rood's submission that by virtue of those legal interests they

hold in the SME Bank, the applicants had a right to be cited and served with the papers on the basis of which the *ex parte* order was granted. It was also argued that the failure to cite and serve them affected their rights and interests and as such, the order was erroneously granted therefor.

[79] The court's attention was drawn to the case of *De Leef Family Trust and Others v Commissioner for Inland Revenue*,¹⁷ where the learned Acting Chief Justice cited with approval the timeless words that fell from the lips of Innes CJ in *Randfontein Estates Ltd v The Master*,¹⁸ where the learned Chief Justice dealt with the concept of a share in the following terms:

'The nature of a share may be elaborated on by stating that it represents a complex of rights and duties of a shareholder, including the latter's right to participate in a distribution of the company's surplus assets on its liquidation. . . According to Palmer's Company Law 25th ed (1992) vol 1 para 6.002 the principal rights which a share may carry are:

- (1) the right to a dividend if, while the company is a going concern, a dividend is declared;
- (2) the right to vote at the meeting of members, and
- (3) the right in the winding up of the company, after the payment of debts to receive a proportionate part of the capital or otherwise to participate in the distribution of assets of the company'.

[80] In *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc. and Others*,¹⁹ Corbett JA stated the following regarding the share in a company:

'A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends. . . normally the person in whom the share vests is the registered shareholder in the books of the company and has issued to him a share certificate specifying the share, or shares, held by him.'

¹⁷ 1993 (3) SA 345 (AD).

¹⁸ 1909 TS 978 at 981-982.

¹⁹ 1983 (1) SA 276 AD at 289.

[81] Lastly, in *Harris v Fisher* **NO**²⁰ Ogilvie Thompson JA stated the following:

'By reason of its shareholding, the estate had, for practical purposes, both the control over, and a 15/24th interest in the assets of the Company.'

[82] What appears a common in the above excerpts is a word that seems to run through all the cases like a golden thread and it is the word 'interest' in the assets of the company. This, incidentally, is the same word employed by the Rulemaker in rule 103. The upshot of all this is that a shareholder in a company has a right to the dividend, if the company is a going concern. This interest does not, however, stop at the stage when the company is placed in liquidation. It is clear, from the foregoing that notwithstanding liquidation of the company, the shareholders still have an interest in and a right to participate in the distribution of the assets of the company, if there is any residue.

[83] It therefore follows from the foregoing that the applicants do have a right and interest in the affairs of SME Bank, even during the stage of liquidation, because they have a right to share in the distribution of the assets of the company if any are left for distribution. In this wise, it becomes clear as noonday that the applicants had every right to be cited and served in any matter that served before court connected to the winding up of the company, including the extended powers that were sought to be given to the Liquidators by the court.

[84] Implicit in this is the fact that the court also granted an order for the payment of the deposit to the depositors to maximum of N\$ 25 000. Regardless of whether or not this amounted to the realisation of the assets of the company in liquidation or not, I am of the considered view that the applicants had an interest and a right therein as the processes carried out may have a detrimental effect at the end of the day, regarding whether, and if

²⁰ 1960 (4) SA 855 AD at 861E-F.

at all, how much they will be entitled to receive of the residue of the company's assets.

[85] The fact that the majority shareholder, the Government of the Republic of Namibia did not make common cause with the applicants, does not, in any way, shape or form, detract from the position that they have an interest in the orders that the court eventually made and this was not in any way contingent on the major shareholder's attitude to the application. The reaction, or lack thereof, on the part of the majority shareholder, is irrelevant to the question whether the minority shareholders have a right and interest. This is a personal decision that each entity, even with a minimum of shareholding must, on advice make to secure their rights and interests in the company in liquidation at the end of the day.

[86] I am accordingly of the considered view that the applicants' shareholding in the SME Bank, regardless of the extent thereof, entitled them to have a right and interest in the order that the Liquidators sought and were granted in this matter. It is my further considered view that the applicant's rights and interests stood to be detrimentally affected by the order that was issued *ex parte* and as it was, without them having been cited or served with the papers. In this regard, the Liquidators did not even apply for the granting of a *rule nisi*, if there were any interests they sought to protect *pro ha vice*. Instead, they applied for and were granted an out and out order, notwithstanding the interests and rights the applicants' shareholding in the company in liquidation granted them at law.

[87] That being the case, I am of the considered view that the applicants had rights and interests which could be potentially affected by the granting of the order in question on an *ex parte* basis. It therefor appears to me that the second question, namely, whether the order granted affected the rights and interests of the applicants must, in the circumstances, be answered in the applicants' favour and this is as clear as noonday, regard had to the nature and effect of a person's shareholding in a company, including one in liquidation, as discussed above.

[88] It thus follows, as night follows day, that in that context, the court erred in granting the order that it did without any notice to the applicants, notwithstanding their clear and unquestionable rights and interests as adverted to above. I am also of the considered view that had full the implications of the order, particularly on the applicants' rights and interests been brought to the attention of the Honourable Deputy Judge President, when the application was moved, I labour under no illusion whatsoever, considering his impeccable sense of justice, that he would not have granted the order that he did.

[89] In this regard, I have to digress and must strongly emphasise and at the same time, exhort legal practitioners, as officers of the court, to fully and effectively perform their 'priestly' duties to the court. Though judges may be reputed to be repositories of manifold wisdom, that wisdom is certainly not infinite. It is for that reason that counsel should be acutely aware of their sacred and indispensable role aforesaid.

[90] Legal practitioners should guide the court accordingly in navigating the sometimes tempestuous seas of the dark and obscure legal issues that may arise, at times, with little or no time for elaborate research, thinking, reflection and decision-making. In this regard, legal practitioners should, especially in *ex parte* applications, point out possible pitfalls and precipices and not leave the judge to his or her own devices, as it were, and to deal with these complicated matters in complete solitude, devoid of necessary assistance.

[91] I revert to the finding made in para [865] above. In support of this finding, it is appropriate to refer to *HMI Healthcare Corporation (Pty) Limited v Medshield Scheme and Three Others*.²¹ In that case, the Supreme Court of Appeal of South Africa referred to the sentiments expressed by Streicher JA in *Lodhi 2 Properties CC v Bondev Developments (Pty) Ltd*.²² In that judgment, the court made the following lapidary remarks:

²¹ (2013/2016) [2017] ZASCA 160 (24 November 2017) at para [13].

²² 2007 (6) SA 87 para 24.

'Where notice of proceedings to a party is required and judgment is granted against such a party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously.'

[92] In dealing with this issue at the self-same paragraph [13], the court in *Medshield* further said the following:

'It thus seems clear that *Medshield* was indeed an affected party and that the *ex parte* order was granted in its absence, despite it having a direct and substantial interest in the relief sought.'

[93] Those words, in my considered view, aptly sum up the applicants' position in this case and all things being equal, I should not be seen to be adding anymore. I accordingly agree with the sentiments and conclusions of the learned Judges of Appeal in both *HMI Healthcare* and in *Lodhi 2*. They fully resonate with my own views as expressed earlier in this very judgment.

[94] Mr. Heathcote's argument that the *Medshield* judgment was wrongly decided and should be disregarded, does not sit well with me, neither am I persuaded that he is correct on this score. I accordingly proceed to embrace the reasoning of the court in that case as accurately reflective of the correct position of the law even in this jurisdiction on this matter under the judicial scalpel.

[95] Mr. Heathcote, in his defiant argument, refusing to capitulate, as it is his right to, referred the court to the works of the learned authors Herbstein & Van Winsen, where the learned authors say the following on *ex parte* applications:²³

'An *ex parte* application is an application brought without notice to anyone either because no relief of a *final* nature is sought against any person, or because notice might defeat the object of the application or the matter is one of extreme urgency. It

²³ The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed, Vol. 1, at p. 121.

has also been described as an application of which notice has as a *fact* not been given to the person against whom the some relief is claimed in his absence. Where the relief is claimed against another party in an *ex parte* application, the application must be 'addressed' to that party but need not be served on that party.'

[96] In their second edition, the same authors say the following regarding the issue of an *ex parte* application:²⁴

'An *ex parte* application is used:

- (a) when the applicant is the only person who is interested in the relief which is being claimed;
- (b) where the relief sought is a preliminary step in the proceedings, e.g. an application to sue by edictal citation or to attach property *ad fundandam jurisdictionem*;
- (c) where, though other persons may be affected by the Court's order, immediate relief, even though it may be temporary in nature, is essential because of the danger in delay or because notice may precipitate the very harm the applicant is trying to forestall, e.g. an application for an interdict or an arrest *suspectus defuga* under the common law. . . Where rights of other persons are involved, notice should wherever possible be given to all such persons.'

[97] It would appear to me that the application in this case, does not fall under the latter category, namely, that notice would defeat the object of the application. Neither does it appear, objectively viewed, to be one where it was alleged or shown that the matter was of extreme urgency. The latter is borne out by the fact that there appears to have been quite a lot of time between the launching of the application and it's hearing, namely, just about a week.

[98] Regarding the only other option, I am of the view that the issue of notice was necessary. I say so for the reason that the relief sought cannot be said not to have been final in nature. I say so because no interim relief was

²⁴ The Civil Practice of the Superior Courts of South Africa, 2nd ed, at p. 58.

sought nor granted, with a return date attached, calling upon the applicants to show cause why the order should not be made final. Furthermore, from the discussion engaged in in this judgment, I found that the applicants stood to be detrimentally affected by the order as it entailed in part, authorising the payment of money to depositors, but which money would, all things being equal, ordinarily have been considered to be that to be made be available for distribution in terms of the General Notice issued by the 8th respondent's Governor, as discussed elsewhere in this judgment.

[99] In this regard, as discussed elsewhere, the applicants were likely to be detrimentally affected by the order, considering also that the applicants had noted an appeal against the final liquidation order. If the applicants succeed in the appeal, for argument's sake, it may be impossible to recover the money paid to the depositors and this leads me to the inescapable conclusion that the applicants needed not only to be cited in the papers, but also to be served with same so that they would be able to make submissions to the court before issuing the order in question. Merely addressing the process to the applicants would have afforded them very little comfort as the consequences, in the larger scheme of things, were certainly grave, as discussed immediately above.

[100] There is an argument that was raised by the applicants' counsel in terms of which they made reference to what appears to be some interaction between Mr. Namandje, the applicants' instructing legal practitioner and the Liquidators. It would appear that the latter visited the former and intimated that they wished to approach the court for the granting of the orders that they eventually obtained *ex parte*. They wished to know, in this connection, if the applicants would oppose such an order. There is a controversy regarding Mr. Namandje's response thereto.

[101] It was argued on the applicants' behalf that the very fact that the Liquidators considered it prudent, if not necessary, to seek the views of the applicants to the proposed application, was in and of itself an *inducium* that the interests and rights of the applicants were at stake such that the

Liquidators found it fit to enquire if the applicants would support that order. It was argued that for that reason, the court should find for the applicants.

[102] I am of the view that it is neither necessary nor desirable to enmesh and to take part in this melee. In this regard, the parties entered into a skirmish regarding whether the contact between the Liquidators, of the one part, and Mr. Namandje, of the other, constituted off-the-record discussions and therefor fell within the bounds of 'without prejudice' communications. I find it unnecessary to decide that issue for the reasons that follow below.

[103] Mr Heathcote argued, in the alternative to saying the said discussions were off- the record, and I think correctly so, that the views of the Liquidators as to whether or not the applicants would oppose the granting of the order, is irrelevant. I agree. The question whether the applicants had an interest and rights in the order granted and which could possibly be adversely affected by the granting of the order, is not a matter that depended on the views, feelings and predilections of the Liquidators. It is indeed a legal question and which this court should answer, regardless of how the Liquidators or any other party, for that matter, feels about it. That exercise I have already done, and to this extent, that argument takes the matter no further in my considered view.

[104] There is another issue that was raised by Mr. Heathcote regarding the payment of the limit of N\$ 25 000 to depositors. It was his contention that the court, in granting that part of the order, did not, for lack of a better word, use its discretion. The court merely gave confirmation to a General Notice issued by the Governor of the 8th respondent and that the order was not final nor binding, as the instrument with binding force, was the said General Notice.

[105] It was also argued that the court did not, in the course of dealing with the matter, determine disputes nor did it give a determinative ruling on the rights of the depositors. For that reason, so the argument ran, the court merely gave effect to the legal notice that had already been issued by the Bank of Namibia. I will have regard to the said legal notice in due course, in

order to determine whether or not there is any force to Mr. Heathcote's argument in that regard.

[106] In order to reach a conclusion on that matter, it is proper that regard should be had to the contents of the said Government Gazette. It is General Notice No. 158 and is dated 15 June 2017. It was issued under the hand of Mr. I. W. Shiimi, the Governor of the 8th respondent. In essence it deals with the priority to be given to claims in the event of the winding up of a banking institution or a controlling company thereof. It was issued in terms of the provisions of the Banking Institutions Act.²⁵

[107] At para 6, the Notice entitled 'Payment of Claims, the following appears:

'6.1 The priority of Claims Determination grants preference to the depositors and creditors highlighted under paragraphs 6.2(a), (b) and (c) over other general creditors to be paid before the remaining creditors can be paid.

6,2 In the event of winding up of a banking institution or controlling company, the following order of priority shall apply:

- (a) The cost and administrative expenses of the liquidators and Master of the High Court incurred in the process of liquidating the banking institution, or controlling company;
- (b) Remuneration of employees in accordance with the Labour Act;
- (c) Deposit liabilities up to an amount of N\$25 000 per depositor;
- (d) Secured creditors; and
- (e) Other creditors, including any claim exceeding the limits referred to in (c).'

[108] Mr. Heathcote's argument, as I understood him, was that it was this General Notice that authorised the Liquidators to pay the amount of N\$25 000 per depositor as recorded in 6.2 (c) above. It was in this regard argued that all that was asked from the court was to merely give authority to the Liquidators to carry out what was already sanctioned by the said General Notice.

²⁵ Act No. 2 of 1998.

[109] Mr. Rood's argument, was a different kettle of fish. He argued that the order sought and granted by the court must be read closely and the meaning of the words employed in the court order, given their ordinary meaning. In his view, the court was not being moved to authorise what had been gazetted by the Governor of the 8th respondent, but the court was moved to make an order of its own and in exercise of its ordinary judicial and discretionary powers.

[110] I agree with the submissions advanced by Mr. Rood. In the first place, when regard is had to the language employed in the General Notice, it merely sets out the order of priority of the claims when payment of claims is carried out in respect of any banking institution or controlling company in liquidation. In this regard, I need to not do more than quote *ipsissima verba* the contents of para 5 thereof, titled, 'Purpose'. It reads as follows:

'Purpose – This Determination sets out the order of priority that must be followed when payment of claim is made in the event of a winding up of a banking institution or controlling company.' (Emphasis added).

[111] What is abundantly clear is that the said Notice did not order the payment of any money to any person, including the depositors. All that it did, in my view, was to set out the priority in terms of payments once a banking institution or controlling company was being wound up and the stage where payments were ripe to be made had been reached.

[112] More significantly, the order the Liquidators sought, was to authorise and direct them to pay the amount provided in the said Notice. In this regard, it is clear that the Liquidators came to court to seek authority to pay out the said amounts to depositors as recorded in the Notice. The Notice does not say at what point this must be done but the Liquidators, in their wisdom, found it fit to approach the court to seek authority to do this whilst the winding up of the SME Bank was still in motion, an act that the applicants claim is detrimental to their interests as it eats into the very assets that may later be available for distribution at the appropriate stage.

[113] It is accordingly clear to me that the Liquidators did not merely approach the court to make a declarator, as it were but they sought authority from the court to pay the depositors at this stage when it appears from all indications that the stage of distribution of the residue of the estate has not been reached in the ordinary course of the liquidation process. There is no doubt in my mind that regard had to the interests and rights the applicants as shareholders have, they were entitled to be cited and served with the application as the order could detrimentally affect their interests and rights as mentioned earlier in this judgment.

[114] I accordingly find that the fact that the Liquidators wanted to give effect to the distribution authorised by the Notice does not detract from the need for them to have notified the applicants of the orders they intended to seek from the court. It is a matter of comment that in the instant case, it would seem that the priority in settlement of claims provided in the said Notice was not followed as the depositors rank third in the list. For this reason alone, the applicants did have a right to be served and to have their say in the proposed distribution of the deposits, particularly before the other higher-ranking claims had not been settled.

[115] If there were contingency plans properly put in place regarding these proposed payments by the Liquidators, then the applicants had a right to know these and service of the application would have served this purpose and would have afforded them the necessary opportunity to consider the impact of the proposed order in the fuller scheme of things. That this was not done ineluctably leads me to the conclusion that the order was issued erroneously.

[116] What can also be discerned from the Notice, is that the distribution will normally be done at the end of the winding up process. I say this for the reason that the claim granted first priority in terms of the Notice is the costs and administrative expenses of the liquidator and Master of the High Court. In the ordinary order of things, it should be possible to state the amount of the costs and administrative expenses once the process has been concluded. I

will say no more of this issue, save to reiterate my finding that on the facts and the evidence, it is clear that the applicants had rights and interests which stood to be affected by the granting of the order in their absence and particularly without notice to them.

[117] The Liquidators, in their affidavit, in denying that the applicants have any interest in the orders sought and granted, stated that²⁶:

‘the applicants accordingly do not even have a financial interest in the ruling that was granted on 2 February 2018, let alone a direct and substantial interest. They are only shareholders with limited rights and interest and given the fraudulent conduct of those who represented the applicants they will probably not even qualify for a dividend, even in circumstances where all the creditors are paid before the SME Bank is finally deregistered and even in circumstances where they are fully paid up shareholders.’

[118] I have found, with regard to the authorities cited earlier that the applicants do have rights and interest in the order issued by the court which were sufficient to have them cited and served with the application. The allegation that they may not qualify for a dividend because of the fraud perpetrated by their representatives is speculative and has to wait for proper investigations to be carried out and the balance of the appropriate processes to run to their logical conclusions before the question whether the applicants will be entitled to any dividend has to be answered.

[119] The importance of the rule of law requiring that an interested party be heard, was dealt with by Ngcobo J in *Masethla v The President of the Republic of South Africa and Another*,²⁷ where the learned Judge, who also sat on our Supreme Court said:

‘The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the *audi* principle). This *maxim* provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or

²⁶ Para 3.2.3.4 of the answering affidavit, p. 148 of the record of proceedings.

²⁷ 2008 (1) SA 566 (CC) at para 187.

ought to underlie any just and credible legal order. The *maxim* expresses a principle of natural justice.’

[120] If any further confirmation of the importance of this principle is required, a judgment by Browde JA in *Swaziland Federation of Trade Unions v The President of the Industrial Court and Another*,²⁸ is apposite. There, the learned Judge of Appeal said the following of the right to be heard:

‘The *audi alteram partem* i.e. that the other side must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English judge to be a principle of divine justice and traced to the events in the Garden of Eden , and has been applied in cases from 1723 to the present time. . .’

[121] The comments in both judgments, namely *Masethla* and the *SFTU* case, must be read and placed in proper context. They have been quoted in so far as they reaffirm the need to give parties affected a hearing. They are not, however, cited in order to cast any aspersion on the learned Judge who granted the order, but to merely underscore the importance of granting a party who has interest in the order sought or who may be affected thereby, a hearing. The duty to cite and serve the applicants with the application, clearly rested on the Liquidators. Evidently, they did not.

[122] In this regard, the basic notion that must be understood in the instant case, is that the possible interest of the applicants was not drawn to the learned Judge’s attention, yet in the *SFTU* case, the applicants sought to intervene, but the judge decided, in his wisdom, and on grounds advanced by him, that it was not proper in the circumstances, to afford the Union a hearing, and which decision drew the invective of the appellate Court. In the instant case, the issue is nothing more than an error in that the attention of the presiding Judge was not drawn to the applicants’ possible rights and interest,

²⁸ (11/97) [1998] SZSC 9 (01 January 1998).

and within the meaning given in case law as previously mentioned, of rule 103.

Observation

[123] There is an issue that was raised by Mr. Rood for the applicants that I need not deal with but which the Master of the High Court may have to consider and determine, namely whether the Liquidators, provisional as they are, (from the information presently before me), have not, by seeking to exercise the powers that had been granted them in the order sought to be impugned, have not thereby exceeded their powers and are purporting to exercise powers by law only reposed in final liquidators, who must be appointed pursuant to a meeting where the creditors and shareholders would take part, in line with the provisions of s. 370 (1) (a) of the Companies Act.

[124] In this regard, Mr. Rood referred the court to the cases of *Ex Parte Van Der Berg*²⁹ and *Moodliar N.O. And Others v Hendricks N.O. And Others*.³⁰ Without necessarily discussing and determining the full import of these cases in detail, they tend to suggest that there is a distinction between the powers, duties and functions of provisional liquidator and a final liquidator. In that regard, it may appear that some of the steps that the Liquidators have sought to undertake, fall beyond their scope as provisional liquidators and may only be reserved for the final liquidators.

[125] In the *Moodliar* case, Davis J, accepted the proposition at para [35] of the judgment to the effect that the primary duties of a provisional liquidator are to look after the property of the company in liquidation and to preserve the *status quo*, pending the appointment of the final liquidator(s).

²⁹ 2003 (6) SA 727 (WLD at 735 B-D).

³⁰ 2011 (2) SA 199 (WCC) at para 35.

[126] The desirability of engaging the next statutory gear, (if my understanding is correct, that of appointing the final liquidators has not yet been reached), and hopefully the final one, by appointing final liquidators to carry out the orders sought, which includes litigating in the countries mentioned in the order, may well be necessary. This is so even if at the end of the day, it is the same Liquidators who carry the majority of the vote in that regard and are duly appointed as final liquidators. The applicants' present mandate as provisional liquidators may need to be augmented and perfected, as it were, if deemed appropriate.

[127] As indicated, I make no firm finding on this matter as it was not raised in the papers nor was it fully argued during the hearing. It is, nonetheless, an important matter that may not pass without mention. If, however, Mr. Rood is correct on that score, it may well be that this is a further respect in which the court may have erred in granting the order it did, as some of the powers the Liquidators sought, on the authorities, appear to be the exclusive preserve of final liquidators in terms of the relevant law. As indicated, above, I make no finding on this issue. I will, however, make an appropriate order regarding this matter at the end of this judgment.

Disposal

[128] In the circumstances, I have come to what I consider as the inexorable conclusion that having regard to all the circumstances of this case, the order granted by the court was so granted in error within the meaning of the provisions of rule 103. This is because although the applicants had rights and interests which were likely, on all accounts, to be detrimentally affected by the order sought and eventually granted, they were not, however, afforded an opportunity to enter the field of play as it were, and to canvass their case.

[129] It therefore follows that the order sought by the Liquidators was granted to them in error, as contemplated by the provisions of rule 103. It must, therefore, be set aside, in its entirety, as I hereby do.

Order

[130] In the premises, I issue the following order:

1. The order granted by this Court on 2 February 2018, pursuant to the *ex parte* application by the Liquidators, is hereby rescinded and set aside.
2. The costs occasioned thereby are ordered to be costs in the liquidation and shall be consequent upon the instruction of one instructing and two instructed Counsel.
3. There is no order as to costs regarding the hearing on 28 February 2018.
4. The applicants are ordered to pay the costs, if any, occasioned by the amendment of the citation and description of the Second Applicant as prayed for in the Applicants' replying affidavit.
5. The Registrar of this Court is ordered to cause a copy of this judgment to be served on the Master of the High Court, who is specifically ordered to consider and if so advised, to act upon the issue raised in raised paragraphs [123] to [127] of this judgment, including the compliance with the provisions of Section 370(1) (a) of the Companies Act No. 28 of 2007, if that has not been complied with thus far.
6. This interlocutory application is removed from the roll and is regarded as finalised.

TS Masuku
Judge

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