REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2020/00217

In the matter between:

NAMIBIA STAR CC	**1ST APPLICANT**
PANORAMA BUTCHERY CC	**2ND APPLICANT**
PANORAMA FOOD CENTRE CC	**3RD APPLICANT**
NATHAN PIETER MBUTU	**4TH APPLICANT**
MADELINE MBUTU	**5TH APPLICANT**

and

BANK WINDHOEK LIMITED	**1ST RESPONDENT**
MASTER OF THE HIGH COURT	**2ND RESPONDENT**
BRUNI & MCLAREN N.O	**3RD RESPONDENT**

Neutral citation: *Namibia Star CC v Bank Windhoek* (HC-MD-CIV-MOT-GEN-2020/00217) [2021] NAHCMD 331 (16 July 2021).

Coram: MILLER AJ

Heard: **4 February 2021**

Delivered: **16 July 2021**

ORDER

1. The court condones the Applicants late filing of his heads of argument.
2. The court orders granted against the applicants herein under case number HC-MD-CIV-MOT-GEN-2019/00193, HC-MD-CIV-MOT-GEN-2019/00194 and HC-MD-CIV-MOT-GEN-2019/00196 on 13 February 2020 are rescinded in terms of Rule 103 (1) (a).
3. Each party to bear its own costs for the rescission application.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MILLER AJ:

[1] This is an application for rescission of an order granted by this court on 13 February 2020 against the applicants under case numbers HC-MD-CIV-MOT-GEN-2019/00193, HC-MD-CIV-MOT-GEN-2019/00194 and HC-MD-CIV-MOT-GEN-2019/00196, on the ground that such orders were granted erroneously and in the absence of the applicants herein. The first respondent herein opposes the application. The parties will be referred to as they are in this rescission application.

[2] On 5 November 2020 the court ordered the parties to file their heads of arguments on 13 January 2021 and 20 January 2021, respectively. The Applicants filed their heads of argument 12 days late and brought a condonation application that was unopposed.

[3] The application before me is one wherein the applicants seek, as appearing in the notice of motion, the following:

1. An order rescinding and setting aside the court orders granted by this Honourable Court on 13 February 2020 under case numbers HC-MD-CIV-MOT-GEN-2019/00193, HC-MD-CIV-MOT-GEN-2019/00194 and HC-MD-CIV-MOT-GEN-2019/00196; as contemplated under Rule 103 (1) (a) of the Rules of the High Court.

2. An order granting the applicants 10 (ten) days from the date of this order to file answering affidavits opposing the liquidation applications.

3. Further and/or alternative relief.

4. Costs of suit against any of the respondents who oppose the application.

[4] Before dealing with the merits of the matter, it is necessary to deal with a point *in limine* raised by counsel for the first respondent. Counsel for the first respondent raised in argument that Mr Mbutu (the 4th applicant) failed to attach a resolution by the first, second and third applicants authorising him to institute and prosecute this application and therefor does not have *locus standi* to instate the proceedings on their behalf.

[5] The founding affidavit was deposed to by Mr Nathan Pieter Mbutu on 10 July 2020. Mr Mbutu is cited as the fourth applicant and he deposed to the founding affidavit in his capacity as a member of the first, second and third applicant. By 10 July 2020, the first, second and third applicants had already been provisionally liquidated and the *rule nisi* had been confirmed. Apart from the fact that Mr Mbutu contends that the first to third applicants are currently under the control of the third respondent, Mr Mbutu alleges that despite all this he is able to bring this application in his capacity as a member of the first to third applicants. He further states that he can bring this application by virtue of the proprietary interests he holds in the first to third applicants.

[6] Mr Anton De Wit who deposed to the answering affidavit filed by the first respondent challenges under a point *in limine*, the *locus standi* of Mr Mbutu to institute these proceedings. Mr Anton De Wit is the head of legal collections at the first respondent. He states that he denies that the first applicant has authority to act on behalf of the first to third applicant as liquidators were already appointed for the first to third applicants and the first meeting has already taken place. Mr De Wit further states that the fourth applicant therefore does not have *locus standi* to launch this application on behalf of the first to third applicants and that solely on that point

the application should be struck from the roll. Counsel for the first respondent further argues in this regard that Mr Mbutu failed to attach resolutions by the first, second and third applicants authorising him to institute and prosecute this application.

[7] The court draws the parties attention to section 359 (1) of the Companies Act[1], which provides as follows:

> 'The Court may at any time after the commencement of a winding-up, <u>on the application of any liquidator, creditor or member</u>, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on terms and conditions which the Court considers appropriate.'

[8] In the matter of *Ondongo Traditional Authority v Elifas and Another* [2] this court cited with approval the remarks of *Watermeyer AJ in Mall (Pty) Ltd vs Merino Ko-operasie Bpk* [3] The learned judge in that case reasoned that:

> 'In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature on the Notice of Motion by an attorney in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized will be provided by an affidavit made by an official of the company a copy of the resolution, <u>but I do not consider that that form of proof is necessary in every case.'</u>

[9] The court is therefore satisfied with the affidavit provided and the documents filed of record on the separate three cases (namely case number HC-MD-CIV-MOT-GEN-2019/00193, HC-MD-CIV-MOT-GEN-2019/00194 and HC-MD-CIV-MOT-GEN-2019/00196) that Mr Mbutu was indeed a member in the Close Corporations and that he holds an interest in the said Close Corporations.

[10] The court in this regard finds that Mr Mbutu by virtue that he was a member and shareholder of the first, second and third applicant (before the liquidation of the first, second and third Applicants) and holds proprietary interest in the first to third

[1] Companies Act (No. 28 of 2004).
[2] *Ondongo Traditional Authority v Elifas and Another* 2017 (3) NR 709.
[3] *Watermeyer AJ in Mall (Pty) Ltd vs Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) of 351 (H).

applicants, has the *locus standi* to bring this application on their behalf. I accordingly, dismiss the point *in limine* raised by the respondents.

[11] The court is however in agreement with the respondents that Mr Mbutu is not authorised to bring this application on behalf of the fifth applicant on the basis that she is his wife (married in community of property) and because she is also a shareholder and member in the first, second and third applicants. The fifth applicant is still expected to file a confirmatory affidavit to the founding affidavit filed by the fourth applicant.

[12] The other factor that the court also needs to address is the issue surrounding the fact that orders were issued for the extension of the *rule nisi*, however the applicant was not represented at that time. The orders were never personally served on the applicants. The court specifically refers to the last court order dated 13 February 2020 whereby the *rule nisi* was confirmed. The applicants were unrepresented during this period whereby Mr Tjombe only filed a notice to represent after the order dated 13 February 2020 was issued on 18 February 2020. The court was not presented with any proof by the respondents that the orders were physically served to the applicants to give them notice of the final return date. It is my view that had the court known at the time that the applicants were not aware of the order dated 30 January 2020, which postponed the matter to 13 February 2020 for the confirmation of the *rule nisi* the court would not have issued the order dated 13 February 2020.

[13] It is vital for the court to point out that the court order dated 13 February 2020 was issued erroneously as the matter was removed from the roll purportedly by agreement between the parties. The *rule nisi* was not extended and I agree with counsel for the applicants that the rule lapsed on that day. Counsel for the respondent should have served the notice of the status hearing dated 27 November 2019 on the applicants. Counsel for the respondents refers the court to transcription proceedings and the submissions made by Mr Erasmus that the applicants attorneys were aware that the matter was enrolled for the day, however the e-justice system indicates that the applicants were unrepresented at that time and that counsel for the applicants only came on record on 18 February 2020.

[14] It is common cause that the application brought by the applicant, is in terms of rule 103. That rule provides the following:

> 'In addition to any 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; . . .'

[15] Jafta J dealt with similar provisions as the one under consideration in *Mutebwa v Mutebwa.*[4] The learned Judge reasoned as follows:

> '[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 interests 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.'

[16] The court agrees that the applicant's rights have been affected by the order dated 13 February 2020 and the court is convinced that the order was granted in the absence of the applicants. The court is further convinced that the order was granted erroneously, and I am therefore satisfied that rule 103 (1) (a) finds application in the matter.

[17] The court is satisfied with the reasons submitted for the late filing of the heads of argument which was in any event unopposed. The court therefore condones the late filing of the heads of argument by the applicants.

[18] As far as costs are concerned, I see no reason to saddle the respondents with a costs order.

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[4] *Mutebwa v Mutebwa* 2001 (2) SA 193 (TKH) para 15-17.

[19] I make the following order:

1. The court condones the Applicants late filing of his heads of argument.
2. The court orders granted against the applicants herein under case number HC-MD-CIV-MOT-GEN-2019/00193, HC-MD-CIV-MOT-GEN-2019/00194 and HC-MD-CIV-MOT-GEN-2019/00196 on 13 February 2020 are rescinded in terms of Rule 103 (1) (a).
3. Each party to bear its own costs for the rescission application.
4. The matter is removed from the roll and is regarded as finalised.

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K MILLER

Acting Judge

APPEARANCES:

Applicant:	ADV. DIEDERICKS
Instructed by:	FB LAW CHAMBERS
Respondent:	ADV. GARBERS-KIRSTEN
Instructed by:	DR WEDER, KAUTA & HOVEKA INC