REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2021/00301

In the matter between:

HAROLD ARTHUR VON LUTTICHAU	**APPLICANT**

and

ALWYN VAN STRATEN N.O.	**1ST RESPONDENT**
WILLIAM DE VILLIERS SCHICKERLING N.O.	**2ND RESPONDENT**
THE TRUSTEES FOR THE TIME BEING OF THE NAMIBIA PROCUREMENT FUND	**3RD RESPONDENT**
ANDRIES STEPHANUS VAN VUUREN	**4TH RESPONDENT**
MASTER OF THE HIGH COURT	**5TH RESPONDENT**

In re Ex Parte application of:
ALWYN VAN STRATEN N.O.
(For establishment of a Commission of Enquiry)

In re:
NAMIBIA ELECTRONIC PAYMENT TERMINALS (PTY) LTD, ALLIED INVESTMENTS CC AND PARCEL FORCE (PTY) LTD (all in liquidation)

Neutral citation: *von Luttichau v Van Straten N.O.* (HC-MD-CIV-MOT-GEN-2021/00301) [2022] NAHCMD 365 (26 July 2022)

Coram: PRINSLOO J
Heard: **3 February 2022**
Delivered: **26 July 2022**

Flynote: Civil Procedure – rescission of order – application for Commission of Enquiry – ex parte application – Rule 103 – alternatively rule 16 – order erroneously sought and granted in his absence – Act does not give the liquidator or any creditor the right to apply for an enquiry – the court or the Master may order an enquiry at its or her own discretion – application to rescind dismissed.

Summary: This is an application to rescind and set aside the order of this court dated 22 January 2021, which was granted on an ex parte basis by Parker AJ. The first and second respondents opposed the application. The applicant wants the order to be set aside as he is of the view that the application brought by the first respondent on an ex parte basis was without full disclosure of all the relevant facts or in some instances a misstatement of the true facts. The applicant avers that his application is brought in terms of rule 103(1) of the Rules of Court and although the applicant does not specify on which sub-rule he is relying, it is clear from the papers that he relies on rule 103(1)(a) as he avers that the order was erroneously sought and granted in his absence. The applicant maintains that the order should not have been granted without him being granted the opportunity to be heard.

The first and second respondents opposed the application on a number of grounds and raised two points in limine in addition thereto, namely that the applicant had no *locus standi* to bring the current application and that the applicant unduly delayed in launching the application to set aside the court order of 22 January 2021. The question to be

considered is whether it can be said that the judgment has been sought or granted 'erroneously'.

Held that: having considered the court order dated 22 January 2021, I am of the view that there will be no opposition if I say that on the face of the record there appears to be no error. It would therefore be necessary to consider the allegations of misinformation made by the applicant in his founding affidavit that might have caused the court to grant the order. It is further necessary to have regard to the affidavit filed by the liquidator in support of his application for the establishment of a commission of enquiry.

Held that: there is no merit in the argument that if the factual averments made in the founding affidavit was before the court at time of deciding the matter that it would not have granted the relief sought by the liquidator. I am satisfied, as Parker AJ must have been, that there was a prima facie case for establishing a commission of enquiry and those matters referred to by the applicant would, in my view, not have been relevant. The issue of oppressiveness of the proceedings. I can further not find any abuse of court process or abuse of the rights of the liquidators.

Held further that: I am not satisfied that the applicant discharged the onus to show that the impugned court order had been erroneously granted.

The application dated 28 July 2021 is dismissed with costs.

ORDER

---

1. The application dated 28 July 2021 is dismissed with costs.
2. Such costs to include the costs of one instructing and one instructed counsel where so employed.

JUDGMENT

PRINSLOO J:

Introduction

[1] The application before me is an application to rescind and set aside the order of this court dated 22 January 2021, which was granted on an ex parte basis by Parker AJ[1].

[2] The initial application was brought by the first respondent, Alwyn van Straten, in his nominal capacity as liquidator for the establishment of a commission of enquiry in respect of Namibia Electronic Payment Terminals (Pty) Ltd, Allied Investment CC and Parcel Force (Pty) Ltd (all in liquidation).

The parties

[3] The applicant is an adult male and the director of Namibia Electronic Payment Terminals (Pty) Ltd ('NEPT') and Parcel Force Couriers (Pty) Ltd ('Parcel Force') (in liquidation). In addition thereto, he is the sole member of Allied Investments CC ('Allied') (in liquidation).

[4] The first respondent is Alwyn Petrus van Straten N.O., cited in his official capacity as liquidator of the companies NEPT and Parcel Force (in liquidation).

[5] The second respondent is William De Villiers Schickerling N.O., cited in his official capacity as liquidator of Allied Investments (in liquidation).

---

[1] Under case nr HC-MD-CIV-MOT-EXP-2020/00486.

[6] The third respondent is the Trustees for the Time Being of the Namibia Procurement Fund (the 'Trust'), the only creditor who submitted a claim against all three entities in liquidation.

[7] The fourth respondent is Andries Stephanus Van Vuuren N.O., an adult male practicing as an advocate and appointed as the Commissioner of Enquiry established in terms of the court order dated 22 January 2021.

[8] The fifth respondent is the Master of the High Court of Namibia appointed in terms of s 2 of the Administration of Estates Act, 66 of 1965.

The relief sought

[9] As indicated earlier, the applicant seeks an order rescinding this court's order dated 22 January 2021 and for the court to:

'2. Direct(ing) that:

2.1. Rule 103(1) is applicable to this application; and

2.2. the amount of N$5,000 paid as security of costs as contemplated in rule 16(2) be refunded to the applicant.

3. Alternatively, and only in the event that the court finds that rule 103(1) is not applicable and that rule 16 is applicable, directing that:

3.1. Dispensing with the requirement of security as contemplated in rule 16(2)(b); and

3.2. that the amount of N$5,000 paid as security of costs as contemplated in rule 16(2) be refunded to the applicant.

4. Setting aside any proceeding or act done pursuant to the order of 22 January 2021, including all subpoenas issued in terms thereof.

5. Suspending the Commission of Enquiry pending the finalisation of:

5.1. An application to the fifth respondent to expunge all claims submitted by the third respondent for proof; and/or

5.2. A review, if any, of the decision of the Master in respect of the application referred to in prayer 6.1(sic).

6. Costs of this application, only in the event of it being opposed.
7. Further and/or alternative relief.'

Background

[10] As a matter of background information, I will deal in broad strokes with the history of the matter that led to the current application.

The winding-up of the entities

[11] In June 2013, the third respondent brought an application for a provisional order of liquidation in respect of NEPT, Parcel Force and Allied, pursuant to the Trust instituting action against NEPT, Allied and Mr von Luttichau (the current applicant) for payment in the amount of N$ 2,029,929.40.

[12] A settlement agreement was reached on 7 November 2012 between the Trust, NEPT, Allied, Parcel Force, Mr von Luttichau and Okaseka Farming (Pty) Ltd. In terms of the settlement agreement NEPT, Allied, Parcel Force and Mr von Luttichau admitted liability jointly and severally in the amount of not less than N$ 3,300,000.00. In terms of the agreement the repayment were set out subject to certain conditions. One of the said conditions were that Okaseka Farming (Pty) Ltd would register a third bond in favor of the Trust as a surety mortgage bond.

[13] There was non-compliance with the settlement agreement and the Trust approached the court for the winding up of the companies in terms of s 349 (f) read with s 350(1) of the Companies Act, 28 of 2004, on the basis that the companies were unable to pay their debts.

[14] The three entities were placed under provisional liquidation and a final order of liquidation was granted under case A 139/2013[2].

[2] On 12 September 2014 NEPT and Parcel Force were placed under a provisional order of liquidation and on 23 October 2014 a final order of liquidation was issued. On 23 July 2015, Allied Investments was also placed under provisional liquidation and a final order was issued on 22 October 2015.

[15] The first respondent was appointed as the liquidator in respect of NEPT and Parcel Force on 26 April 2017 and the second respondent was appointed as the liquidator in respect of Allied on 29 July 2020[3].

[16] The first and second meeting of creditors and directors in respect of the three entities were held and finalized[4]. In terms of the resolutions made, the liquidator was authorized to make an application to court to perform any action and to exercise any power which it is not expressly authorized to do in terms of the Companies Act 28 of 2004 and the Insolvency Act 24 of 1936 (as amended)[5].

The application for Commission of Enquiry

[17] Following the second creditors meeting the liquidators brought an ex parte application before Parker AJ in chambers. The application was supported by the third and fourth respondents in casu.

[18] The first respondent avers in his founding affidavit in support of the application that the target of the investigation before the commission would be the transactions of the companies in liquidation and the specific role of Mr von Luttichau in the dissipation of the assets of the said companies. The first respondent also averred that given the conduct of the applicant, that he might not get sufficient cooperation from Mr von Luttichau (and the former employees) in providing all the relevant records of the entities.

[19] The first respondent further indicated that the focal point of the investigation before the commission would consists of:

a) Investigation and verification of transactions of the companies in liquidation for the past twenty years pre-liquidation;

[3] Appoint of the Liquidators under Master's reference numbers W11/2013; W12/2013 and W13/2013.
[4] In respect of NEPT and Parcel Force the second meeting was convened and finalized on 5 August 2020. Date for finalization of the second meeting of Allied is not clear from the papers.
[5] The resolutions in respect of Allied was not attached to the papers.

b) That in the investigation of assets of the companies in liquidation might be identified as one's for distribution as part of the liquidation process that there might be transactions which would be impeachable;

c) To establish whether Mr von Luttichau could be held personally liable for all or any of such debts or other liabilities of the companies.

[20] Having consider the comprehensive papers filed in support of the application Parker AJ issued the following order:

'Having read the pleadings for HC-MD-CIV-MOT-EXP-2020/00486 filed of record:

IT IS HEREBY ORDERED:

1. That a commission of enquiry ("the commission") into the affairs of Namibia Electronic Payment Terminals (Pty); Allied Investments CC and Parcel Force (Pty) Ltd) (all in liquidation) be established and held in terms of section 423, read with section 424, of the Companies Act, no. 28 of 2004, as amended ("the Companies Act");

2. That Adv. Andries Stephanus Van Vuuren ("the Commissioner"), a practicing advocate and a member of the Society of Advocates of Namibia, be appointed as Commissioner in terms of section 423 of the Act and that he/she be authorized to affix the time(s) and place(s) for the holding of the commission as he/she in his/her sole discretion deems fit;

3. That the Commissioner be authorized and empowered to summon, or cause to be summoned before him, Harold von Luttichau to be examined at the commission by counsel or any legal practitioner on behalf of the applicant or by any other competent party as provided for in section 424 of the Companies Act;

4. That the Commissioner be authorized to summon further persons before him/her who, as a result of the evidence led before him/her or representations made to him/her, appear to him/her to be capable of giving information concerning their knowledge of dealings and association with the business, trade, properties and affairs of Namibia Electronic Payment Terminals (Pty) Ltd, Allied Investments CC and Parcel Force (Pty) (Ltd) (in liquidation);

5. That all persons summoned before the Commissioner may be examined concerning the trade, dealings, affairs or property of Namibia Electronic Payment Terminals (Pty); Allied Investments CC and Parcel Force (Pty) Ltd (in liquidation):

> 5.1 That all persons summoned by the Commissioner be ordered to produce at the commission, inter alia, all books, records and documents whether in printed format or sorted in digital format, including documents stored through the utilization of computer hardware or software, in their possession, custody, power or under their control in their possession, custody, power or under control of the firm, company, trust, or entity by which they are employed, instructed or which they represent in respect of all matters concerning the trade, dealings, affairs or property of Namibia Electronic Payment Terminal (Pty) Ltd, Allied Investments CC and Parcel Force (Pty) Ltd (in liquidation);

6. That the signature of the registrar of the High Court of Namibia or of the Commissioner on the summons to be issued, shall be sufficient for the validity thereof;

7. That the record of this application and all proceedings before the Commissioner shall be kept private and confidential and shall not be disclosed, save in accordance with this order as part of the applicant's report, without the prior leave of the court or the Commissioner having been obtained;

8. That the costs and expenses of this application and of the commission, on attorney-own-client scale, be paid out of the assets and/or funds of Namibia Electronic Payment Terminal (Pty) Ltd, Allied Investments CC and Parcel Force (Pty) Ltd (in liquidation).

BY ORDER OF THE COURT'

Grounds for the relief sought

[21] The applicant seeks to set aside the relief granted, as he is of the view that the application brought by the first respondent on an ex parte basis was without full disclosure of all the relevant facts or in some instances a misstatement of the true facts.

[22] The applicant avers that his application is brought in terms of rule 103(1)[6] of the Rules of Court. The applicant maintains that the order should not have been granted without him being granted the opportunity to be heard. The applicant further takes issue with the fact that a final order was granted on an ex parte basis.

[23] The applicant further avers that there was no basis established for approaching the court on an ex parte basis as the entities having been liquidated more than 5 years prior to the application by the liquidator for the establishment of a commission of enquiry. Apart from that, the entities stopped trading a number of years prior to the liquidation. The applicant maintains that there is no basis established for the suspicion that the applicant would, if he had known of the application, dispose of the records of the entities.

[24] As far as it relates to Allied Investments CC in liquidation the first respondent had no *locus standi* to bring the application as he was not appointed as the liquidator in respect of Allied. The second respondent is the liquidator in respect of Allied and although he supported the application for the establishment of the commission of enquiry he was not an applicant in the ex parte application.

[25] The applicant avers that the establishment of the commission of enquiry is not appropriate for the following reasons:

a) The only creditor who submitted a claim against the three entities in the liquidation claim prescribed is the third respondent and the claim itself is based against all three entities jointly and severally and this claim already prescribed by the time it was admitted. The applicant avers that the third respondent's claim against all three entities prescribed on 31 October 2015.

[6] The applicant does not specify on which sub-rule he is relying, it is clear from the papers that he relies on rule 103(1)(a) as he avers that the order was erroneously sought and granted in his absence.

b) In law a claim which has prescribed cannot be proved by a creditor in liquidation and the applicant intends to apply to the Master of the High Court to expunge the claim.

c) All three the entities ceased their operations prior to 2014 and the applicant is no longer in possession of the records of the three entities. These records were presumably destroyed/thrown away by Windhoek Storage and Distribution where the records were stored for a period of approximately seven years as the applicant could not pay the storage fees.

d) The establishment of the commission of enquiry and the appointment of the Commissioner appears to be aimed at forcing the applicant to make an offer to pay the third respondent's claim, which is tantamount to an abuse of process and abuse of rights of the liquidator(s).

e) The three entities were liquidated in 2014 and 2015 respectively and nothing was done for a period of approximately five years in respect of the liquidations, yet the liquidators wish to investigate and verify the transactions of the entities for the twenty years prior to liquidation, expecting the applicant to remember details about transactions which took place during those periods.

f) The approach by the liquidators are prejudicial to the applicant.

g) The cost of the commission of enquiry is not justifiable in the circumstances. The applicant offered to meet with the liquidators in order to provide them with the information he may have in his possession, which offer was refused by the liquidators.

h) There are no other creditors who have proven any claims and therefore the commission of enquiry has only been established in order to benefit the third respondent unfairly and under oppressive circumstances.

<u>Opposition to the current application</u>

[26] The first and second respondents opposed the application by the applicant on a number of grounds and raised two points in limine in addition thereto, namely that the applicant had no *locus standi* to bring the current application and that the applicant unduly delayed in launching the application to set aside the court order of 22 January 2021.

[27] The further grounds upon which the respondents opposes the application are that:

a) The court was entitled to make the order establishing the commission of enquiry as it is needed for the liquidators to determine the true state of affairs in respect of the companies in liquidation.
b) The liquidators made full disclosure of all relevant and material facts in the founding papers. The said founding affidavit contained no material discrepancies or misrepresentation to the court, which could have resulted in the court granting the ex parte order it did on 22 January 2021.
c) The applicant did not make out a case for interdictory relief.
d) There are other creditors who can still submit claims against the companies in liquidation who have obtained default judgments.
e) The purpose of the commission of enquiry is not only to ensure payment of debts but also to investigate the applicant's role in the dissipation of assets, and:
    i. Whether there are transactions that are impeachable;
    ii. Whether the applicant could be held personally liable of any debt of the companies;
    iii. To establish whether the liquidators can institute vindicatory claims against the third parties who may be found in possession of assets owned by the companies in liquidation.

Points in limine

[28] *Locus standi*: The respondents maintain that when the court ordered an enquiry, as in the case of the ex parte order granted on 22 January 2021, it did not determine the rights or obligations of any party, i.e. the applicant is not affected by the ex parte order

granted and that the enquiry is ordered at the court’s own discretion on information brought to it by interested persons. As a result no rights or obligations were determined other than imposing the obligation on the party to attend the enquiry.

[29] The respondents submit that the primary function of the enquiry is to allow the liquidators to conduct an enquiry into the undisclosed affairs of the liquidated companies and obtain information required to enable the liquidators to discharge their duties.

[30] The respondents contend that the applicant’s reliance on the fact that he is/was the director of NEPT and Parcel Force and the sole member of Allied and that the application was prejudicial and that it would impact on his ability to earn an income is not substantiated. In support of their contention the respondents aver that: a) one of the effects of liquidation is that the director ceased to be a director and as a result he lost his office officially and nominally, and b) the general allegation of prejudice are not supported by any specific instance or evidence that he suffered prejudice as a result of the ex parte order granted on 22 January 2021. At best the applicant has a financial interest in the enquiry since he has an interest in the residual value of the estate but not a legal interest in the appointment of the commission of enquiry. Further to that the applicant may only resist an order which would subject him to an examination in a commission of enquiry established under sections 423 and 424 of the Act.

[31] The respondents contend that the applicant holds the view that due to the delay in the matter it is a clear case of oppression and abuse of court process and the rights of the liquidators, yet the applicant makes out no case in support of the bald statement.

[32] The respondents further submit that the applicant does not fall within the ambit of the provisions of rule 103(1)(a) and is consequently not entitled to apply for the relief provided for in rule 103(1)(a) and does not have the *locus standi* to launch the rescission application.

[33] *Undue delay*: The respondents submit that an application in terms of rule 103(1)(a) must be brought within a reasonable time and in the current instance the order was granted on 22 January 2021. The applicant became aware at the latest on 3 June 2021 that the liquidators obtained the order in question and that should be the date to consider in order to determine if the applicant brought the application within a reasonable time. The applicant, however, waited seven weeks before launching his application. The applicant did not in his founding affidavit provide a detailed and accurate explanation for his unreasonable and extensive delay in the current matter.

Reply to the applicant's legal points

[34] *Locus standi of the second respondent*: The respondents concede that they were not appointed as co-liquidators as contemplated in terms s 381 of the Act but submit that the second respondent is the duly appointed liquidator for Allied and he supported the ex parte application and the relief sought.

[35] The respondents contend that the applicant is placing form over substance as Mr Schickerling (the second respondent) as the liquidator for Allied, for all intents and purposes was also an applicant in the ex parte application, and that failure by a liquidator to obtain the requisite authority to litigate is not fatal to the proceedings brought by him against a third party because it is not open to the latter to challenge the liquidators authority. The respondents maintain that if a liquidator acts without authority then the only consequence is that the liquidator may be made to bear the costs personally for the litigation. As a result the objection by the applicant against the second respondent is without merit.

[36] *Prescription*: The respondents deny that the claim of the third respondent prescribed on 31 October 2015 and further deny that the issue of prescription can be determined on the papers of the rescission application launched by the applicant. In amplification of the respondents' denial the respondents plead that the applicant, through his legal practitioner, made an acknowledgement of debt in September 2013

and again in October 2013, acknowledged the indebtedness of the companies in liquidation and his indebtedness to the third respondent. In the correspondence of October 2013 it was disclosed by the applicant that there are several cases against the companies in liquidation. In addition thereto:

a) In terms of s 11(a) (ii) of the Prescription Act, 68 of 1969, the relevant period for prescription for any judgment debt obtained is 30 years.
b) In terms of s 17(1) of the Prescription Act the Court could not raise the issue of prescription out of its own motion during the ex parte application.
c) The correct forum to raise the objection in respect of the third respondent's claim would be at a further creditor's meeting and to thereafter apply to the Master of the High Court to exercise its discretion and rights to expunge such claims as provided for in s 11(9) of the Insolvency Act, 24 of 1936.

[37] In conclusion the respondents aver that the issue of prescription does not fall to be determined for purposes of the current application.

Applicable legal principle

[38] The applicant brought his application for rescission in terms of rule 103(1)(a) of the Rules of Court, alternatively rule 16 of the Rules of Court in the event that the court finds that rule 103(1) is not applicable. The requirements regarding rule 16 and those of rule 103 differ materially, as will be shown below.

[39] An application for rescission in terms of rule 16 has a specific application as it follows a judgment granted by default in terms of rule 15(3)[7], as rule 16(1) reads as follows:

[7] '(3) The court or managing judge may, where the claim is for a debt, liquidated demand or the foreclosure of a bond, without hearing evidence and in the case of any other claim after hearing or receiving evidence orally or on affidavit, grant judgment against the defendant or make such order as the court or managing judge considers appropriate.'

'(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.'

[40] It is common cause that the current application does not fall within the categories as set out in rule 15(3) as it is neither a debt nor a liquidated demand of the foreclosure of a bond. Default judgments, as contemplated in rule 16, are specific to default judgments granted in respect of civil actions proceedings (initiated by combined summons and defended by way of a notice of intention to defend).

[41] What remains available to the applicant is therefore rescission in terms of rule 103 of the court rules or in terms of the common law. The order sought to be rescinded by the applicants was granted in respect of civil motion proceedings, which the applicant maintains the order was granted erroneously.

[42] From reading the judicial pronouncements, relief in terms of rule 103, rescission will be granted when[8]:

a) There was a irregularity in the proceedings[9];
b) If the Court lacked legal competence to have made the order[10]; and
c) If the Court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order[11].

[43] It is not necessary for the applicant to show good cause for rule 103 to apply unlike in the case of an application in terms of the common law. In his founding affidavit the applicant seems to rely on the common law in the alternative. The applicant is however limited to the election in his notice of motion and must make out a case for the particular relief sought[12].

[8] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417.
[9] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038D; *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30H-31A; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471H; *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B) at 399B-C)
[10] *Athmaram v Singh* 1989 (3) SA 953 (D) at 956H -957A.
[11] *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510G
[12] *WUM Properties (Pty) Ltd and Another v Prometheus Investments CC and Others* (HC-MD-CIV-ACT-CON- 2927 of 2019) [2021] NAHCMD 364 (11 August 2021) para 18.

Was the order granted in error in the absence of the applicant?

[44] There can be no argument that the order of 22 January 2021 was made in the absence of the applicant. It is clear from the proceedings that it was on an ex parte basis and that the order was issued from chambers by Parker AJ. The question is therefore limited to whether the order was granted erroneously.

[45] In *De Villiers v Axis Namibia*[13] Shivute CJ discussed the applicable law in respect of rule 44(1)(a) of the repealed rules of court, which was similarly worded to the current rule 103(1)(a) as follows:

> 'a court would therefore be entitled to have regard not only to the record of the proceedings of the court that had granted the impugned judgment or order, but also to those facts set out in the affidavit relating to the application for rescission.'

[46] In *Labuschagne v Scania Finance SA*[14], Smuts JA discuss the above further as follows:

> '[21] There is some doubt on the South African authorities as to whether it is necessary for the error to appear on the face of the record. The conflicting authorities on this are *Bakoven Ltd v GJ Howes (Pty) Ltd* where Erasmus J held (contrary to the assertion by appellant's counsel in this case) that it is necessary for the error to appear on the record, and *Tom v Minister of Safety and Security*. The SCA in *Lodhi 2* discussed this conflict with reference to the underlying facts of these and other cases in a thorough survey and found that the approach in *Bakoven* to be too narrow. Streicher JA in *Lodhi 2* appeared to accept a narrow exception to the error appearing on the face of the record. It relates to whether the party against whom an order has been made was aware of the hearing date. Inherent in the reasoning of the court and its discussion of prior cases is the importance of placing pronouncements on the rule within their factual context, particularly with reference to the nature of the error or irregularity contended for or found to have existed in earlier cases. Streicher JA held that where there has not been proper notice of the

---

[13] *De Villiers v Axis Namibia* 2012 (1) NR 48 SC at 56.
[14] *Labuschagne v Scania Finance SA* (2) (SA 45 of 2013) [2015] NASC 16 (07 August 2015).

proceedings to the party seeking rescission, whether the fact of the absence of notice appears on the record or not, any order granted will have been granted erroneously. This would seem to be the correct approach – only in narrow circumstances will errors that do not appear on the face of the record lead to rescission in terms of rule 44. The focus of the enquiry should rather centre on the nature of the procedural error and whether there has been any procedural irregularity or mistake committed in the issuing of the order when determining whether an order has been granted erroneously.

[22] Streicher JA in *Lodhi 2* concluded that in cases where a plaintiff is procedurally entitled to judgment in the absence of the defendant, the judgment cannot be said to have been granted erroneously in the light of subsequently discovered evidence. He summed up the position:

'. . . A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment'.

[23] The approach of the SCA in *Colyn* and amplified in *Lodhi 2* in my view correctly reflects the narrow procedural ambit of errors and mistakes contemplated by rule 44(1)(a) as a basis for rescission and should be followed in Namibia.'

[47] Counsel argues on behalf of the applicant, that the application that served before court on 22 January 2021 should not have been brought on an ex parte basis without notice to the applicant as the applicant is a director of NEPT and a shareholder and director or Parcel Force and a member of Allied Investments. Counsel further argues that the applicant has a direct and substantial interest in the matter, which includes a financial interest which value would be reduced and could be extinguished by the costs of the enquiry.

[48] In order to consider the application for rescission it is in my view important to consider the nature of the application that served before the court on 22 January 2021.

[49] The application that served before the court on 22 January 2021 was for the establishment of a commission of enquiry and be held in terms of s 423 read with s 424 of the Act.

[50] The characteristics of s 423 and 424 can be summarized as follows:

a) The Master or the Court may, at any time after the making of a winding-up order, summon any director or officer of the company or person known or suspected to have in his or her possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company. (s 423(1))
b) Any person so summoned may be represented at the enquiry by a legal practitioner. (s 423(2))
c) Every magistrate and every other person appointed by the Master or the Court is a commissioner for the purpose of taking evidence or holding an enquiry in connection with the winding-up of any company. (s 424(1))
d) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry to a commissioner. At such an examination the liquidator or any creditor, member or contributory of the company may be represented by a legal practitioner. (s 424(2))
e) The liquidator or any creditor, member or contributory of the company may be represented at an examination or enquiry by a legal practitioner. (s 424(3))
f) A person who applies for an examination or enquiry either under s 423 or s 424 is liable for the payment of the costs and incidental expenses, unless the Master or the Court directs that the whole or any part of the

costs and expenses must be paid out of the assets of the company concerned. (s 423(7))

g) An examination or enquiry under s 423 or s 424 is private and confidential, unless the Master or the Court directs otherwise. (s 423(8))

[51] Under s 417 and 418 of the Companies Act 61 of 1973 (South African) prior to its amendment by Act 29 of 1985 to read similar to s 423 and 424 of our Companies Act an applicant for a commission of enquiry was entitled to apply on an ex parte basis without any notice to any person proposed to be examined and to state privately to the court the grounds on which he or she relies.

[52] According to Henochsberg on the Companies Act[15], the aforementioned position subsist both in relation to an application to the Court and the Master post-amendment, however, what is important is that there is now power in both the court and the Master to direct that the application should not be private and confidential. In other words, the court or the Master can direct that the notice of the application be given to any person proposed to be summoned[16].

[53] The learned author further adds that:

'.. the intention is that that Court or the Master should be in the position to afford such a person an opportunity to answer by way of affidavit, the allegations upon which the applicant relies, where it appears prima facie that such person may well be able to do so, with the result that the enquiry would be unnecessary. In the light, however, of the purpose of the section, it is submitted that (particularly where the applicant's ultimate purpose is the determination of whether an action is available against such a person or anyone else) neither the Court nor the Master should lightly follow this course.'[17]

[15] Henochsberg on the Companies Act Vol 1, Service Issue 31 June 2010 at 891-892.
[16] S 417 (7) South Africa or s 423(8) of Namibian Companies Act.
[17] Henochsberg on the Companies Act Vol 1, Service Issue 31 June 2010 at 892.

[54] In *Friedland v The Master,*[18] the court was faced with a review raising the question whether the prospective examinees in an enquiry had a procedural right to be heard by the Master before he exercised his discretionary power. The applicants in the said matter maintained that the Master had denied them their procedural right and that that infringement on the principles of natural justice.

[55] Stegman J stated as follows[19]:

‘The first question arises from the rules of natural justice, and in particular from the maxim audi alteram partem. Section 417(7) expressly provides that an application for a private and confidential examination or enquiry under s 417 is itself private and confidential, except to the extent that the Master or the Court otherwise directs.

Section 155 of the Companies Act 46 of 1926 was a precursor of the present ss 414-18. The old s 155 contained no express provision similar to the present s 417(7). It was however accepted that proceedings under the old s 155 were private; and also that the Court was entitled to exercise its power to summon before it persons believed to be in a position to give information about the affairs of a company being wound up, without prior notice to such persons, and without first affording such persons the opportunity to be heard on the question whether or not they should be so summoned.

Nevertheless, it was held by Schreiner J *in Ex parte Liquidators Ismail Suliman & Co (Pty) Ltd* 1941 WLD 33 that, if an application to summon a person to attend for examination under s 155 should happen to come to the attention of the person to be summoned before the order to summon him had been made, such person would have the necessary locus standi to oppose the application to summon him, and he should be afforded the opportunity to be heard on that question. The learned Judge said at 34:

> ‘"It seems to me that the Court can take into account the hardship upon a witness in deciding whether to make an order under s 155 or not. It may be that a strong case of oppression must be made out before the Court will deny to a liquidator the rights given under s 155, assuming that the requirements of the section are satisfied; but even if

[18] *Friedland v The Master* 1992 (2) 370 (W).
[19] At 375 F-376E.

this is so, a witness must have locus standi to make out such a case. If he could move to set an order aside, he can equally oppose the grant of an order in the first instance if he happens to have had notice of the application.''

Mr Nugent submitted that, inasmuch as the person to be summoned for examination (whom I shall call the 'prospective examinee') had, to the extent indicated by Schreiner J, a right to be heard on the question whether he should be so summoned by the Court, so, when the power to summon a prospective examinee was by s 9 of Act 29 of 1985 extended to the Master, the prospective examinee must have been intended to enjoy a similar right to be heard on the question whether he should be so summoned by the Master.

There is in my view some merit in this submission; but what remains to be considered is the extent of the prospective examinee's right to be heard.

The first limitation on the right is quite clear from the case relied upon by Mr Nugent: the prospective examinee has no right to receive prior notice of the fact that the liquidator is to approach the Master (or the Court) to exercise the discretionary power to order an examination or enquiry under ss 417 and 418, and to summon, or to authorise a commissioner to summon, the prospective examinee to attend. It is only if the prospective examinee should happen to hear in advance, before that power has been exercised by the Master (or the Court), that he can claim any sort of right to be heard. That serious limitation indicates that the situation of the prospective examinee is not one in which he enjoys the full extent of the rights usually understood as being accorded when the maxim *audi alteram partem* applies. (my underlining)'

[56] At p 379 of the judgment, Schreiner J concluded as follows:

'The procedural consequence is that such a prospective examinee has only a limited right to be heard. His procedural right to be heard comes into existence only if he happens to learn of the application that is aimed at subjecting him to an examination in time to enable him to claim, before the order subjecting him to examination is made, a right to be heard by the Master or the Court approached for such order; and then only if what he has to say relates to the question of jurisdiction, or to a question of hardship and oppression, or possibly to unusual

or exceptional circumstances which it may seem appropriate to entertain. He has no absolute right to be heard.'[20]

[57] It therefore appears from this judgment that prospective witnesses are not entitled to prior notice and it is only in circumstances where he or she happens to learn of an approach to the Master or the Court for that matter that he or she may acquire a right to be heard and even then the right to be heard appears to be limited. The right will be limited to questions of jurisdiction, a question of hardship and oppression or possibly to unusual or exceptional circumstances, which may be appropriate to entertain.[21] This approach is also supported by LAWSA[22].

[58] The authors of LAWSA[23] is of the view that the examination <u>and</u> the application for it are private and confidential in character, <u>unless the court or the Master directs otherwise</u>. The authors state that the liquidator is entitled to approach the court or the Master ex parte, in the absence of a direction to the contrary, to state his claim to the court or the Master privately.

[59] The object of the procedure is to keep secret from the prospective examinee the subject matter of the examination, which information, if disclosed to him, might enable him to defeat the process of the examination itself[24].

[60] The nature of the application that is placed before the court or the Master is of specific relevance in my view. The authors refer to the examination process as an extraordinary process. The characterization of the enquiry as an 'extraordinary procedure' means no more that the procedure is unusual or that it is not your typical everyday type of procedure[25]. The process is regarded as sui generis.

[20] At 379 F-H.
[21] At 379 E-F.
[22] LAWSA (First Reissue) Vol 4, Part 3, Butterworths, at para 194 at p 313.
[23] LAWSA (First Reissue) Vol 4, Part 3, Butterworths, at para 194 at p 313.
[24] LAWSA (First Reissue) Vol 4, Part 3, Butterworths, at para 194 at p 313.
[25] *Bruni N.O and Others v Minister of Finance and Others* [2021] NASC 23.

[61] Tebbutt J in *Van der Berg v Schulte*[26] describes the nature of an enquiry thus*:*

'The nature of an inquiry such as that under s 417 has been described in relation to similar inquiries under the English Companies Act as an-

"'... extraordinary process to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding-up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis. '" (See *Re Rolls Razor Ltd* [1969] 3 All ER 1386 (Ch) at 1396I - 1397A.)'

[62] S 423 read with s 424 of the Act does not provide for a procedure whereby a person may be brought before the court or the Master and it does not determine rights or impose obligations other than the obligation to attend the examination.[27]

[63] I was referred to the matter of *Metropolitan Bank of Zimbabwe (Pty) Ltd v Bruni N.O.*[28] wherein the applicants sought an order for the setting aside of an application granted which was granted on an ex parte basis authorizing the institution of proceedings and to proceed with same to finality in our courts and in other foreign jurisdictions. These proceedings inter alia to include proceedings for injuctive or interdictory relief or liquidation proceedings permitted by the laws of the said foreign countries, whether such proceedings are similar to s 424 of the Act or not. The court also granted leave that the liquidators effect payments of deposit liabilities of the company (in liquidation). My Brother Masuku J, held that the applicants by virtue of their shareholding had rights and interest which could be affected by the granting of the order in question ex parte and that the applicants have shown that their rights and interests were potentially affected by granting of the ex parte order and as a result rescinded the ex parte order granted by Angula DJP.

[26] *Van der Berg v Schulte* 1990 1 SA 500 (C) at 506 I-J.
[27] LAWSA (First Reissue) Vol 4, Part 3, Butterworths, at para 192 p 307.
[28] *Metropolitan Bank of Zimbabwe (Pty) Ltd v Bruni N.O.* HC-MD-CIV-MOT-GEN-2018/00062 [2018] NAHCMD 97 (17 April 2018) para 87.

[64] I am of the view that the *Metropolitan Bank* matter is distinguishable from the current matter in material aspects, specifically in respect of the granting of the order directing the liquidators to effect payment in respect of payment liability. In essence the liquidators sought a final order to effect payment. In that context I cannot disagree with the reasoning of Masuku J. However, in the current matter the liquidator sought an enquiry, which does not have final effect and does not impede on the applicant's rights in any way. If he took issue with being subpoenaed, his relief does not lie in an application to rescind the order of court dated 22 January 2021, but in an application to court for the setting aside of the subpoena as discussed in para 56 above.

[65] In fact, I am of the view that the applicant does not have *locus standi* to bring this application for the rescission. In *Lok and Others v Venter N.O. and Others,*[29] counsel for the applicants (sole member of the company and creditors) applied for the setting aside of an order for the holding of a commission of enquiry and relied: 1) upon the lack of authority of the liquidator, and 2) that such application for the commission of enquiry constituted an abuse of the process of this Court. I wish to distill from this judgment not only what Goldstone J said about the authority of the liquidator, as it is an issue that I still need to address, but also what the learned judge said regarding *locus standi*. He stated as follows:

> 'The parties affected by the order are not entitled to question the authority of the liquidator in having sought such order. If he was unauthorised by creditors or contributories as in the present case, the Court may, notwithstanding the terms of para 8 of the order made ex parte by HUMAN J, refuse to allow <u>the costs incurred by the liquidator to be paid out of the assets of the company and he may have to pay those costs himself</u>.
>
> Counsel for the applicants also submitted that in the present case one of the applicants, relying upon the lack of authority of the liquidator, is the sole member of the company, and that other of the applicants are creditors. The submission was to the effect that these persons are not outsiders and that the rule enunciated in the *Waisbrod* case accordingly does not apply to them.

[29] *Lok and Others v Venter N.O. and Others* 1982(1) SA 53 (W) para 57.

In my opinion these considerations do not assist the applicants. As far as the enquiry proceedings are concerned, they are parties whom the liquidator, on behalf of the company, wishes to have interrogated. Their remedy relates to the incidence of costs after the enquiry has terminated. In my view they do not have *locus standi* to attack the validity of the proceedings initiated by the liquidator. It follows, in my opinion, that the absence of specific authority having been conferred by the creditors or members or contributories upon the liquidator is not a ground which entitles, let alone obliges, me to set aside the earlier orders.'

[66] In light of the persuasive authority referred to above I am satisfied that the liquidator was entitled to approach the court on an ex parte basis seeking the order granted by Parker AJ and that the order was not sought erroneously in the absence of the applicant.

Was the order granted erroneously?

[67] The remaining issue to consider is whether Parker AJ granted the issue establishing a commission of enquiry erroneously because of the misinformation provided by the liquidator. In order to determine this question I will firstly consider the points in limine raised by the applicant.

a) *Locus standi of the first respondent*

[68] Firstly, the issue of the *locus standi* of the first respondent should be considered, obviously limited to Allied Investment. The applicant is of the view that the order as far as it relates to Allied should be rescinded as the first respondent is not a joint liquidator in respect of this entity and therefore had no standing to bring the application in respect of Allied as well, regardless of the fact that second respondent deposed to a confirmatory affidavit. A further issue was raised that the second respondent failed to file the requisite authority to seek the order granted.

[69] From the papers of the ex parte application, it is clear that the second respondent deposed to confirmatory affidavit wherein he confirms the affidavit of the first respondent as far as it relates to him.

[70] This confirmatory affidavit in my view stands to be criticized as a generic, however, it is clear that as the second respondent was aware of the application and he stood in support thereof. In his confirmatory affidavit the second respondent submitted as follows:

> ‘ 5. I submit, on the same basis laid out by the founding affidavit of Mr Van Straten, that the appointment of the commission and the appointment of a commissioner are critical and therefore necessary for the proper and effective winding up of the companies in liquidation.’

[71] It is clear from the confirmatory affidavit that the second respondent prayed for the same relief as the first respondent and even in the absence of authority under 392(5) and (6) the liquidator may approach the court in terms of s 392(7) of the Act. Therefore lack of authority would not render the proceedings a nullity[30]. The consequences at most would be the second respondent as liquidator for Allied may be personally liable for the cost of enquiry.

[72] The applicant makes an issue regarding of the unnecessary costs of a commission of enquiry and given the fact that Allied is jointly and severally liable towards the third defendant on the strength of a settlement agreement with all three entities, it makes sense that the enquiries in respect of all three entities should be done during same proceedings.

[73] By granting leave to conduct the examination or enquiry as prayed for the court enabled liquidators to perform their statutory duties to the creditors of companies in liquidation ‘so that they may determine the most advantageous course to adopt in regard to the liquidation of the company[31]’.

[30] Para 66 supra.
[31] *Western Bank Ltd v Thorne NO & others* 1973 (3) SA 661 (C) at 666F.

[74] I am, therefore, in agreement that the applicant is placing substance over form and I am of the view that the point in limine stand be dismissed.

b) Prescription

[75] I have considered the argument advanced in respect of the issue of prescription however the issue of prescription cannot be determined on the founding affidavit of the applicant and in any event prescription is not an issue that the court can raise mero moto and would therefor in my view also not have impacted on the decision of the court to establish the commission of enquiry.

Record of the proceedings of the court and the affidavit relating to the application for rescission.

[76] The applicant for rescission in terms of rule 103 bears the *onus* to show that the impugned court order had been erroneously granted.

[77] Having considered the court order dated 22 January 2021 I am of the view that there will be no opposition if I say that on the face of the record there appears to be no error. It would therefore be necessary to consider the allegations of misinformation made by applicant in his founding affidavit that might have caused the court to grant the order. It is further necessary to have regard to the affidavit filed by the liquidator in support of his application for the establishment of a commission of enquiry.

[78] It is important to understand when the court or master will make an order of this nature. In some of the older case law the application was referred as a petition to the court instead of an application and the reason is simple: The Act does not give the liquidator or any creditor the right to apply for an enquiry, however, the court or the Master may order an enquiry at its or her own discretion on information brought to it or her by an interested person. Ordinarily an application for examination will be made to

the court or the Master by the liquidator but may also be made by any person having an interest in the company.

[79] The court or Master has an unfettered discretion to grant an order to establish a commission of enquiry and if the court or Master is satisfied that the formal requirements of the Act are satisfied. There is no onus on the liquidator (or applicant) to make out a prima facie case that there had been misfeasance or actionable conduct of any kind. The court is satisfied that there is a fair ground for suspicion that the person proposed to be examined can probably give information about what is suspected[32].

[80] In exercising its discretion the court would balance the need of the liquidator to obtain the relevant information on the one hand against the possible oppression to the person from whom the information was sought. In the current instance the applicant not only submit that the procedure followed is oppressive, but also that it is an abuse of court process and an abuse of the rights of the liquidator. The applicant also alleges that the liquidator failed to make full disclosure of all the relevant facts to the court when submitting the information to the court in order to exercise its discretion.

[81] The applicant made specific averments regarding the settlement agreement and the involvement of Okaseka Farming CC thereto and several vehicles belonging to the respective entities and avers that the information regarding these issues placed before court were incorrect. In the founding affidavit it seems as if the applicant is attempting to explain the paper trail and whereabouts of the vehicles. Issues that he as the director of the companies and member of the close corporation would have intimate knowledge of.

[82] At the time of placing the information before the court the liquidator could only place facts before the court which were *correct to the best of their knowledge*. The liquidator could only place before the court the information and documents to his disposal, which he did and which the court would have considered. The liquidator attached to the application a number of documents obtained from the Natis system in

[32] LAWSA (First Reissue) Vol 4, Part 3, Butterworths para 196 at p 315.

order to determine the status of the vehicles of the entities. As in the case of Parcel Force, a courier company, the vehicles were its biggest assets and the investigation into the whereabouts of the vehicles is critical. The founding affidavit of the applicant and his response to the said documents just strengthens the fact that an enquiry is required.

[83] In my view there is no merit in the argument that if the factual averments made in the founding affidavit was before the court at time of deciding the matter that it would not have granted the relief sought by the liquidator. I am satisfied, as Parker AJ must have been, that there was a prima facie case for establishing a commission of enquiry and those matters referred to by the applicant would, in my view, not have been relevant. The issue of oppressiveness of the proceedings. I can further not find any abuse of court process or abuse of the rights of the liquidators.

[84] Having carefully considered papers, I am not satisfied that the applicant discharged the *onus* to show that the impugned court order had been erroneously granted.

Conclusion

[85] In light of my earlier findings I do not deem it necessary to discuss the second point in limine raised by the respondents regarding the delay in bringing the current application. I am of the view that this point in limine would not take the matter any further.

[86] In terms of para 5.1 of the Notice of Motion the applicant seeks interdictory relief, more specifically an order suspending the Commission of Enquiry pending an application to the fifth respondent to expunge all claims submitted by the third respondent for proof, and or a review of the decision of the Master in respect of the said application. However, the papers of the applicant does not address the mandatory requirements of the interdictory relief sought. I therefor do not deem it necessary to consider this issue any further

Order

1. The application dated 28 July 2021 is dismissed with costs.
2. Such costs to include the costs of one instructing and one instructed counsel where so employed.

JS PRINSLOO

Judge

APPEARANCES:

FOR THE APPLICANT:	A Hans-Kaumbi Ueitele & Hans Legal Practitioners Windhoek
FOR FIRST AND SECOND RESPONDENTS:	C Van Zyl Instructed by Engling, Stritter & Partners Windhoek