IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: 2487/2023

In the matter between:-

KETS GROUP (PTY) LTD **APPLICANT**

and

BUSINESS PARTNERS LIMITED **RESPONDENT**

JUDGMENT

NORMAN J:

[1] This is an application for rescission of a winding up order by the applicant who is presently in liquidation. The applicant applied for rescission of the winding – up orders in terms of section 354 of the Companies Act 61 of 1973 ("the Companies Act") and also in terms of the common law. The application is opposed by the respondent.

[2] The application is in two parts, A and B. Part A was brought on an urgent basis wherein Kets sought an order for the suspension and/or a stay of an order of final winding up granted by Laing J on 05 March 2024. Part A was heard on 02 April 2024 and it was dismissed with costs by Dunywa AJ on 07 May 2024. Part B is the subject of this application. The applicant seeks the following main relief:

"5.1 Rescinding the Orders of 05 March 2024 and 28 November 2023 placing Kets under final and provisional liquidation respectively; and

5.2 suspending "any warrants of execution issued subsequent thereto pending final determination of this application."

[3] As can be gleaned from paragraph 5.2 of Part B, above, the order that is being sought is similar to the one that was dismissed by Dunywa AJ on 07 May 2024.

Parties

[4] Applicant is Kets Group Proprietary Limited (Kets), a company with limited liability that is duly registered and incorporated in terms of the company laws of this country. Kets has its registered address at 87 Prince Alfred Street, Queenstown, Eastern Cape. Kets is in liquidation and it has as its sole director, Ms Lungelwa Okuhle Ketsekile (Mrs Ketsekile). She is the deponent to the founding affidavit in this rescission application.

[5] Respondent is Business Partners Limited, (BPL), a company with limited liability duly registered in terms of the company laws of the Republic of South Africa. Respondent is a specialist risk finance company and operates its business at 23 Hofmeyr Road, Westville. The parties shall be referred to hereinafter as Kets and BPL.

Factual background

[6] BPL alleged in the winding up application that Kets is indebted to it in the sum of R1,563,640.64. The debt allegedly arose from a loan agreement concluded between the parties on 13 May 2019, in terms of which an amount of R1,650,000 was loaned to Kets. Kets was, in terms of the agreement, to make monthly instalments of R22 962.88 over a period of 120 months commencing on 1 September 2019. The other terms of the agreement are not relevant for the purposes of this application.

[7] In the winding up application BPL alleged that Kets fell into arrears of its monthly instalments towards the latter part of 2022. A period of eleven months had lapsed and Kets was not able to pay its monthly instalments to BPL. A certificate of balance was annexed to the papers evincing Kets's indebtedness to BPL. The certificate of outstanding balance signed by the Legal Manager of BPL reflected the arrears as at 25

September 2023 to be in the sum of R239 169.73 and the outstanding balance as R1 563 640.64.

[8] On 24 July 2023, BPL's legal representatives, Edward Nathan Sonnenbergs (ENS), sent a letter of demand to Kets wherein it dealt with the following: advising Kets that it had breached the loan agreement, was in arrears in the amount of R193,625.47 and demanded immediate repayment of the outstanding balance in the sum of R1,537,528.25 plus interest. ENS specifically drew the attention of Kets to the provisions of section 345 (1) (a) of the Companies Act No. 61 of 1973 (the Act). Most importantly, Kets was advised that should it neglect to make payment or secure or compound the outstanding balance to the reasonable satisfaction of BPL for three weeks, Kets, will be deemed to be unable to pay its debts in terms of section 345(1) (a) of the Act. Kets was further advised that BPL would recover the amounts outstanding which may include an application for the liquidation of Kets.

[9] The letter was served by the sheriff on 23 August 2023 at the registered address of Kets. Kets takes issue with the return of service only on the basis that the person who allegedly received the process was not known to it and never brought the process to its attention. It was also contended that the deponent was never served with the application relating to the initiation of liquidation proceedings.

[10] On 14 September 2023, Kets's attorneys wrote to ENS and acknowledged the letter of demand and requested that all further correspondence in the matter be directed to them. Nothing further was addressed about the contents of the demand letter. On 15 September 2023, ENS, wrote to Luxolo Fodi Inc, and enquired about their instructions regarding settlement of the debt. They further indicated that if they did not hear from them within a specified time, they would proceed with legal action. No response was received from Kets or from its attorneys of record.

[11] On 04 October 2023, BPL launched the application wherein it sought the winding up of Kets on the basis that it was unable to pay its debts as contemplated in sections 344 (f) and 345 (1) (a) and (c) of the Act. It also alleged that Kets owed the Enoch Mgijima Municipality an amount of R25 084.29, which had been outstanding for sixteen months.

[12] BPL stated in its founding affidavit that it held security for the debt being a covering mortgage bond, B 4936/2019 registered on 10 July 2019 by Kets in favour of BPL in the sum of R 1,650,000 as a first mortgage, the property described as Erf 1669

Queenstown, situate in the Enoch Mgijima Local Municipality, in extent 714 square metres held by Deed of Transfer T 10805/2019. The other form of security was a cession of rental in terms of paragraph 18 of the loan agreement.

[13] On 24 October 2023, the application for winding up was served by the sheriff on Kets at its registered offices as well on its attorneys, offices at 25 Ebden Street, Queenstown. No notice to oppose was filed and Kets did not oppose the application.

[14] On 22 November 2023, the Master of this court issued a certificate of tendered security. On 28 November 2023 an order for the provisional winding up of Kets was granted by Smith J (as he then was) on an unopposed basis. It is in that order that the court called upon all interested persons to show cause on 5 March 2024, why a final winding up order should not be issued. On the same day the provisional order was published in the Daily Dispatch newspaper. On 22 December 2023, the provisional order was published in the Government Gazette.

[15] It was only on 14 February 2024, that the provisional winding up order was served on Kets at its registered and business address. There was also personal service of the provisional order on Mrs Ketsekile. The sheriff also served on Kets's attorneys of record. The return date on the provisional order was 5 March 2024. On 05 March 2024 the final winding up order of Kets was granted by Laing J, on an unopposed basis.

Kets's case for rescission

[16] Kets seeks rescission of both the provisional and final orders. It contends that the applicant was not served with the application and was thus unaware of the winding up application. It denied any knowledge of a Lusiba Buqa who purportedly received the process of behalf of Kets at its registered offices. That Lusiba Buqa did not bring the process to the attention of Kets. The deponent as a director of Kets has a direct and substantial interest in the matter but was only served with the application on 14 February 2024 and thus not afforded sufficient time to oppose the matter due to short service. BPL failed to comply with time frames in relation to service and as a result Kets suffered prejudice. On the 05 March 2024, Kets briefed an attorney whose car had a tyre puncture and as a result he arrived at court after the final order had been granted. He was fifteen minutes late. It's attorney approached BPL's attorneys requesting that the matter be recalled but they refused to do so, hence it brought this application. If it owed any monies to it, which is denied, there is sufficient security

which far exceeds the amount claimed. Kets stated that the liquidation application was brought on falsified grounds and that BPL missed various procedural steps. Kets also contended that BPL made unsubstantiated allegations that the applicant committed an act of insolvency. The winding up proceedings constitute an abuse of court processes.

[17] At paragraph 14 of the founding affidavit in Part B, she stated:

> "14. The applicant not having been served timeously, had in preparation for opposing the granting of the final order on the 5th March 2024, instructed a firm of attorneys to represent her in court who got stuck on the road due to puncture, and arrived in court just 15 minutes after the matter was called and on discussing on recalling the matter and abandoning of the judgment with the respondent's attorneys they refused, hence this application."

[18] It was stated, in reply, that Mrs Ketsekile is a lay person and needed to appoint an attorney, a costly exercise. Kets contends that had the court been made aware of the short service it would not have granted a final winding up order. It further stated that the court would have granted a further postponement which would not have been prejudicial to BPL.

BPL's case

[19] BPL raised the following points in *limine* that the provisions of section 354 are not available to Kets. They are only available to a liquidator, a creditor or a member. The fact that the application was brought by Kets, is defective because Kets does not have standing. It submitted that the application should be dismissed on this ground alone.

[20] To the extent that Kets relies on rescission in terms of the common law, it has failed to provide a reasonable explanation for not having taken steps since October 2023 to oppose the winding up application. There is no evidence whatsoever to show that Kets has a *bona fide* defence to the respondent's claim. BPL contends that from the time a letter of demand was sent to Kets up to the granting of the final winding up order, Kets did nothing to resist or react to all the processes. BPL submitted that this court should simply dismiss the application with costs. BPL contended it does not rely on 'acts of insolvency' as they are not relevant to liquidation proceedings. In the liquidation application BPL relied on Kets's commercial insolvency. BPL also stated that the existence of security is not relevant. BPL also stated that Kets is as a fact finally wound up.

Legal submissions

[21] Mr Ntila appeared for Kets and Mr Brown for BPL. Mr Ntila submitted that the sole director of Kets deposed to an affidavit in support of Kets's application and on that basis as a Director she has residual powers to act on the company's behalf in opposing the confirmation of the rule in the provisional winding up or to appeal against the winding up order. In this regard he relied on *Stortie v Nugent*[1]. He contended that there is no rational basis to distinguish the standing of a board of directors to appeal in the company's name against a winding up order from Kets's standing to apply to set aside such an order obtained without its knowledge. He was adamant that Kets does have standing to bring the rescission application.

[22] He relied on *Chetty v Law Society of Transvaal*[2] for the contention that sufficient cause or good cause has been shown by Kets. He further relied on *Cairns' Executors v Gaarn*[3] for the contention that two essential elements of sufficient cause for rescission are: (a) that the party seeking relief must present a reasonable and acceptable explanation for his default and (b) that on the merits such party has a *bona fide* defence which *prima facie* carries some prospects of success. In this regard he also relied on *De Wet and Others v Western Bank Ltd*[4].

[23] He submitted that when the provisional order was granted on 28 November 2023 at 09h30 there was pending service on Kets and this fact was not disclosed to the court. He relied on the allegations that the first time Kets became aware of the liquidation proceedings was only on 14 February 2024. On this basis he contends that Kets is entitled to rescission. Later on, he submitted that, only the provisional order was served on Kets. Mr Ntila seemed to confuse Kets with Mrs Ketsekile, whenever he referred to the applicant. When taken through the returns of service on Kets and on Mrs Ketsekile, he conceded that no issue was being taken with the service as reflected in the returns of service. He argued, that the only issue is that, on BPL's version, the deponent, Mrs Ketsekile was only served on 14 February 2024. He argued that in terms of the Act, it was incumbent upon the BPL to serve the winding up proceedings on the company, Kets. In making submissions in relation to the explanation for not appearing in court on the 5th of March 2024, the following is stated in the heads of argument at paragraph 10:

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[1] Stortie v Nugent and others 2011 (3) SA 783 (W) at 795 G – 796 C; also on O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk 1979 (1) SA 553 (T) at 5555H – 5558E.

[2] Chetty v Law Society of Transvaal 1985 (2) SA 756 (A)

[3] Cairns' Executors v Gaarn 1912 AD 181 at 186.

[4] De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042; alsoP E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A).

> "10. It is according to the applicant's own version paragraph 47.5.2 common cause that the applicant became aware of winding up proceedings on 14 February 2024 which service is undoubtedly a short service and therefore was the reason why the respondent was unprepared to attend the next court sitting of 05 March 2024 hence the application went unopposed."

[24] On the *bona fide* defence, he argued that Kets is not indebted to BPL and even if it was, which is denied, the debt owed to BPL by Kets is secured. There is more than sufficient security to secure the debt, he argued. On this basis there was no reason to bring winding up proceedings. He argued that where there is sufficient security it is not necessary to bring winding up proceedings. He further submitted that the security was three times more than the value of the loan. He contended that the winding up proceedings amount to an abuse of the process of court and that rescission ought to be granted.

[25] Mr Brown relied on *HR Computek (Pty) Ltd v Dr WAA Gouws (Johannesburg) (Pty) Ltd*[5], for the submission that section 354(1) of the Act excludes a company that is under compulsory winding – up from bringing the application envisaged in that section itself. He argued that that exclusion applies whether the company seeks to bring the application through its directors and without the co – operation of its liquidators, or otherwise. He submitted that although locus standi under section 354 (1) is limited, directors retain residual powers to bring an application for rescission under Rule 42 and the common law.[6]

[26] On the requirements for rescission of a winding- up order under section 354 of the Act, he relied on *Ward and another v Smit and others : In re : Gurr v Zambia Airways Corporation Ltd*[7] , that Kets must: show that exceptional circumstances exist for the setting aside of the order; provide a satisfactory explanation for not having opposed the application in the first place; and demonstrate prima facie prospects of success on the merits. He argued that Kets failed to satisfy all three requirements.

[27] In dealing with the requirements where Kets relies on common law for the rescission of the winding up order, he submitted that the applicable principles are well established. Kets is required to establish sufficient cause by demonstrating a reasonable and acceptable explanation for its default; establishing that, on the merits, such party has a bona fide defence which, *prima facie*, carries some prospect of success.[8]

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[5] HR Computek (Pty) Ltd v Dr WAA Gouws (Johannesburg) (Pty) Ltd [2023] JOL 60146 (GJ) at para 17.
[6] Praetor and Another v Aqua Earth Consulting CC (162/2016) [2017] ZAWHC 8 (15 February 2017) at para 4.
[7] Ward and another v Smit and others: In re: Gurr v Zambia Airways Corporation Ltd [1998} 2 All SA 479 (A).
[8] See: Chetty, Storti and Praetor, supra.

[28] He further submitted that a bona fide defence in liquidation proceedings would be that Kets is solvent, alternatively, that the claim relied on for liquidation was bona fide disputed on reasonable grounds. In this regard, he relied on, *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[9] . He submitted that Kets failed to satisfy these requirements and the application must accordingly fail.

[29] He further argued that the existence of security is not relevant to the consideration of solvency and the ability to discharge debts in the normal course of business, when they fall due, and to continue in business thereafter. That, he submitted, is the test for commercial solvency in the context of liquidation proceedings. In this regard he relied on *Absa Bank v Rheebokskloof*[10].

Discussion

Locus standi of Kets

[30] Kets's locus standi is predicated on the basis that Mrs Ketsekile being the sole director retains the power to cause the company to rescind the winding up order without co-operation of the liquidator.

[31] Section 354 provides:

> "(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and upon proof to the satisfaction of the Court that all proceedings in relation to the winding-up should be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
>
> (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."

[32] In the *Storti* decision relied upon by Kets, Gautschi AJ stated:

> "Secondly, the company, represented by its board of directors, has no locus standi in judicio under the section. A company has the right to rescind or appeal a winding-up order, or to oppose an application for winding up[11].

Mrs Ketsekile as a member of Kets, qualifies to cause Kets to bring the rescission application.

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[9] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T); Absa Bank Ltd v Rheebokskloof (Pty) Ltd 1993 (4) SA 436 (C) at 440 F-I; Boschpoort Onderneemings (Ptyvc) Ltd v Absa Bank Ltd 2014(2) SA 518 (SCA).
[10] Absa Bank Ltd v Rheebokskloof at 440 F-I.
[11] Storti, supra, page 795 para H.

[33] In the *Ward* decision, the Supreme Court of Appeal stated:

> "12. There is nothing in the section to suggest that the court's discretionary power to set aside a winding-up order is confined to the common law grounds for rescission. However, in the Herbst case, supra, Eloff J expressed the view (at 109 F- G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle ut sit finis litium'. (Abdurahman v Estate Abdurahman, supra, at 875 G -H.)
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> 13. It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed. (Cf Aubrey M Cramer Ltd v Wells NO, supra, at 305 H.)[12]

[34] In *HR Computek*, Coppin J (as he then was), relied on the *Praetor* decision by Binns-Ward J stated:

> "[19] And, more particularly, Binns-Ward J went on to hold as follows: "It seems to me that there is no rational basis to distinguish the standing of a board of directors to appeal in the company's name against a winding-up order from its standing similarly to apply to set aside such an order obtained without its knowledge. Indeed, in *Storti supra, loc. cit.,* it was stated that 'a company has the right to rescind… a winding-up order.' It is clear from that context that the learned judge had in mind that the application to rescind would be mounted by the company at the instance of its board, not its liquidators. I am willing to accept therefore that the second applicant as standing to bring the rescission application, although it would probably have been correct in such circumstances to have cited it without the words 'in liquidation' after its name." (my emphasis)
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> [24] The reasoning in *Praetor* is sound. There is no reason in logic why the company cannot, through its directors, and without the co-operation of its liquidators, apply to set aside the liquidation order that had been granted in its absence. After all, it is able to appeal against the grant of such an order in that manner and to take all the necessary steps to oppose the confirmation of a provisional liquidation order. The SCA in *Ward* did not preclude a company from doing so, and perhaps more fundamentally, did not deal with that issue at all. The *dicta* in *Impac* and *Ragavan*, and other matters, to the contrary, or suggesting the contrary, are, with respect, not correct, and are, in any event, *orbiter*." (Footnotes omitted)

[35] Having considered these authorities I am satisfied that Kets, through its director, has authority to bring the rescission application, without the co-operation of the liquidators. The authorities relied upon are progressive in that the approach adopted therein is not only consistent with the intended purpose in section 354(1), but it does not place a company under liquidation at the mercy of the liquidators (that their co – operation must be sought) even where there are valid grounds to challenge the liquidation order. It follows that the lack of standing point must fail.

[12] Ward, above, paras 12 and 13.

Merits

[36] I now turn to the explanation proffered by Kets for not opposing both the provisional and final orders. The starting point will be the returns of service. Section 346 A (1) (d) of the Companies Act provides that a copy of the winding -up order must be served on the company, unless the application was made by the company.

[37] The court in *Ward* found that a winding-up order shall only be set aside in exceptional circumstances whereupon a satisfactory explanation is furnished for not having opposed the granting of a final order or appealed against the order – that for a court to exercise its discretion, no less would be expected of an applicant who seeks to have a judgment rescinded at common law. With those principles in mind one must examine the reasons for the failure to oppose the grant of the final relief.

[38] Service of the application for the winding up is central to this application. The undisputed evidence that has been put up by BPL shows that: the letter of demand was properly served on Kets by the sheriff at its registered address and was received by it. Not only did it receive it, Kets instructed its attorneys of record to write to ENS in relation thereto. Despite the enquiries about settlement plans of the debt made to the attorneys of Kets by ENS, no response nor settlement plans were made. On these facts it has been proved by BPL that a letter of demand was properly served and considered by Kets, hence it instructed its attorneys of record. The demand was not met and therefore there was justification, on the facts, for the bringing of liquidation proceedings.

[39] Section 346A of the Companies Act provides that a copy of the winding up order must be served on the company. As aforementioned on 24 October 2023 the sheriff ‘s return of service evinced that the rule 41A notice, notice of motion and founding affidavit with all annexures, were served on Kets at its registered and business address. The sheriff also served on the employees and trade unions of Kets at its registered and business address. The sheriff also served on the employees by affixing to a wall at Kets’s address, on the same day being, 24 October 2023, the aforementioned process. Further service was also effected on Kets’s legal representatives at Luxolo Fodi Inc. on 24 October 2023. There are returns of service from the sheriff evincing how he handled and served these processes on Kets, its employees and trade unions and on its attorneys. Most

importantly, the returns of service have the following endorsement "*Note appearance date 28- Nov-2023*". There is no explanation at all for the applicant's non- appearance at court on that date. Further, after the provisional order was granted in the absence of Kets, that too, was served on Kets at its registered address.

[40] Kets does not take issue with BPL's compliance with the formal requirements for a winding up application. A service affidavit was filed in compliance with section 346(4)(a) and (b) of the Act. Kets seems to suggest that it was not served with the winding- up application prior to the granting of the provisional order. That is not correct. There is a return of service which evinces service on Kets at its registered address on 14 February 2024. The provisional winding up order was served on Kets at its registered address. The sheriff recorded that she found Mrs Ketsekile present and was in charge of the residence/ office of Kets at the time of service. The sheriff also recorded that she explained the nature and exigency of the court order dated 28 November 2023, to the deponent, Mrs Ketsekile. The service affidavit deposed to by Mr Stuart Andrew Tarr, BPL's correspondent attorney confirms that. I am accordingly satisfied that there was proper service on Kets prior and after the grant of the provisional order. Kets seems to conflate service on the company and on its director. The attack on service in this regard is misplaced. The concession made by Mr Ntila to the effect that there was service on Kets was well made.

[41] What triggered the winding up application was the failure of Kets to meet the demand for payment or providing security to the satisfaction of BPL. BPL did not conceal the fact that it held security for its claims against the respondent.

[42] The applicant stated the following from paragraph 27:

> "27. Even if the respondent's debts were to remain unpaid, the respondent would not suffer as it hold to it cession of a monthly rental to its property held by it as security. Amongst other assets held as security is the insurance covering the non-payment of the debt itself. For this matter not to be ventilated properly the applicant will be left in the dark as regard to other assets that were tendered as security with the respondent company. It is on those grounds and as demonstrated by the applicant that the liquidation at this stage was not an option in view of the amount of security that the respondent has. In respect of the willful default which is also requirement for rescission the applicant's submissions are illustrated in paragraph 14 of her founding affidavit."

[43] I have referred to the returns of service from the sheriff that show that as early as 24 October 2023 Kets was served with the application for provisional winding up. There is no explanation whatsoever on the reasons why Kets took no steps to oppose the

provisional order. Between 23 August 2023 and 15 September 2023 there is no explanation from Kets as to why it did not at the very least take up the offer, make payment plans, secure or compound the debt as indicated in the letter of demand and that of ENS dated 15 September 2023.

[44] It did not even indicate how much rental was ceded to BPL and how such rental was sufficient to pay off the arrears. No details whatsoever. No figures, how much was it paying, how it would pay the arrears or even indicate its attempts to pay those arrears. Most importantly, no details about its solvency. There are startling allegations made in the replying affidavit by Kets. They are:

> "(v) Save to note service (SAT 3) to LUXOLO FODI INC, and fails to Understand as to why they were served as they were neither my Attorneys of record at the time, nor parties to the proceedings"

[45] These are Kets's attorneys who requested that service be effected on them as early as 14 September 2023. Mr Ntila of Luxolo Fodi Inc. appeared and argued the rescission application before this court. He also appeared for Kets in the stay of proceedings (Part A) before Dunywa AJ. These averments are clearly misleading.

[46] I now revert to the contents of paragraph 10 of the heads of argument ,quoted above. The contents of that paragraph differ materially from what is stated in paragraph 14 of the founding affidavit:

> "14.
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> The applicant, despite her not having been served timeously., had in preparation for opposing the granting of a final order on the 5th March 2024, instructed a firm of attorneys to represent her in court who got stuck on the road due to puncture, and arrived in court just 15 minutes after the matter was called and on discussing recalling the matter and abandoning of the judgment with the respondent's attorneys they refused , hence this application."

[47] I accept that personal service of the provisional order and the application was effected on Mrs Ketsekile on 14 February 2024. That, in my view, is of no moment because on Ket's version, there was effective service of the order on Kets, its attorneys and on interested parties before and after the grant of the provisional winding up order. Luxolo Fodi Inc. were instructed on behalf of Kets as early as 14 September 2023 after the delivery of the letter of demand. If on 05 March 2023, Kets's attorney was delayed in attending court due to a tyre puncture, he or she did not confirm those allegations. His or her name is not known, there are no details of where he/she was when his\her car had a puncture. Most importantly, there is no explanation of why a notice to oppose the

granting of a final winding up order was not delivered and/ or with an answering affidavit. Mr Tarr confirmed that an attorney purporting to act for Kets approached him at approximately 11h00, indicating that he had instructions to oppose the granting of the final order. When informed that the order had been granted he indicated that an application for rescission would follow.

[48] Kets, when seeking rescission of the winding – up orders, is obliged to place facts that would cause this court to find in its favour in this application. As indicated above there is nothing said about the state of solvency of Kets. The fact that an attorney had arrived after the order was made but to date there are no facts placed to controvert those placed before court by BPL in relation to the commercial insolvency of Kets, except for bare denials, does not constitute an acceptable explanation for the default.

[49] This is a litigant who was properly served with the application as early as 24 October 2023. Kets's attorneys of record are also silent. The complaint that the period from 14 February 2024 until 5 March 2024 was short and Kets could not instruct an attorney because it needed to have funds to instruct an attorney, does not assist Kets because Luxolo Fodi Inc. confirmed instructions from Kets as early as September 2023. In fact, according to the deponent she was aware that a notice to oppose had to be filed by 29 February 2024 but there is no explanation advanced for failure to do so. A period of about four months lapsed from October to February 2024 and there was no challenge to the winding – up orders.

[50] In argument, Mr Ntila was constrained to concede that there is evidence that the application for the winding up was served on Kets. The fact that the director of Kets was served with the provisional winding up order on the 14th of February 2024, means that she was aware that the return date was 5 March 2024 as indicated on the order. No legal steps were taken to register opposition to the granting of the final order. No notice to oppose was filed nor was there an answering affidavit filed to resist the grant of either the provisional or the final order. Kets remained supine. I accordingly find that there is no reasonable and acceptable explanation for the default.

Is there a bona fide defence which, prima facie, carries some prospect of success?

[51] The only defence is that there was sufficient security that was put up by Kets to secure the debt. There are no details or facts whatsoever dealing with, amongst others, how Kets fell into arrears; whether it has liquid assets or readily realizable assets available

out of which or the proceeds of which , Kets is in fact able to pay its debts; whether it has since recovered from the financial difficulties it experienced; how much rental was ceded to BPL and to what extent would such rental liquidate the arrears; how is Kets trading; how is it able to meet its debts when these debts become due and payable and why it had failed to make an offer to settle the debt as invited to do so by BPL. None of those details are given in the rescission application. Most importantly, there is no logical defence put up in respect of the merits to demonstrate that Kets is solvent. Failure to place such facts before this court has resulted in this court not to be able to locate a *bona fide* defence that, prima facie, carries some prospect of success. It follows that Kets has failed to meet this requirement as is required if the application is brought under common law.

[52] In *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others*[13] where in was found as follows:

> "[31] The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, it is whether the company 'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant?' Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading." (excluding footnotes)

[53] In my view, Kets also failed to make out a case for the relief sought in terms of section 354 of the Companies Act because no special or exceptional circumstances were advanced to support a rescission of the winding – up orders. In the circumstances and for all the reasons advanced the rescission application must fail.

Costs

[54] The general rule is that a successful party is entitled to costs. In the exercise of this court's discretion, I do not intend to grant a punitive cost order against Kets as

[13] Murray and Others NNO v African Global Holdings (Pty) Ltd and Others 2020(2) SA 93 (SAC) at para 31.

requested by BPL. The reason for that is that in the Part A order Kets was ordered to pay costs on a punitive scale because of the manner it conducted itself in dealing with that application. Some of the conduct frowned upon in Part A does feature in this application. To punish it for the same conduct twice will not be in the interests of justice. It is for that reason that I do not find that a punitive cost order is warranted. Kets has, in any event, succeeded in resisting the lack of standing point in limine.

ORDER

[55] In the result the following Order is made:

55.1 The point in limine based on the applicant's lack of locus standi is dismissed with costs.

55.2. The application for rescission of the winding – up orders is dismissed with costs.

T.V NORMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the APPLICANT	**:**	**MR NTILA**
Instructed by	**:**	**LUXOLO FODI INC.**
c/o	**:**	**MABENTSELA & ASSOCIATES**
		110 HIGH STREET
		MAKHANDA
		TEL: 072 129 3484
		EMAIL: kaypeentila@outlook.com
		REF: MR NTILA:2309/NM/023
For the RESPONDENT	**:**	**ADV BROWN**
Instructed by	**:**	**EDWARD NATHAN SONNENBERGS INC.**
		1 RICHEFOND CIRCLE
		RIDGESIDE OFFICE PARK
		UMHLANGA
		REF: C SCHOON/0507896
c/o	**:**	**DE JAGER & LORDAN INC.**
		2 ALLEN STREET
		MAKHANDA
		EMAIL: stuart@djlaw.co.za / chantal@djlaw.co.za
		REF: ST/cb/B694
Matter heard on	**:**	**13 November 2024**
Judgment delivered on	**:**	**03 December 2024**