THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No: 5790/2021
Reportable: YES/NO

In the rescission application between:

OLYMPIC FLAME (PTY) LTD Applicant[1]
(Registration no.: 1971/[…])

And

CONNECTPRO (PTY) LTD t/a NASHUA WELKOM Respondent[2]
(Registration no.: 2018[…])

In the rule 30/30A applications between:

CONNECTPRO (PTY) LTD t/a NASHUA WELKOM Applicant
(Registration no.: 2018[…])

And

OLYMPIC FLAME (PTY) LTD Respondent
(Registration no.: 1971/[…])

Coram: Opperman J

Heard: 26 October 2023

Delivered: 24 January 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 24 January 2024. The date and time of hand-down is deemed to be 15h00 on 24 January 2024

Judgment: Opperman J

[1] "Olympic".
[2] "Nashua".

Summary: Rescission application – contracts – condonation applications – rule 30/30A applications – late filing of replying affidavit in the rescission application & filing of further affidavit in the form of a confirmatory affidavit by applicant without leave of the court – authority to litigate

JUDGMENT

INTRODUCTION

[1] At the core of this case is a rescission application.[3] It is an application brought on notice of motion[4] for the rescission and setting aside of a default judgment granted on 9 June 2022.[5] The

[3] In the case of *Thwala v Miway Insurance Ltd; In re: Miway Insurance Ltd v Thwala* (A 230/21) [2022] ZAGPPHC 843 (8 June 2022) (Du Plessis AJ (with Davis J) at [24] it was confirmed that a rescission application is interlocutory since it is associated with the main action. It is only once an application for a rescission order is dismissed that it will have a final effect.

[4] "Rescission Application" at pages 1 to 22.

[5]
IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN
Before the Honourable Acting Deputy Justice President C REINDERS
On the 9th day of JUNE 2022

In the matter between:
CONNECTPRO (PTY) LTD t/a NASHUA WELKOM [Registration number: 2018/[…]] — Applicant/Plaintiff
and
OLYMPIC FLAME (PTY) LTD [Registration number: 1971[…]] — Respondent/Defendant

Having considered the documents filed of record and having heard the legal practitioner for the applicant/plaintiff,
IT IS ORDERED THAT:
1. Default judgment is granted against the Respondent in favour of the Applicant in the following terms:
CLAIM 1:
(a) The Respondent shall immediately return to the Applicant the CCTV with serial number: C4934927.
(b) The Respondent shall pay the Applicant the amount of R135 958.68.
(c) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of summons served to date of payment.
(d) The Respondent shall pay the Applicant the amount of R626 143.48.
(e) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of judgment to date of payment.
(f) Costs of suit on an attorney and client scale.
CLAIM 2:
(a) The Respondent shall immediately return to the Applicant the following goods:
  (i) Time and attendance: serial number: OGT6040056032200071;
  (ii) Time and attendance: serial number: OGT6040056032200085;
  (iii) Time and attendance: serial number: OGT6040056032200179;
  (iv) Time and attendance: serial number: OGT6040056032200392;
  (v) Time and attendance: serial number: OGT6040056032200722;
  (vi) Time and attendance: serial number: OGT6040056032200822;
  (vii) Time and attendance: serial number: 3484160300214;
  (viii) Time and attendance: serial number: 6662181960342;
  (ix) MP2501SP: serial number: E334M720384.
(b) The Respondent shall pay the Applicant the amount of R28 225.03.

default judgment order, in essence, orders Olympic to pay a total of R1 842 284.68[6] to Nashua and return to Nashua about twelve items of movable equipment with specified serial numbers.

[2] The parties on both sides, allegedly, did not comply with the contract(s) they entered into with each other and pledged to comply with. It subsequently exploded into conduct, correspondence and litigation that reminds of the epic remark in the judgment of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021):

> [130] What is true is that Mr Zuma's behaviour has resulted in a monumental waste of judicial resources. At the heart of this matter, there is a potent need, to uphold the integrity of the administration of justice and to send a message to all litigants that rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and *bona fide* applications, and who have not, at every turn of the page, sought to abuse judicial process.

[3] The following presented for adjudication:

(c) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of summons served to date of payment.
(d) The Respondent shall pay the Applicant the amount of R251 887.60.
(e) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of judgment to date of payment.
(f) Costs of suit on an attorney and client scale.

CLAIM 3:

(a) The Respondent shall immediately return to the Applicant the KX-HTS32with serial number: 9CCTI00586.
(b) The Respondent shall pay the Applicant the amount of R67 588.03.
(c) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of judgment to date of payment.
(d) The Respondent shall pay the Applicant the amount of R266 266.11.
(e) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of judgment to date of payment.
(f) Costs of suit on an attorney and client scale.

CLAIM 4:

(a) The Respondent shall immediately return to the Applicant the CCTV with serial number: D22785684.
(b) The Respondent shall pay the Applicant the amount of R114 835.94.
(c) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of summons served to date of payment.
(d) The Respondent shall pay the Applicant the amount of R351 379.81.
(e) Interest *a tempore morae* on the aforesaid amount at the prevailing rate of interest per annum calculated from date of judgment to date of payment.
(f) Costs of suit on an attorney and client scale.

ORDER OF THIS COURT
COURT REGISTRAR
HILL, McHARDY & HERBST INC
EKA & ASSOCIATES

[6] Heads of argument for Olympic dated 12 April 2023 at paragraph 2. The money (an amount of R1 849 000.00) was, according to counsel for Olympic, paid into the trust account of one Mr. Kruger's firm as security for the judgment debt. See paragraph 51.11 of the heads of argument for Olympic dated 12 April 2023. This occurred after the urgent application on 4 August 2022 praying for, *inter alia*, the stay of the attachment of Olympic's bank account. The urgent application was struck from the roll for lack of urgency. The payment occurred on 10 August 2023.

1. A condonation application for the late filing of the rescission application;
2. the authority to have launched the rescission application and authority to oppose the first rule 30/30A application;
3. the first rule 30/30A application on the late filing of the replying affidavit in the rescission application;
4. the conditional condonation application for the late filing of the replying affidavit in the rescission application;
5. the second rule 30/30A application on the filing of the confirmatory affidavit;
6. the rescission application;
7. Costs.

[4] All the issues in the case are entwined and entangled with the rescission application and to the extent that it may not be regarded in isolation. The facts and merits of the case as it evolved and the legal issues that developed stacked the one on the other and this caused that the conspectus of evidence and law is required to be considered to make a final finding on the applications and specifically, the rescission application.

THE PARTIES

[5] "Olympic" is OLYMPIC FLAME (PTY) LTD, a private company with limited liability, incorporated in terms of the laws of South Africa and having its registered address and principal place of business in Welkom in the Free State.

[6] Mr. Johny Abatzoglou, a director of Olympic, passed away in September 2021, leaving his wife Ms. Eleni Abatzoglou (Ms. Abatzoglou), and his brother, Mr. Aristides Abatzoglou (Mr. Abatzoglou) as the sole remaining active directors.[7]

[7] "Nashua" is CONNECTPRO (PTY) LTD t/a NASHUA WELKOM, a private company with limited liability, incorporated in terms of the applicable laws of South Africa, having its main place of business in Welkom in the Free State.[8]

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[7] As far as could be ascertained from the papers Mr. Kruger was the erstwhile attorney of Mr. Abatzoglou. Due to a conflict of interests, he recommended Mr. Kriek and he was appointed by Mr. Abatzoglou to deal with the action that ended in the default judgment. Mr. Kriek withdrew as attorney and one Mr. Smith was appointed. Hereafter followed Piet Haasbroek Attorneys as represented by Mr. Castro. Mr. Hannes Peyper from Peyper Attorneys also featured when the impasse between the directors on the High Court proceedings in this case had to be resolved.

[8] Mr. van Wyk from Van Wyk Attorneys seems to have represented Nashua throughout the litigation.

INTRODUCTORY REMARKS

[8] It was argued by counsel for Olympic that the final test in the case in its totality is grounded in prejudice suffered by any of the parties; or not. He maintained that the interest of justice must be served and measured in the context of prejudice. He argued that the case must be allowed to go to trial and the issues surrounding the contracts be vented and ruled upon.

[9] What should have been this simple was complicated by the conduct of Olympic. Various issues in law were caused by them that caused litigation in reaction and this burdens the case. The reality is that the pendulum of prejudice swung both ways; the administration of justice to have suffered the most.

[10] Parties may not twist, manipulate and maneuver the rules of law as, when and how it suits them; it simply destroys the administration of justice. Litigants have the right and the duty to keep each other accountable to the rule of law. In the matter of *Zipp v Zipp*[9] Sutherland J said, and I agree, that:

> [27] Too often, legal practitioners display sycophantic acquiescence in their client's desires. This is wrong. Diligent and professional advice includes frankly telling a would-be litigant what the realities of the law are. Indulging in litigation which serves only to wear down the opposition or protract the case is a violation of the duty of both attorneys and counsel to the process of the court. Litigation is not a free for all. Our adversarial system of litigation does not license practitioners, whether attorneys or counsel, to ignore their duties to the court which requires them to act so as to promote the efficacy and efficiency of the process of the court. When practitioners, in their zeal for loyalty to their clients, abandon this duty they behave unprofessionally. (See: D.Ipp, 'Counsel's duties to the Court' (1998) 114 LQR 63)

THE HISTORY OF THE LITIGATION & SOME FACTS[10]

[11] In broad strokes and for context;[11] the parties entered into four rental agreements in 2019. On 11 May 2021, in response to a demand for payment of arrears rental under the agreements in question, Olympic notified Nashua that it was cancelling the rental agreements. Nashua accepted Olympic's repudiation, terminated the rental agreements, and instituted action, claiming the return of the rented equipment, arrears rental and the contractually agreed pre-estimate of Nashua's liquidated damages.

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[9] Unreported judgment in *GH Zipp v LA Zipp*, in the High Court of South Africa: Gauteng Local Division, Johannesburg, Case number 2016/23915, judgment on 16 February 2017.

[10] The chronology of events as drafted by counsel for Olympic attached to their heads of argument dated 12 April 2023 must also be regarded here since it provides a helpful depiction of the events in the case.

[11] Nashua's heads of argument dated 14 April 2023 at paragraphs 4 to 13 and Olympic's heads of argument dated 12 April 2023 at paragraphs 1 to 7.

[12] The combined summons in the action was issued by Nashua on 13 December 2021 and served on 17 January 2022.

[13] Olympic defended the action but failed to deliver its plea within the days stipulated in the rules. Nashua then served a notice on Olympic, requiring it to deliver its plea within five days. Olympic failed to do so and was thus *ipso facto* barred from delivering a plea.

[14] Nashua gave Olympic five days' notice of its intention to apply for default judgment. Still, Olympic ignored the litigation. Nashua applied for and was granted default judgment on 9 June 2022.

[15] The papers filed of record[12] show that the legal representative Mr. Kriek[13] of Olympic received and was served with the notice of application for judgment by default in terms of rule 31(2) and rule 31(5) on 1 June 2022 at his offices in Bloemfontein.

[16] Olympic had about four months to rescue their case from the date they received service of the action in January 2022. The legal representative withdrew as attorney of record on notice and served this notice on Nashua on 8 June 2022. It is not known to the court what the basis for the withdrawal of the attorney at this crucial stage was. It is common cause that Mr. Abatzoglou never communicated or instructed the attorney, one Mr. Kriek, on this case after he engaged his services. According to the papers Mr. Kriek's place of business is in Bloemfontein.

[17] Olympic, and specifically Mr. Abatzoglou a director of the company,[14] became aware of the judgment on 1 July 2022 when the Sheriff attended their main office to execute a warrant on the default order.

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[12] "Default Judgment" at page 7.

[13] Eben Kriek, EKA & Associates, 62a, Calliope Drive, Pentagon Park, Bloemfontein. Email: eka@law4us.co.za.

[14] Ms. Eleni Abatzoglou (Ms. Abatzoglou) and Mr. Aristides Abatzoglou (Mr. Abatzoglou) are the sole remaining active directors of OLYMPIC FLAME (PTY) LTD. According to the replying affidavit of Mr. Abatzoglou in the rescission application at paragraph 38.6 ("Rescission Application" at pages 219 to 220) "the applicant"; Mr. Abatzoglou owns and manages various restaurants, shops and the like and employs close to 300 employees. More specifically, the applicant's business entails the ownership and management of various companies in and around Welkom. These businesses include Ocean Basket, Wir Debonairs, Babazul, Coco Fino, Liquor Bro's, Al Mexicano Loco *et cetera*. He is ultimately responsible for all of these businesses and that he is required to travel extensively, worked extraordinarily long hours and that he is regularly out of the office.

[18] Mr. Smit was now appointed as legal representative by Mr. Abatzoglou, and their first consultation was on 3 July 2022.

[19] The rescission application had to be filed on 29 July 2022.

[20] On 3 August 2022 Mr. Abatzoglou launched an application for the rescission of the default judgment in the name of Olympic. It was set down for hearing on 30 August 2022. Olympic withdrew this application on 4 August 2022.

[21] The 3rd of August 2022 is also the date on which Olympic learnt that Nashua had attached its main bank account.

[22] On 4 August 2022 Olympic brought an urgent application seeking a stay of the writ of execution and that it be granted leave to file a rescission application. The application was struck off the roll with costs because it lacked urgency. The application for the stay of the writ of execution is apparently still pending. The outcome of the application or progress thereof, is unknown to the court.[15]

[23] Olympic launched the present rescission application on 19 August 2022, thirty-four days after it gained knowledge of the default judgment order.[16]

[24] Olympic must now seek condonation for the filing of the rescission application *fourteen days* outside the 20 days specified in rule 31(2)(b) that was on 29 July 2022.

[25] On 23 August 2022 Mr. Smit from Bezuidenhout's Attorneys filed their notice of withdrawal as attorneys of record for Mr. Abatzoglou and supposedly so, Olympic.

[26] The rescission application was in the form of a notice of motion and was even referred to as "Notice of Motion" on page 2 of the rescission application issued on 19 August 2022.

[27] Nashua filed a notice in terms of rule 7 on 7 September 2022:

NOTICE IN TERMS OF RULE 7[17]

[15] Nashua's heads of argument dated 15 August 2023 at paragraph 10.
[16] Olympic's heads of argument dated 12 April 2023 at paragraph 3.
[17] "Rescission Application" at pages 73 to 76.

KINDLY TAKE NOTE THAT the Respondent disputes the authority of Piet Haasbroek Attorneys and, consequently its correspondent, Honey Attorneys, to act on behalf of the Applicant and request that it provides the Respondent with the following documentary proof within ten days of service hereof:

(a) Copies of the power of attorney, if any

(b) A copy of the resolution taken by the Applicant, if any, authorizing Piet Haasbroek Attorneys and its correspondent, Honey Attorneys to institute this application.

DATED at BLOEMFONTEIN on this the 6th day of SEPTEMBER 2022.

[28] Nashua's opposing affidavit was delivered on 15 September 2022. Olympic delivered its replying affidavit in the rescission application *twenty-five court days* later and on 20 October 2022.

[29] Nashua served a notice in terms of rule 30/30A on 21 October 2022 (later set down for hearing on 20 April 2023) on Olympic in terms of which Olympic was notified that its replying affidavit in the rescission application was delivered outside the period contemplated by rule 6(5)(e) and that this constitutes an irregular step and/or a failure to comply with the rules. Olympic was afforded ten days to remove the cause of the complaint.

[30] Olympic's attorney responded in a letter on 24 October 2022 that the rescission application is interlocutory in nature, and the period for delivering a reply as contemplated by rule 6(5)(e) therefore does not apply. Olympic maintained that rule 6(11) is applicable.

[31] On 4 November 2022 the *ten-day period for Olympic to remove the cause of complaint expired*. On 15 November 2022 Olympic was informed that Nashua will proceed with an application to strike out Olympic's replying affidavit. The matter was removed from the roll on 8 December 2022 by Nashua on notice dated 2 December 2022. The full rule 30/30A application was launched on 17 November 2022.

[32] Nashua complained on 15 November 2022 that:[18]

22. The principle of finality in legal proceedings is fundamental. The imposition of time limits to pursue and (sic) application such as the rescission application in issue here is meant to give effect to the basic principle that public interest demands that litigation must come to an end. The need for litigation to end complements the need for legal certainty in relation to the finality of disputes.

23. The supine manner in which Olympic Flame has approached the litigation in this matter is hardly indicative of a serious desire on the part of Olympic Flame to challenge the default judgment and

[18] "First Rule 30/30A Application" at page 10.

prejudices Nashua's right to finality in this litigation. *To make matters worse, I believe that Nashua has demonstrated in its answering affidavit to the rescission application that Olympic Flame does not have a bona fide defence.* (Accentuation added)

[33] Olympic opposed the application and brought a conditional condonation application much later. The conditional counter condonation application was only filed on 8 February 2023 and ironically with an allegation that the rule 30/30A application's true purpose is to delay and frustrate and harass the applicant in the rescission application:

F. CONCLUSION

39. For the reasons addressed above, the respondent's uniform rule 30/30A application is an abuse. The application lacks merit. Its true purpose is to engineer a delay and in so doing frustrate and harass the applicant with an application such as this. It is therefore respectfully asked that application (sic) be dismissed with costs, which costs are to be on the scale as between attorney and client.

40. In the alternative to the above:

40.1. If the Court finds that the applicant's replying affidavit in the rescission application was filed late and/or out of time, then and in such event, the applicant seeks condonation for such late and/or out of time filing. It is, with respect, in the interests of justice that the court hearing in determining the rescission application have regard to the applicant's replying affidavit.[19]

[34] This was Nashua's notice of motion on 17 November 2022:[20]

NOTICE OF MOTION:

APPLICATION IN TERMS OF RULES 30 AND 30A

KINDLY TAKE NOTICE that application will be made on behalf of the RESPONDENT, Connectpro (Pty) Ltd t/a Nashua Welkom (Nashua) on 8 DECEMBER 2022 at 09:30 or as soon thereafter as counsel may be heard for an order in the following terms:

1. That the replying affidavit delivered by the applicant, Olympic Flame (Pty) Ltd in the rescission application in the above case number be struck out;
2. That the applicant be ordered to pay the cost of the application;
3. Further and/or alternative relief.

[35] In the meanwhile, on 2 December 2022 another notice in terms of rule 7 was filed by Nashua notifying that there does not exist any indication that Mr. Abatzoglou a director of the company or their attorneys have authority to litigate on behalf of Olympic Flame (Pty) Ltd.

NOTICE IN TERMS OF RULE 7[21]

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[19] "First Rule 30/30A Application" at page 70.
[20] "First Rule 30/30A Application" at pages 1 to 2.
[21] "First Rule 30/30A Application" at pages 43 to 46.

KINDLY TAKE NOTE THAT the Respondent disputes the authority of Piet Haasbroek Attorneys and, consequently its correspondent, Honey Attorneys, to oppose the Rule 30 and Rule 30A application on behalf of the Applicant and request that it provides the Respondent with the following documentary proof within ten days of service hereof:

(a) Copies of the power of attorney; if any

(b) A copy of the resolution taken by the Applicant, if any, authorizing Piet Haasbroek Attorneys and its correspondent, Honey Attorneys to oppose this application.

DATED at BLOEMFONTEIN on this the 2nd day of DECEMBER 2022.

[36] The notice was ignored by Olympic.

[37] On 9 February 2023 the case was back on the roll and the court ordered as follows:

Having considered the documents filed of record and having heard the legal practitioners,

IT IS ORDERED THAT: (By agreement between the parties)

1. The application is postponed to 20 APRIL 2023 to the opposed roll to be argued;
2. The Respondent's replying affidavit in terms of the rule 30/30A application to be filed before or on 27 FEBRUARY 2023;
3. The heads of arguments to be filed as per court directives;
4. Costs to stand over for later adjudication.

[38] The replying affidavit was filed on 27 February 2023. In the affidavit it was made clear by Nashua that Olympic Flame (Pty) Ltd as represented by Mr. Abatzoglou and their legal representatives had neither the authority to bring the rescission application, nor do they have the authority to oppose the rule 30/30A application.

[39] Nashua capitulated and yielded in favor of Olympic and the administration of justice in that, if Olympic be so fortunate to surmount the obstacle of authority, Nashua shall not contest the conditional counterapplication for condonation. This is what is contained in the replying affidavit:[22]

8. Because this application and rescission application is intertwined in respect of the authority issue, and because the legal question whether Nashua rightly invoked Rule 30/30A will ultimately be determinative of costs only, Nashua will propose to Olympic Flame that this application and the recission application be heard together in order to save costs and time.

Olympic Flame did not properly authorise the opposition to this application.

[22] From page 80: “First Rule 30/30A Application”.

9. The issue demanding immediate attention is that of authority. Nashua contends that neither the rescission application purportedly instituted on behalf of Olympic Flame nor the opposition to this application was properly authorised.

10. Mr Johny Abatzouglou (sic), a director of Olympic Flame, sadly passed away in September 2021, leaving his wife Ms. Eleni Abatzoglou (Ms. Abatzoglou), and his brother, Mr. Aristides Abatzoglou (Mr Abatzoglou) as the sole remaining active directors.

11. In the small town of Welkom news travels fast and Nashua heard through the scuttlebutt that Mr. and Ms. Abatzoglou were not seeing eye to eye because she was being side-lined as a director. And that is why Nashua was so intently focused on the issue of authority in the rescission application. I jump ahead in the timeline to say that credence was given to these rumours when, in December 2022, *Piet Haasbroek Attorneys suggested that I attend round table discussions between it and Peyper Attorneys because Nashua had an interest in an "impasse" that had arisen between Mr. and Ms. Abatzoglou about "the high Court proceedings."* I attach a copy of the letter marked RR1. Nashua declined the invitation. (Accentuation added)

12. Nashua raised the point that there was no allegation in Mr. Abatzoglou's founding affidavit that the institution of the rescission application was properly authorised. In addition, Nashua served under Rule 7 requiring not only a power of attorney, but also a company resolution which authorised the appointment of Piet Haasbroek Attorneys and its correspondent, Honey Attorneys, to institute the rescission application. A copy of the Rule 7 notice is attached marked RR2.

13. The Rule 7 notice is still unanswered. In the replying affidavit deposed to by Mr Abatzoglou's (sic) he says:

> "34.4 ... Ms. Eleni Abatzoglou and I - in our capacities as active directors of the applicant-confirm and acknowledge that Piet Haasbroek Attorneys, the applicant's attorneys of record (with all of the usual and expected duties, obligations, responsibilities powers and functions flowing from and or arising out of such appointment) have the requisite authority to bring this application, defend the action, and to prosecute such proceedings to finality (including all incidental, interlocutory and\(sic) or ancillary proceedings and/or appeals in relation thereto).
>
> 34.5 Additionally, to the extent required, Eleni Abatzoglou and I similarly ratify and condone any and all steps previously taken or taken thus far by Piet Haasbroek Attorneys on behalf of the applicant in this application and its prosecution.
>
> 34.6 For the avoidance of any doubt, the aforesaid is also confirmed, on behalf of the applicant and on her behalf, by Ms. Eleni Abatzaglou (sic) via her confirmatory affidavit attached hereto."

14. *But the purported confirmatory affidavit of Ms. Abatzoglou that is attached as annexure RA10 to the purported replying affidavit is unsigned.*[23]

15. When Olympic Flame purportedly opposed this application, Nashua served a further notice under Rule 7 requiring not only a power of attorney, but also a company resolution which authorised the appointment of Piet Haasbroek Attorneys and its correspondent, Honey Attorneys, to oppose this application.

[23] The affidavit is thus valueless and illegal as evidence.

16. The deponent to the answering affidavit in the present application, Mr Jean Raymond Castro (Mr. Castro) alleges that he is duly authorised to oppose the application on behalf (sic) Olympic Flame and to represent it, relying on a confirmatory (sic) from Mr. Abatzoglou.

17. *But nowhere in the confirmatory affidavit of Mr Abatzoglou is it alleged that the opposition to this application is properly authorised*. Instead, Mr. Abatzoglou simply affirms that he is a co-director of Olympic Flame and that he has duly authorised his attorney to depose to the answering affidavit. There are two obviously (sic) difficulties with the allegation, Firstly, Mr. Abatzoglou speaks of "his" attorney, Secondly, the allegation is superfluous and irrelevant because the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. *It is the opposition to the application that must have been authorised by the directors of Olympic Flame.* (Accentuation added)

This application is simply about an irregular step alternatively a failure to comply with the Rules of Court

18. Olympic Flame characterises the present application as a stratagem to prevent it from delivering a replying affidavit. That is hyperbolic and a distortion of what this application is about.

19. The question of whether Olympic Flame was obligated to deliver its replying affidavit within the prescribed 10 court days is a purely legal matter. If such an obligation did exist, then Rule 30/30A was rightfully triggered. *In order to rectify the irregularity or comply with the Uniform Rules, Olympic Flame simply had to seek condonation, which it ultimately did-albeit conditionally.* (Accentuation added)

20. The approach taken by Olympic Flame is truly curious. On the one hand, it unleashes an unrestrained *ad hominem* attack on Nashua in response to a wholly legitimate legal challenge. On the other hand, it requests the court's forgiveness for the tardy submission of its replying affidavit if Rule 30/30A was rightfully triggered. It is difficult to reconcile these two divergent positions and it is an affront to the principles of a legal process that demands consistency and credibility from parties appearing before the court.

21. *As I indicated, if Olympic Flame be so fortunate to surmount the obstacle of authority, Nashua shall not contest the conditional counterapplication for condonation. However, I must draw attention to the following point. Olympic Flame has accused Nashua of attempting to capitalize on a default judgment that was obtained fortuitously and without Olympic Flame's knowledge or presence. This rhetoric lacks any foundation and is wholly unsustainable when one considers the objective facts detailed in Nashua's answering affidavit.* (Accentuation added)

22. *I also want to point out that in the replying affidavit delivered by Olympic Flame, it has attempted to augment a fundamentally inadequate application for rescission. That it may not do. It must stand and fall by the case that it made in the founding affidavit.* (Accentuation added)

Conclusion

23. Neither the rescission application nor the opposition to this application is properly authorised. That being so, Mr Abatzoglou should be ordered to pay the costs of both applications on *an attorney and own client scale.* (Accentuation added)

[40] The rescission application and the first rule 30/30A application was enrolled for 20 April 2023. Hereafter followed the full-blown issue of the authority of Olympic to have instituted litigation and to oppose the first rule 30/30A objection. The dispute included the filing of the confirmatory affidavit by Ms. Abatzoglou deposed to on 6 April 2023 and a company resolution and minutes dated 16 March 2023 on 12 April 2023 together with the heads of argument. Acrimoniously Olympic's attorney wrote to Mr van Wyk acting for Nashua on 30 April 2023 and challenged them to bring its rule 30/30A application if they challenge the way the confirmatory affidavit was filed.[24]

[41] This became a major issue. The affidavit that depends on the confirmation of the confirmatory affidavit was filed on 20 October 2022 and deposed to on 19 October 2022. At paragraph 4 of his replying affidavit Mr. Abatzoglou stated that:[25]

> 4. Eleni Abatzoglou states and confirms that (i) she accepts and understands the need for the applicant's bringing of this application; (ii) ***I am, remain and have always been duly authorised to bring this application on behalf of the applicant,*** and (iii) she, to the extent necessary and/or required ratifies and condones any and all previous steps that I may have taken on behalf the applicant in the bringing and prosecution of this application. Ms. Eleni Abatzoglou's confirmatory affidavit is attached as annexure "RA10" and is in the process of being signed and commissioned, as she is currently out of the country. (Accentuation added)
>
> 5. Where I advance legal submissions in this affidavit, I do so on the basis of the legal advice furnished by applicant's legal representatives. ***The applicant and I accept and adopt such advice as our own***. This should not be construed as a waiver of any privilege that attaches to any of the legal advice procured from the applicants' legal representatives. (Accentuation added)

[42] Counsel for Olympic argued in court that Nashua was forewarned that the confirmatory affidavit will follow and that authority to institute litigation and file a further affidavit is not an issue. The letter "RR2" indicating an "impasse" that had arisen between Mr. and Ms. Abatzoglou about "the high Court proceedings"; and the resolution taken on 16 March 2023, *contradicts the claim under oath of authority*. It is also not clear why the fact that Ms. Abatzoglou was overseas prevented the obtaining of her signature and confirmation.

[43] The lack of veracity of averments in an affidavit by Mr. Abatzoglou that existed now and that had to be confirmed in the confirmatory affidavit is of concern to this court.

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[24] "Second Rule 30/30A Application" at page 31.
[25] "Rescission Application" at pages 197 to 198.

[44] The filing of an affidavit and resolution together with heads of argument when the matter has been set down for hearing within about a week's time, seems procedurally bizarre. It is trite and was acknowledged during the hearing on October 2023 that authority to litigate may not me ratified in retrospection.[26]

[45] The matter was not heard on 20 April 2023. One would suppose it was due to this strange situation, but another delay followed. On 20 April 2023 the court ordered that:

> Having considered the documents filed of record and having heard the legal practitioners,
>
> IT IS ORDERED THAT: (By agreement between the parties)
>
> 1. The application(s) set down for hearing is removed from the roll.
> 2. *The wasted costs shall stand over for later adjudication*. (Accentuation added)[27]

[46] The second rule 30/30A application was filed on 18 April 2023 and launched on 25 May 2023.[28]

> **Please take notice** that the respondent hereby gives notice that, for the reasons set out below, the further confirmatory affidavit delivered by the applicant constitutes an irregular step.
>
> 1. A party may not, without leave of the court, file further affidavits.
> 2. The applicant impermissibly took it upon itself to file a further affidavit, in the form of a confirmatory affidavit deposed to by Eleni Abatzoglou on 6 April 2023, without first having obtained leave of the court to do so.
>
> **Please take further notice that:**
>
> (a) The respondent hereby affords the applicant a period of 10 (ten) days within which to remove the cause of complaint referred to above, to the extent possible in law, and
>
> (b) If the applicant fails to remove the cause of complaint, and to the extent that the affidavit is not treated as *pro non scripto*, the respondent intends to apply to the above Hounourable Court in terms of Rule 30/30A to set aside the filing of the further affidavit in question with costs on a scale as between *attorney and own client.* (Accentuation added)

[47] Olympic maintained that the rescission application resorts under rule 6(11) and that the prescribed *dies* in notice of motion applications are not applicable for the filing of affidavits and rule 6 is silent on confirmatory affidavits. They stood steadfast in their rescission application based on the premise that the default was explicable and reasonable; Olympic has a *bona fide* defence in that the product that Nashua supplied malfunctioned and that there will not be any prejudice should the rescission application be granted.

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[26] *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency SOC Limited and Others* (3996/2019) [2020] ZAFSHC 135 (18 August 2020).
[27] "First Rule 30/30A Application" at page 93.
[28] "Second Rule 30/30A Application" at pages 1 to 4.

[48] On 15 June 2023 the court ordered that:[29]

Having considered the documents filed of record and having heard the legal practitioner/s,
IT IS ORDERED BY AGREEMENT BETWEEN THE PARTIES THAT:

1. The application is postponed to the opposed roll of 24 AUGUST 2023 to be argued.
2. The Applicant's answering affidavit in terms of the rule 30/30A application shall be filed before or on 10 July 2023.
3. The Respondent's replying affidavit in terms of the rule 30/30A application shall be filed before or on 26 July 2023.
4. The heads of argument shall be filed as per court directives.
5. Costs shall stand over for later adjudication.

[49] A second set of heads of argument were filed on 15 August 2023 and 16 August 2023. The previous heads of argument were filed on 12 and 14 April 2023.

[50] On 24 August 2023 the court ordered that the matter be postponed by agreement between the parties for hearing of "this application" and that costs shall be costs in the cause.

[51] A letter addressed to the court by the correspondent attorneys for Nashua to the Registrar of this court dated 4 October 2023 and so received on 9 October 2023, informed that the matter was set down for the hearing of the rescission application, condonation applications as well as the first and second rule 30/30A applications on the 26th of October 2023. During their opening statements before the court on the 26th of October 2023 both parties confirmed this.

[52] The war on paper spans from 11 May 2021 until 26 October 2023. I now turn to the specific issues to be adjudicated.

CONDONATION APPLICATION FOR THE LATE FILING OF THE RESCISSION APPLICATION & THE COUNTER CONDITIONAL CONDONATION APPLICATION

[53] The outcome of the condonation applications is entwined with the issues hereunder being; authority, the rule 30/30A applications and the prospects of success on the rescission application. I will deal with it in conclusion at the end of the judgment.

[29] "Second Rule 30/30A Application" at page 59.

[54] It is vital that all the issues must be adjudicated to serve the imperative that access to justice must be fair, swift and with finality to be in service of the rule of law.

AUTHORITY

[55] Harms[30] after careful research of case law stipulated the following principles regarding authority in the circumstances at hand:[31]

1. It is not necessary that the attorney who signs the notice of motion should hold a power of attorney.
2. If the respondent has reason to doubt the attorney's authority, he may raise it as an issue by using the provisions of rule 7(1) which will then have to be resolved either on the papers or by means of *viva voce* evidence.
3. The deponent to the supporting (founding) affidavit must set out the authority for the bringing of the application; an allegation in express terms is not essential.
4. It is not necessary that the deponent or witness itself be authorised to make the affidavit. It is sufficient to know whether the attorney acts with authority.
5. *Where an artificial person such as a company is the applicant, there ought to be some proof that it has authorised the bringing of the application in its name.* (*Mall (Cape) (Pty) Ltd v Merino Koöp Bpk supra; Pro-Rite (Edms) Bpk v Delportshoop Munisipaliteit* [1999] 3 All SA 452 (NC); *Boerboonfontein BK v La Grange NO en 'n Ander* 2011 (1) SA 58 (WCC)).
6. *The annexing of a copy of the resolution itself is not necessary, but sufficient proof, under the circumstances, that the application was properly authorised, should be laid before the court.*
7. *It may also be necessary to establish that the organ who authorised the litigation on behalf of the juristic person has the power to grant such authority. This may involve an interpretation of the constitution or enabling statute of the juristic person concerned.*
8. If the facts permit, authority may be derived from the doctrine of unanimous consent.
9. If the point is raised and the issue has not been fully canvassed in the founding affidavits, the applicant will be well advised *to supplement the papers*.
10. The authority to initiate the application must relate to the type of application actually instituted and not to some related but separate procedure.

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[30] Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, Last Updated: November 2023 - SI 78. at B6.8 Authority**,** https://www.mylexisnexis.co.za/Index.aspx.

[31] Some further caselaw and statements were added from paragraph 13.

11. Harms *supra* suggests that proceedings launched without any proper authority may be ratified subsequently, and the fact of ratification may appear from the replying affidavit.

12. *Ratification and condonation suggest that there was no resolution which authorised the institution of the rescission application at the time of the institution of the litigation.*

13. Moreover; in *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency SOC Limited and Others* (3996/2019) [2020] ZAFSHC 135 (18 August 2020) two judges of this court, sitting as a court of review, held that a lack of authority cannot be cured retrospectively (in reply).

14. In the case of *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV (Markus Johannes Jooste and another as third parties)* [2021] 4 All SA 810 (WCC) the court ruled that *the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is not to challenge the authority in the answering affidavit, but instead to make use of rule 7(1) of the Uniform Rules of Court.* The finding of the judgment in the *Lancaster 101 (RF) (Pty) Limited* – case *supra* is that the authority in the circumstances where companies are involved is vital and rule 7 notices cannot be summarily regarded as a delaying tactic. The court ruled that:

> Held – Rule 7(1) provides that the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed. ***Such person may then no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or the application.*** (Accentuation added)

15. The *Lancaster 101 (RF) (Pty) Limited* – case quoted the following dictum to establish the onus to prove authority where a company is involved:

> [41] In *Pretoria City Council v Meerlust Investments* (*Pty*) *Limited* 1962 (1) SA 321 (A) Ogilvie Thompson JA stated as follows:
>
> "The question of authority having been raised, *the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised* by the Council; that it is the Council which is prosecuting the appeal, *and not some unauthorised person on its behalf* (cf. *Mall* (*Cape*) (*Pty*) *Ltd v Merino Ko-operasie Bpk*., 1957 (2) SA 347 (C) at pages 351–352). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, *less reason exists to assume*, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned**. *In order to discharge the abovementioned onus, the petitioner ought to have placed before this Court an appropriately worded resolution of the Council . . .*** This the petitioner has failed to do" (own emphasis).

[42] In *FirstRand Bank Limited v Fillis and another* 2010 (6) SA 565 (ECP) [also reported at [2010] JOL 26112 (ECP) – Ed], the court stated that if an attorney's authority to act on behalf of a party is challenged, then in terms of rule 7 of the Uniform Rules of Court, the attorney is required to satisfy the court that he is properly authorised to act on behalf of the litigant. **Until he has done so, he is precluded from acting further.** ***The obligation to establish this authority only arises when the authority to prosecute the process is challenged.*** (Accentuation added)

[43] In *South African Allied Workers' Union and others v De Klerk NO and others* 1990 (3) SA 425 (E), Jansen J referred to *Mall* (*Cape*) (*Pty*) *Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351D–H [also reported at [1957] 2 All SA 242 (C) – Ed], where Justice Watermeyer stated as follows:

"I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case *there is judicial precedent for holding that objection may be taken if there is nothing before the Court to show that the applicant has duly authorised the institution of notice of motion proceedings* (see for example *Royal Worcester Corset Company v Kesler's Stores*, 1927 CPD 143; *Langeberg Ko-operasie Beperk v Folscher and another*, 1950 (2) SA 618 (C)). Unlike an individual, *an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution*. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. ***It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it.***

There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example *Lurie Brothers Ltd v Arcache*, 1927 NPD 139, and the other cases mentioned in Herbstein and van Winsen, *Civil Practice of the Superior Courts in South Africa* at pages 37, 38). ***This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance*****".** (Own emphasis).

16. The gist of the *Lancaster 101 (RF) (Pty) Limited* – case and the dictum above seem to be that the court may apply its inherent jurisdiction to inquire whether authority existed at the time of the institution of litigation. If the conduct of the director was *bona fide* and in the interest of the company ratification may occur. It will depend on the facts of the case. But the court ruled:

> Held: …Consequently, the resolution was invalid, and the automatic consequence was that Naidoo failed to show that he was authorised to act. *In the absence of his authority to act, then any instruction that he had given to any legal representative to act on Lancaster's behalf in the proceedings was similarly invalid.* (Accentuation added)

[56] This brings the facts of this case to the fore. It shows that authority did not exist at the time when the rescission application was initiated and the first rule 30/30A application opposed. The suggestion by Olympic that they were authorised to institute litigation was a misrepresentation to court. Whether willful or by pure *bona fide* mistake is another question. Two rule 7 notices were ignored and Olympic as assisted by competent legal representatives painted a picture of the existence of authority whilst well knowing that they did not have authority. They then endeavored to bring into evidence the besieged confirmatory affidavit and the resolution with their heads of argument.

1. I reiterate; at the time of the launching of the rescission application on 19 August 2022 Mr. Abatzoglou did not have authority to institute the litigation on behalf of the company. He merely stated in the founding affidavit dated 19 August 2022 that:

   1.4 I depose to this affidavit in my official capacity as director of the Defendant and in my personal capacity cited as the third defendant in the main action.

2. The statement of Mr. Abatzoglou in his replying affidavit in the rescission application deposed to on 19 October 2022 does not take his case any further. I did refer to it already.
3. The statement of Mr. Abatzoglou lacks corroboration. The confirmatory affidavit was not signed; apparently because the deponent was overseas. It does not make sense that in 2022 unsigned affidavits are filed because deponents are overseas. Technology and the admissibility of the presentation of evidence of this nature has made these excuses questionable. It took Ms. Abatzoglou almost 6 months to sign the confirmatory affidavit.
4. In addition; the confirmatory affidavit dated 6 April 2023 only attested to the truth of the replying affidavit of Mr. Abatzoglou that was deposed to on 19 October 2022.
5. That said; the authorization did not exist because the information confirmed does not grant legal authorization to institute litigation and the like.
6. It was suggested that in December 2022 there existed an "impasse" that had arisen between Mr. and Ms. Abatzoglou about "the high Court proceedings." They are the two remaining directors of the company. *There was not any consensus between the directors*

of the company about the institution of litigation and the resolution was only achieved in March 2023.

7. Erasmus[32] with reference to *Eskom Holdings Soc Ltd v Masinda* 2019 (5) SA 386 (SCA) pointed out that the procedure of adducing evidence by way of hearsay evidence in the main affidavit, supported by so-called "confirmatory affidavits" by the witnesses who should have provided the necessary details, but who merely sought to confirm what was said in the main affidavit "insofar as reference [has been] made to me", was criticized by the Supreme Court of Appeal and described as a "slovenly practice". The rule is that the necessary allegations upon which the applicant relies must appear in the founding affidavit, as the applicant will not generally be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit nor in a confirmatory affidavit.

8. The resolution that is an extract from the meeting of the directors of Olympic was only taken on 16 March 2023. It is a ratification of the legal steps taken until then and a further authorization of Mr. Abatzoglou and Piet Haasbroek to litigate in the matter. The dictum in the matter of *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency SOC Limited and Others* (3996/2019) [2020] ZAFSHC 135 (18 August 2020) is the law:

> [21] The Founding Affidavit makes no mention of the company resolution. The deponent sought to amend this defect in the Replying Affidavit by attaching the resolution that simply said: "2. All steps previously taken by Mario Engelbrecht on behalf (sic) the company is hereby rectified as it may be necessary" As mentioned in Interboard, a later decision will not serve as a ratification of or give retrospective authority for the launching of the application. *Rule 6 of the Uniform Rules of Court provides that the Applicant's right/authority to apply, that is, the applicant's locus standi, should be established in the Founding Affidavit and not in the Replying Affidavit.* The deponent to the affidavit need not be authorised by the party concerned to depose thereto, it is the institution of the proceedings thereof that must be authorized. *In my view and taking into consideration the above, the applicant cannot rectify the defect in its application retrospectively*. The court cannot therefore find that Mario Engelbrecht had the necessary authority to bring the review application in this matter. (Accentuation added)

9. I agree that the case for authority, specifically where artificial persons such as companies are involved, must be made at the beginning of the case; it should be established in the founding affidavit. *The consequences of a lack of lawful and*

[32] *Superior Court Practice*, Volume 2: Uniform Rules and Appendices, RULES OF COURT, 6 Applications, at footnote 70 in the text, https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu.

legitimate authority may be wasted and moot litigation that results in illegal orders and an implosion of the rule of law sustained by the administration of justice.

10. In *casu* the authority that is a mere retrospective ratification was only made available to Nashua on 12 April 2023 when the heads of argument were filed. The *audi alteram partum dictum* comes into play here. Parties must know the case against them, be granted the opportunity to answer thereto and to have a fair trial. The filing of the resolution and the confirmatory affidavit is procedurally unacceptable and constitutionally wrong.
11. Two rule 7 notices were brushed aside and ignored. If authority and a resolution existed, the mere filing thereof after the first rule 7 notice on 7 September 2022 would have put an end to the issue. The truth is that authority did not exist; hence the delay.

[57] Counsel for Nashua is correct when they added in their heads of argument that shifting focus to the Rule 30/30A application, the answering affidavit, allegedly filed on behalf of Olympic, was deposed to by Mr. Jean Raymond Castro. He claims to have the proper authorization to oppose the application on Olympic's behalf. As evidence, he relies on a confirmatory affidavit provided by Mr. Abatzoglou. It should have been self-evident that Mr. Abatzoglou's confirmatory affidavit offers no help, as he merely attests to being a co-director of Olympic and that 'he' has duly granted 'his' attorney the authority to depose to the answering affidavit. That does not satisfy the requirement of proving that the opposition to the application was properly authorised.

[58] The application must be dismissed on the issue of authority and in total and with severe costs findings. Mr. Abatzoglou's conduct was in breach of his fiduciary duties to the company. The noncompliance of the law by Olympic did not stop here.

THE ALLEGED BREACH OF RULE 6 OF THE UNIFORM RULES OF COURT BY OLYMPIC AND THE RULE 30/30A APPLICATIONS

[59] I reiterate; in the case of *Thwala v Miway Insurance Ltd; In re: Miway Insurance Ltd v Thwala* (A 230/21) [2022] ZAGPPHC 843 (8 June 2022), Du Plessis AJ (with Davis J) it was confirmed that *a rescission application is an interlocutory order since it is associated with the main action, regulating the conduct or the course of the proceedings. It is only once an application for a rescission order is dismissed that it will have a final effect.* The question remains as to how the affidavits in terms of the disputes in this case had to be dealt with.

[60] Counsel for Olympic refers to their application as a *notice of motion* in footnote 3 of their heads of arguments dated 12 April 2023. The form prescribed for a notice of motion was used to draft the application. This would indicate that Olympic opted for the notice of motion route and not just a notice in terms of rule 6(11).

[61] It is Olympic's case that rule 6(11) is applicable to the rescission application because it is interlocutory in nature and rule 6(11) does not contain or specify time periods within which affidavits must be filed.

[62] Rule 31(2)(b) indicates that rescission applications in terms of this rule may be brought on notice:

> Rule 31(2)(b):
>
> A defendant *may,* within 20 days after acquiring knowledge of such judgment, apply to court upon *notice* to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit. (Accentuation added)
>
> [Sub-r. (2) substituted by GNR.417 of 1997 and by GNR.61 of 25 January 2019.]

[63] Harms[33] with reference to case law noted that there is a difference between a notice and a notice of motion:

> The provisions of rule 6(5)(e) relating to the time within which further affidavits must be filed, do not apply to interlocutory applications, but the applicant risks a postponement at his expense if the times allowed by him are too short. *In other words, further affidavits must be filed within a reasonable time and such time will usually be shorter than the time allowed by rule 6(5)(e).*
>
> ***Use of the wrong form does not lead to a nullity of the proceedings, but they remain irregular and may be set aside under rule 30.*** (Accentuation added)

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[33] *Supr*a at B6.62 Rule 6(11) and B63 Interlocutory applications:
"B6.62 Rule 6(11)
Notwithstanding the aforegoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.
[Substituted by GG 39715 of 19 February 2016 – Regulation Gazette 10566, Vol 608.]"
"B6.63 Interlocutory applications
Interlocutory applications and other applications incidental to pending proceedings may be brought on notice, supported by such affidavits as the case may require. 'Incidental to' means 'subordinate or accessory to, while at the same time being distinct from' the main proceedings and proceedings remain 'pending' until their final determination. *Notice does not mean notice of motion and all that is required is notice to the other side that an application will be brought on a date assigned by the registrar or directed by a judge. Use of the short form is required by some courts and is always advisable*. It need not be served by the sheriff and can be served on the party's attorney of record."

[64] Rule 6(11) dictates that notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings *may* be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge. Erasmus[34] pointed out that "May be brought on notice" in this subrule does not mean notice of motion. Olympic brought the rescission application in the wrong procedurally prescribed form.

[65] Olympic demanded that the answering affidavit must be filed within 15 days after notice to oppose the application was filed and referred to "rule 6(5)(b)(1)". The opposing affidavit was filed on 15 September 2022.

[66] Olympic proceeded to file their replying affidavit on 20 October 2022. Rule 6(5)(e) prescribes that within 10 days of the service upon the respondent of the answering affidavit and documents the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits. In terms of rule 6(5) the replying affidavit was late.

[67] If rule 6(11) applies, the replying affidavit had to be filed within a reasonable time. The yardstick is the period prescribed in rule 6(5) and in the context of the facts before the court. In *Gisman Mining and Engineering Co (Pty) Ltd (In Liquidation) v LTA Earthworks (PTY) LTD* 1977 (4) SA 25 (W) at page 26 it was ruled that:

> Whatever the correct reading of Rule of Court 6 (11) relating to interlocutory applications may be, it cannot mean that in an interlocutory matter the applicant has unlimited time to file a replying affidavit. If the correct position is that there is no Rule defining exactly the time within which affidavits must be filed, then the Rule should at least be read to mean that they must be filed within a reasonable time. ***Prima facie a reasonable time would certainly not be longer than the time prescribed in terms of Rule of Court 6(5)(e), unless there were some special circumstances applying.*** (Accentuation added)

[68] *The time that lapsed between 15 September 2022 and 20 October 2022 measured to the 10 days is unreasonable and constitutionally untenable. Chaos and vigilante litigation will break out if parties are allowed to file affidavits when and how they deem fit in reliance of rule 6(11); this may not be condoned.* The application in terms of rule 30/30A must succeed on the fact that the late filing of the affidavit was procedurally illegal, unconstitutional, and Olympic lacked

[34] *Supra,* 6 Applications, at footnote 306 in the text.

authority to oppose the application. Condonation may not be granted for the late filing due to the cluster of irregularities committed.

[69] The way the confirmatory affidavit was managed is worse. Rule 6 is indeed silent on this. Nashua argues that permission ought to have been obtained from the court to file a further affidavit. The arguments in the heads of arguments of Nashua dated 15 August 2023 from paragraph 20 to 46 is indeed the law. I will not recite it in the judgment. The dictum cited by Olympic themselves in their heads of argument dated 12 April 2023 works against them for the way they ploy the law by bizarrely attaching an affidavit to their heads of argument. It is trial by ambush. This is the words of Olympic in their heads of argument dated 12 April 2023 that now holds them accountable for their own untoward conduct:

> 1. The *audi alteram partem* rule is "an ancient rule that has existed since the dawn of time". Audi alteram partem (or audiatur et altera pars), whilst having ancient Greek hereditary is the Latin maximum for "listen to the other side" (or "let the other side be heard as well") It a central canon of natural justice that mandates fairness, namely that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

[70] A confirmatory affidavit is a legal document that confirms the authenticity of a statement or fact made by an individual. Erasmus[35] noted that if an affidavit sets out facts based on hearsay information, the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of his knowledge or belief; and failure to state the source of the information or grounds of belief in the original affidavit is an irregularity that cannot be cured by stating them in a replying affidavit. It does not follow, however, that the court is obliged to accept such hearsay evidence, even if the source and the grounds for the belief are furnished.

[71] The evidence showed that there was no consensus on the litigation between the directors at the time Mr. Abatzoglou claimed such and neither authority to litigate. The unsigned confirmatory affidavit used in the replying affidavit has no evidentiary value and the signed confirmatory affidavit contradicts the allegation that consensus existed on the authority on the date it was claimed.

JUST CAUSE FOR RESCISSION

[35] *Supra* at Footnotes 81 to 83 in the text.

[72] It was noted in the beginning that this case could have been a simple matter of a trial. Unfortunately, the one defect after the other in the way that Olympic litigated caused the wheels of justice to derail. This is what Olympic, *inter alia* and undisputedly so, did whilst represented by attorneys and counsel:

1. They did not answer to the invitation to go to trial; the very issue they now pray for;
2. they ignored the notice that a default judgment application is pending;
3. they filed two applications for the rescission of the default judgment and late;
4. they filed their replying affidavit on the rescission application out of time or not within reasonable time;
5. they entered into litigation without authority;
6. the claim of authority to have existed was not true;
7. they filed a confirmatory affidavit and a company's resolution in total disregard to the *audi alteram partem* dictum with their heads of argument when the matter has already been set down for hearing. The date of hearing was 20 April 2023; the papers were filed on 12 April 2023;
8. worst; they became belligerent and insulting and claimed *de bonis propriis* costs orders for litigation they invited. Fortunetaly counsel in court conducted themselves with the utmost decorum.

[73] Constitutional principles have come to play a pivotal role in matters of this kind and specifically in rescission applications. In *RGS Properties (Pty) Ltd v Ethekweni Municipality* 2010 (6) SA 572 (KZD) a mindful and balanced approach by courts adjudicating these cases was the resolve to the constitutional challenge. The test as summarised is:

1. A court should not, in an application for the rescission of a default judgment, scrutinise too closely whether the defence is well founded, as long as, *prima facie*, there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim.
2. Where a defendant has never clearly acquiesced in the plaintiff's claim, but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard.
3. Judgment by default is inherently contrary to the provisions of section 34 of the Constitution. This section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum.

4. Therefore, in weighing up facts in an application for the rescission of a default judgment, the court must balance the need of an individual who is entitled to have access to court and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance.
5. In its deliberation, the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that, while, among others, this requirement incorporates showing the existence of a *bona fide* defence, the court is not seized with the duty to evaluate the merits of such defence.
6. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted.
7. That said, however, the nature of the defence advanced must not be such that it *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant.
8. An absolute constitutional rejection of default judgments will not suffice because there is a persistent tension between commercial certainty and prompt remedies in law for non-compliance with contracts and court orders, on the one hand; and the right to access to courts on the other hand.
9. Each case must be adjudicated on its own merits and there is no *numerus clausus* of factors. The law is that the court has a wide discretion in evaluating good cause to ensure that justice is done. The explanation for default must be stated and be reasonable. The default may not be wilful and an attempt to delay justice.

[74] Olympic wants to put the merits of the case before a court in pursuit of their right in terms of section 34 of the Constitution of the Republic of South Africa, 1996. Basically, they claim that Nashua did not perform in terms of the contracts. The product Nashua delivered, according to Olympic, allegedly malfunctioned. It is trite that Olympic summarily suspended payment in terms of the contract and in contravention to the terms of the contract.

[75] The dispute could have been resolved in a court of law if Olympic had not disappeared from the litigation after they were summoned to court to exercise their right in terms of the Constitution. The dispute could have been adjudicated shortly after 17 January 2022 when the summons issued on 13 December 2021 was served. The history of the contracts also shows that discord prevailed between the parties and that they had to realize that they must take legal steps to bring the acrimonious legal relationship to a solution. Both parties were throughout represented by attorneys.

[76] Section 34 of the Constitution cuts both ways; both Olympic and Nashua have a right to justice by the effective application of the administration of justice and the utmost respect to the rule of law.

[77] The dichotomy whereby a party challenged the other to bring rule 30/30A applications and now threatens with costs orders *de bonis propriis* does not make sense. This is unacceptable and could have been prevented.

[78] *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* (2014/14286) [2015] ZAGPJHC 176; 2016 (1) SA 78 (GJ) (3 August 2015) said it all and lays down the law:

> [7] The efficient conduct of litigation has as its object the judicial resolution of disputes optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. *Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.* (Accentuation added)
>
> [8] Litigants may not be allowed to turn their backs on the justice system and the court and walk away as, and when, and how it suits them and then return when the shoe pinches. It often ensues that the party with due knowledge of the ongoing court case ignores the litigation and stays away from court and then abruptly reacts when a warrant of execution is implemented. This cannot be tolerated by our courts anymore.

[79] *Litigants are the masters of their cases and not their legal representatives*. It should not be necessary for the court to protect the rule of law against litigants. The Constitutional Court in the Zuma - case *supra* was clear and unyielding when it was ruled that:

> [2] ... Ironically, the judgment now impugned, contains a thorough exposition of the rule of law and its fundamental importance to South Africa's constitutional democracy. Indeed, it says, "[n]o one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law" in South Africa. Yet, with the finality of its decision questioned, this Court, once again, finds itself tasked with defending the integrity of the rule of law.

> [103] …If our law, through the doctrine of peremption, expressly prohibits litigants from acquiescing in a court's decision and then later challenging that same decision, it would fly in the face of the interests of justice for a party to be allowed to willfully refuse to participate in litigation and then expect the opportunity to re-open the case when it suits them. *It is simply not in the interests of justice to tolerate this manner of litigious vacillation*. (Accentuation added)

[80] It is the constant tug of war between contractual freedom and the administration of justice that often prevails in cases of this nature that causes the complications. The litigants here did not resolve their disputes in terms of the contracts. Mediation failed dismally. Eksteen JA in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 761 to 762 remarked that:

> In *Roffey's* case *supra* Didcott J refers to the *dictum* of Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 with approval, where the learned Judge said at 465:
> *'If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.'*
> In weighing up the public interest involved in the principle of freedom of trade against the sanctity of contracts, Didcott J came to the conclusion (at 505C-H) that 'South African law prefers the sanctity of contracts' and he went on to stress the importance in the public interest that ***'people should keep their promises'.*** The principle that *pacta sunt servanda*, particularly where parties contract on a basis of equality, is generally accepted as an important part of our Roman-Dutch law and stems from the basic requirement of good faith. ***It is grounded therefore not only in law but also in morality.*** (Accentuation added)

[81] The very simple imperative is that "people should keep their promises; it is grounded not only in law but also morality". It speaks to the preservation of a civilized democratic society. Courts should not be called upon to remedy unbecoming litigious behavior by litigants; courts must be accessed to serve the constitutional decree to ***settle disputes*** that is situated in the right to access to courts in terms of section 34 of the Constitution of the Republic of South Africa, 1996. *All litigants have this same right, and it may not be obstructed by the unexplained or willful absence of a party at a trial*.

[82] Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 *(*1*)* SA 984 *(*CC*)* at paragraph [26] described equal protection under the law as: "a central consideration in a constitutional state". These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.

[83] The above goes to a basic civilized society. Bowden[36] discussed this dichotomy to be managed in a democracy:

> R.G. Collingwood has outlined three aspects of civilization: economic, social, and legal. Economic civilization is marked not simply by the pursuit of riches—which might actually be inimical to economic civilization—but by ***"the civilized pursuit of wealth."*** … (Accentuation added)

The default

[84] I turn to the explanation for the default.

1. Olympic lays the blame for its default at the door of its former attorney, Mr. Kriek. In *Minister of Police v Murray, Murray v Minster of Police* (A81/2016) [2016] ZAWCHC 152 (2 November 2016) the court ruled on this issue.

> [16] The law reports are replete with examples of courts visiting the negligence of legal representatives on their clients. The rationale for the approach is easy to understand. The conduct of litigation affects all the parties to it, and also the judicial system in which it takes place. A litigant chooses its representative and if it chooses badly or fails to ensure that its representative is effectively carrying out its mandate, *the resultant prejudice is something that it, rather than the other litigants and the court system, should bear.* The courts' approach is not a mechanical one, however; due regard is had to the interests of justice on the facts of the given case in deciding whether or not to be forgiving to the litigant for the sins of its legal representative. It is for that reason that in a case like the current matter the court exercises its discretion with regard to all aspects of the case. (Accentuation added)

2. The allegations against Mr. Kriek are entirely unfounded based on the evidence; Olympic did not actually instruct Mr. Kriek to file a plea and they have not provided him with the necessary instructions to plead to the allegations contained in the particulars of claim. Word for word from the replying affidavit of Mr. Abatzoglou he never communicated with Mr. Kriek:

> 38.2 I never personally met or communicated with Mr Kriek. The applicant and I were referred to him and his firm by Mr Kruger, given Mr Kruger's conflict of interest. Because Mr Kruger suggested and recommended Mr Kriek, I expected Mr Kriek to act as Mr Kruger would, and given that Mr Kruger had recommended him and interacted with him, the applicant and I believed that the applicant was in safe hands (so to speak).
>
> 38.3 Mr. Kruger communicated directly with Mr. Kriek on my behalf in respect of the referral to him and provided him with a copy of the plaintiff summons and my contact details, and furnished him with the applicant's instruction, on his recommendation, to enter an appearance to defend. Mr. Kruger knew, from my initial interactions with him, that (i) the applicant denied being liable

[36] Brett Bowden, *Civilization and Its Consequences,* https://doi.org/10.1093/oxfordhb/9780199935307.013.30, Published: 11 February 2016.

to the respondent, (ii (sic) the basis upon which such liability was (at least in broad terms) and (iii) the applicant wished and intended to defend the respondent's action.

3. The above are noteworthy because:[37]

    1. Olympic admits to not having personally met or communicated with Mr. Kriek and it speaks volumes about Olympic's commitment to the case.
    2. Olympic's claimed reliance on Mr. Kruger's recommendation of Mr. Kriek does not absolve it from its responsibility to communicate with and instruct its attorney. Simply expecting Mr. Kriek to act as Mr. Kruger would have, without establishing a clear line of communication, is not a sufficient basis for legal representation. To appoint an attorney is not sufficient, it is the duty of the litigant to instruct his legal representatives properly and effectively.
    3. There could not have been any presumption that Mr. Kruger, due to his existing conflict of interest, was able to delegate authority to Mr. Kriek or offer instructions on Olympic's behalf. Furthermore, the responsibility of providing direct instructions to Mr. Kriek fell on Olympic.
    4. Olympic appears to have become disinterested in the management of the case after it had been referred to Mr. Kriek by Mr. Kruger. It has not provided any acceptable explanation for its failure to keep in touch with Mr. Kriek as to the progress of the matter. Olympic cannot be absolved from blame.
    5. The impression that is created is that Olympic treated the matter with utter indifference. It is the author of its own problems, and it would be inequitable to visit Nashua with the prejudice and inconvenience flowing from such conduct. This attitude and conduct of Mr. Abatzoglou caused extensive litigation, delay in the finalisation of the case and affected the administration of justice negatively.
    6. Olympic was assisted and represented by different legal representatives and it maintained an attitude of noncompliance with the rules of court. It does not make good sense that a legal representative would fail in his duty towards his client on the excuse that he could not contact him. Mr. Kriek could have contacted Mr. Kruger that had, apparently so, an open line to Mr. Abatzoglou. The duty in law is on Olympic to ensure that their legal representative is properly and timeously instructed.

[37] See the heads of argument for Nashua dated 14 April 2023 at paragraphs 32 to 38.

7. Olympic caused severe delays in this case by, for instance, ignoring the rule 7 notices and filing their affidavits and presenting their evidence as and when they deemed fit and in disregard of the rules of court.
8. The conduct of an applicant that causes default and prejudice may however not be used against the applicant to punish. If there exists a valid defence, rescission must be granted.

The *bona fide* defence

[85] Slotting in with the above and after careful examining of the mosaic of evidence the only reasonable conclusion is that the defence(s) of Olympic are not valid in law. The defence of Olympic can be described; if measured to the facts and the reality of the case, as inherently unconvincing. The fact that a layperson subjectively and honestly believes in his defence does not raise it to *bona fide* in the sense required here and in law. The applicant in a rescission application, conversely, need not establish a *prima facie* defence. The applicant need only set out the facts which if established at the trial, would constitute a good defence.[38] Olympic did not meet the yardstick summed simplistically in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) on page 228:

> There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit. It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. *It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.* (Accentuation added)

[86] The proposals of Nashua in their heads of argument dated 14 April 2023 at paragraphs 39 to 67 against a *bona fide* defence are correct. A valid defence does not exist and rescission cannot be granted.

THE ISSUE OF ACQUIESCENCE BY OLYMPIC

[87] The allegation by Nashua that Olympic acquiesced in the default judgment order does not appear to be true, verifiable and is not supported by facts. Counsel for Olympic in their heads of argument dated 12 April 2023 is correct in the submissions made from paragraphs 65 to 70 and I will not repeat it.

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[38] Heads of argument for Olympic dated 12 April 2023 at paragraph 40.

CONCLUSION & COSTS

[88] The application for rescission failed when the authority of Mr. Abatzoglou to institute and maintain the litigation up until March 2023 was proven beyond any doubt to be nonexistent. The application for rescission was thus unlawful for this fact only.

[89] Moreover, are the explanations for the late filing of the rescission application and the late filing of the replying affidavit in the rescission application not sufficient and satisfactory; neither in law nor in fact. Both the condonation applications must fail. The condonation application for the late filing of the rescission application due to the fact that there was not any authority for the litigation and that there are not any prospects of success of the rescission application both on default and defence. The conditional counter condonation application fails on the reality of a lack of authority as well as the illegal process that was followed.

[90] The manner in which the replying affidavit and the confirmatory affidavit in the rescission application was placed before the court is procedurally and constitutionally unacceptable. The first and second rule 30/30A applications must succeed.

[91] The claim by Nashua that Olympic acquiesced in the judgment was dismissed; notwithstanding it did not assist Olympic in their application. The evidence in conspectus is against them.

[92] The claims by Nashua in terms of rule 30/30A and rule 7 were justified. It was proactive, necessary and promoted proper legal process on the facts of this case. It protected the case against a miscarriage of justice and law. Olympic by their unacceptable conduct, caused this litigation.

[93] There does not exist any *bona fide* explanation nor defence on the side of Olympic to fulfil the obligation of just cause.

[94] The prejudice suffered by Nashua and the administration of justice is the final nail in the coffin; the extensive and expensive litigation caused by Olympic is unconstitutional. The claim that the money in trust protects against prejudice is not convincing. The risk of illegal litigation and orders in the end is worrisome and prejudicial to the litigants, the court and the administration of justice.

[95] The words in the case of *Minister of Home Affairs v Ahmed and Others* (A102/17) [2019] ZAGPPHC 19 (14 February 2019) speak volumes to the conduct of Olympic during the litigation: "Insults in Court are not to be tolerated, no matter what the subject-matter at hand is. There is no room for abuse or insults in Court proceedings, be it verbally, or in affidavits."

[96] The practise that has become too common in that attack is the best defence and that it be by threats of punitive costs orders, must seize. It offends litigants' and legal practitioners' constitutionally protected dignity and the administration of justice.

[97] Costs must follow the cause. I am tempted to order that costs be on a punitive scale, but Nashua requested costs on a party and party scale and I will allow it as such.

[98] I am indebted to the counsel for both parties that submitted draft orders to court on short notice. The draft order submitted by counsel for Nashua will be followed.

[99] **ORDER**

1. The filing of the confirmatory affidavit deposed to by Eleni Abatzoglou on 06/04/2023 in support of the applicant's rescission application is set aside as an irregular step;

2. The application for rescission is dismissed;

3. The applicant is ordered to pay the costs of the rescission application and both rule 30/30A applications on a party and party scale. Such costs, to include the costs of two counsel where so employed.

M OPPERMAN J

APPEARANCES

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