IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Not reportable
CASE NO. 2818/2024

In the matter between:

S P LENONG CIVIL GROUP 8 (PTY) LTD
Registration number: 2013/159279/07 Applicant

And

ABSA BANK LIMITED First respondent

NEW BIGINNINGS PROJECTS CC
Registration number: 2005/022765/23
(Under provisional liquidation) Second respondent

OTTIE ANTON NOORDMAN N.O. Third respondent

SHUAIB MAHOMED N.O. Fourth respondent

CHARLES PHIRI N.O.
(In his capacity as voluntarily appointed
business rescue practitioner of
New Biginnings Projects CC) Fifth respondent

THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION OF SOUTH AFRICA Sixth respondent

MASTER OF THE HIGH COURT Seventh respondent

ALL AFFECTED PERSONS Eighth respondent

JUDGMENT

LAING J

[1] This is an application that was brought on an urgent basis for the setting aside of a previous order that, *inter alia*, placed the second respondent ('New Biginnings') under provisional liquidation. In that regard, the first respondent ('ABSA'), as a major creditor, had applied not only for the provisional winding up of New Biginnings but also the setting aside of a resolution adopted by the close corporation to place itself under voluntary business rescue and supervision. A summary of the parties' respective cases appears below.

Applicant's case

[2] The applicant expressly relies on section 354(1) of the Companies Act 61 of 1973,[1] which permits a court to stay or set aside winding up proceedings. It avers that it is a creditor of New Biginnings because the close corporation owes it the sum of R 15,529,140 for services provided.

[1] Despite the repeal of the Companies Act 61 of 1973 ('the old Act'), item 9(1) to Schedule 5 of the Companies Act 71 of 2008 ('the new Act') provides that Chapter 14 of the old Act continues to apply with respect to the winding-up and liquidation of companies. Section 354(1) of the old Act is in Chapter 14.

[3] The basis of the applicant's challenge is that it was never notified of ABSA's application. The bank merely emailed the papers to the applicant's erstwhile attorneys, Dlabantu & Associates, who did not represent the applicant at the time and never brought the bank's application to the applicant's attention. Consequently, ABSA failed to notify the applicant, as a creditor or an affected person,[2] of its intention to apply for the setting aside of New Biginnings' resolution to place itself under business rescue, and for the provisional winding up of the close corporation.

[4] Dealing with the exceptional circumstances that warranted the relief sought, the applicant averred that the fifth respondent, Mr Charles Phiri, had been the previous business rescue practitioner. He resigned, alleged the applicant, on 31 May 2024; subsequently, his duties were taken over by Adv GCM Masemola and Mr Thomas Samons, but the sixth respondent ('CIPC') allegedly failed to record their appointments. By the time that ABSA instituted its application on 3 July 2024, New Biginnings was unrepresented.

[5] The applicant's managing director, Ms Bongiwe Mbangula, stated that New Biginnings had secured several contracts after having been placed under business rescue. The applicant was and remained prepared to provide funding and to make available its machinery to the close corporation so that the contracts could be implemented. It had sufficient resources to complete any large construction project. Ms Mbangula said that the two entities had enjoyed a lengthy working relationship and had successfully collaborated previously. This had continued after the commencement of business rescue proceedings. She listed the various contracts secured by New Biginnings, but admitted that the implementation of many of them was subject to the outcome of the winding up proceedings. If the previous order was set aside, then the close corporation would, with the applicant's assistance, be able to undertake the work required and to secure additional contracts.

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[2] For purposes of Chapter 6 of the new Act, dealing with business rescues proceedings, section 128(1) defines an affected person as, *inter alia*, a shareholder or a creditor of a company that forms the subject of a business rescue.

[6] Addressing its opposition to the winding up proceedings, the applicant contended that the erstwhile business rescue practitioner's failure to fulfil his duties did not mean that business rescue was not a viable option for New Biginnings. Existing contracts and the close corporation's claim against the Free State provincial government had to be considered.

[7] Ms Mbangula concluded by dealing with the question of urgency. She pointed out that the close corporation was placed under provisional liquidation on 27 August 2024, but the first time that she became aware of the order to that effect was on 17 October 2024. Upon her instruction, the applicant's attorneys investigated the matter and commenced with the preparation of the present application. The papers had to be amended after the appointment of provisional liquidators on 25 October 2024, which only came to Ms Mbangula's attention on 29 October 2024. The application was launched on 14 November 2024.

ABSA's case

[8] In its answering affidavit, ABSA challenged at the outset the alleged urgency of the matter, observing that it had taken the applicant almost a month to institute proceedings from the date upon which it first became aware of the order. There was no proper explanation on the papers for the delay. In contrast, ABSA was afforded five court days within which to deal with the application and deliver its answering affidavit.

[9] The bank contended that the undisputed fact was that New Biginnings was 'hopelessly insolvent', with its liabilities exceeding its assets by at least R 145,000,000. The deponent to the answering affidavit, Mr Gerrit Gouws,[3] referred to his allegations in relation to the winding up proceedings and asserted that these remained undisturbed by any of the admissible evidence presented by the applicant in the present matter. He

[3] Mr Gouws described himself as being employed by ABSA as a Specialist Business Rescue Manager: Relationship Banking Recoveries.

went on to argue that the applicant's reliance on section 354(1) of the old Act did not assist. This was because the provisions dealt exclusively with the winding up of companies, but not business rescue and supervision, which were only addressed under the new Act. The distinction was fatal to the present application. Furthermore, argued Mr Gouws, the jurisdictional requirements for reliance on section 354(1) remained unsatisfied.

[10] Turning directly to the applicant's submissions, ABSA pointed out that the alleged value of the contracts secured by New Biginnings had to be distinguished from their expected profitability. What amount could be anticipated for distribution to creditors, if the close corporation was placed under business rescue, was simply never disclosed. The alleged value of the contracts also suggested that they would take a considerable period to complete, but the bank was no longer prepared to wait. Mr Gouws also indicated that New Biginnings could only implement the contracts if it had a valid tax clearance certificate; considering its indebtedness to SARS in the amount of R 74,444,000, this was highly improbable. ABSA pointed out, too, that the contracts allegedly secured by the close corporation were of the nature that often attracted costly and protracted litigation.

[11] ABSA also contended that Ms Mbangula had failed to substantiate her assertion that the applicant had sufficient resources to tackle, successfully, any major construction project. There was no information about the scope of works for the contracts in question or the status of the applicant's finances to cope with the cash flow requirements. Many of the contracts, remarked the bank, had yet to materialise.

[12] The appointment of an alternative business rescue practitioner, as suggested by the applicant, would not assist; it would not, argued the bank, extricate New Biginnings from the dire financial straits in which it found itself. Such an appointment would further delay an already protracted business rescue and the practitioner's fees would, moreover, ultimately be borne by the close corporation's creditors.

[13] In relation to ABSA's alleged failure to give notification to the applicant of the winding up proceedings, Mr Gouws indicated that Dlabantu & Associates had indicated in correspondence dated 19 September 2023 and 31 October 2023 that they were the applicant's attorneys of record. There was no suggestion that the scope of their mandate was restricted. There was also no information about when their mandate was terminated and whether this was ever conveyed to the bank (which Mr Gouws denies). There was, moreover, no supporting or confirmatory affidavit from any representative of Dlabantu & Associates. It was, argued the bank, improbable that the letter sent to all affected persons by the business rescue practitioner, Mr Phiri, alerting the recipients to ABSA's commencement of winding up proceedings, did not come to the attention of the applicant.

[14] Dealing with the applicant's assertion that Mr Phiri had previously resigned, ABSA referred to his notice to abide regarding the winding up proceedings, various CIPC records and Lexis WinDeed searches, correspondence sent on 2 and 15 August 2024 in terms of which he confirmed his role as business rescue practitioner, as well as correspondence to that effect from his attorneys to Adv Masemola. All of this contradicted the applicant's assertion.

Issues to be decided

[15] The applicant delivered no reply to ABSA's answering affidavit. Consequently, the issues can be distilled to the following: (a) whether there was sufficient urgency to warrant a departure from the timeframes set out in rule 6 of the Uniform Rules of Court ('URC'); (b) if not, then whether the application should be dismissed for lack of merit, rather than simply be struck from the roll.

[16] A brief overview of the relevant principles follows.

Legal framework

[17] The applicant centres its case on section 354(1) of the old Act. For ease of reference, the entire section is set out below:

> '**354. Court may stay or set aside winding-up**.–(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on 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.'

[18] In *Ward and another v Smit and others, In re: Gurr v Zambia Airways Corporation Ltd*,[4] the erstwhile Appellate Division observed, per Scott JA, that:

> 'The language of the section [i.e. section 354(1)] is wide enough to afford the court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events.'[5]

[19] The court went on to hold that:

> '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

[4] [1998] 2 All SA 479 (A).
[5] At 484.

> delay in bringing the application and the extent to which the winding-up had progressed.'[6]

[20] More recently, in *Nyhonyha and others v Venter NO and others*,[7] Vally J reiterated that the powers of the court were, within the context of section 354(1), very wide.[8] The learned judge went on to hold that:

> 'The court is bound to scrutinise the facts very carefully and to exercise its discretion in a manner that at the very least does not disadvantage any creditor. The interests of the creditors weigh heavily with the court for after all, once the company has been provisionally wound up, a *concursus creditorum* and no transaction, whether by one or some of the creditors, can be entered into to the prejudice of the general body of creditors.'[9]

[21] Mindful of the above, it can be said that section 354(1) provides the court with a generous discretion in relation to the making of the order contemplated. Furthermore, the test for the setting aside of winding up proceedings is strict; an order to that effect is not to be made lightly. A heavy onus rests on the applicant to demonstrate that, *inter alia*, it would be in the interests of the general body of creditors that such an order be made. As a bare minimum, the applicant would have to demonstrate that the order would not be to the disadvantage of any creditor. This would need to be proved on a balance of probabilities.

[22] In the present matter, the applicant contended that the previous order should not have been granted because it was never properly notified. Stoop conveniently summarises the general principles in this regard as follows:

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[6] Ibid.
[7] [2021] 2 All SA 507 (GJ).
[8] At paragraph [34].
[9] At paragraph [35].

> 'Where an applicant seeks to have a winding-up order set aside on the ground that the company should never have been liquidated, he or she is subject to judicial limits similar to those laid down in respect of an application for rescission of a judgment at common law. An order setting aside a winding-up order on this ground is an extraordinary form of relief and one that will be granted only in rare cases. Although the court's discretionary power to set aside a winding up-order is not limited to rescission on the common-law grounds, no less is expected of an applicant than is expected of an applicant who seeks to have a judgment set aside at common law. Unusual or special or exceptional grounds must exist in order to justify the setting aside of the order. The court will not rehear the matter or sit in appeal on the judgment in the winding-up proceedings as regards its merits. Special and exceptional circumstances which may result in an order being set aside are, for example, where the company was not in fact unable to pay its debts, or had made provision for the payment of its debts in full, and where, in addition, the applicant laboured under some excusable disability or difficulty as regards contesting the winding-up order.'[10]

[23] The above principles constitute the basic framework within which the present matter must be determined. This will be done in relation to the issues that are discussed under the paragraphs that follow.

Urgency

[24] The issue of urgency must be addressed at the outset. The applicant's reasons for its departure from the timeframes envisaged under rule 6 of the URC were essentially that it only became aware of the previous order some seven weeks after it was granted, that provisional liquidators were appointed shortly afterwards, and that New Biginnings would be unable to trade despite its having secured numerous contracts that would have provided the necessary income streams to have remedied its

[10] H Stoop (et al), 'Winding-up', in *LAWSA* (part 3, vol 6(3), 3ed, 30 November 2022), at paragraph 77. Footnotes omitted.

de facto insolvency. ABSA, for its part, asserted that any urgency as might have existed was self-created; there was, moreover, insufficient evidence to warrant the applicant's reliance on the contracts as the basis for the close corporation's financial recovery.

[25] In her founding affidavit, Ms Mbangula indicated that the applicant and New Biginnings had collaborated closely on various construction projects. This had occurred over several years. The applicant was, moreover, responsible for the implementation of various projects on behalf of the close corporation in terms of various written or verbal agreements concluded between the parties after the commencement of business rescue. That New Biginnings' sole member, Mr Patrick Phuti, never communicated to the applicant its receipt on 5 July 2024[11] of ABSA's papers for the commencement of winding up proceedings or that he waited for some seven weeks after 27 August 2024[12] before alerting Ms Mbangula to the previous order is improbable. Considering the degree to which the close corporation depended on the applicant's cooperation for the implementation of the contracts in question, it would have been expected that Mr Phuti would have drawn Ms Mbangula's attention to such legal developments at the earliest opportunity. In the absence of any explanatory or even a confirmatory affidavit from Mr Phuti, the applicant's assertion that it only became aware of the previous order on 17 October 2024 is difficult to accept.

[26] Leaving that aside, however, it cannot be denied that the applicant failed to explain, in detail, why it consequently took four weeks to launch the present application. Ms Mbangula merely asserted, in the vaguest of terms, that it had been necessary to instruct attorneys to investigate the circumstances of the matter, adjust the applicant's legal strategy to accommodate the appointment of provisional liquidators, and thereafter prepare and serve papers. No indication whatsoever was made of why this had taken as long as it did.

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[11] The date appears from the service affidavit of ABSA's local attorney, Mr Jacobus Coetzee, dated 23 August 2024 and attached to the bank's papers in the winding up proceedings, as well as the sheriff's return of service in that regard.

[12] This was the date upon which the previous order was granted.

[27] In *Caledon Street Restaurants CC v D' Aviera*,[13] Kroon J observed, within the context of the inappropriate use of rule 6 of the URC, that:

> '…the temptation is to brush the wrong handling of the matter and the applicant's presentation thereof as urgent beyond what was justified, under the mat. The papers had to be read to adjudicate the argument about urgency and it could come across as such a waste not to decide the merits. A refusal to do so would entail all the work having to be done *de novo*. The temptation is enhanced by the circumstance that an appropriate order for costs against the applicant can be resorted to… However, the attractiveness of finally disposing of the litigation should not be allowed to govern. The approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not.'[14]

[28] The court enjoys a discretion, under rule 6(12), to dispose of a matter in such manner and in accordance with such procedure as it deems fit. The procedure adopted must be, as far as practicable, in accordance with the URC. In *Caledon*, Kroon J made it clear that if a deviation from the URC was to be permitted then the extent thereof will depend on the circumstances of the case. The applicant or his or her legal advisors must analyse the facts to decide whether a greater or lesser degree of relaxation of the URC was warranted; in each case, the applicant was required to strike a balance between the duty to comply with rule 6(5)(a) and the entitlement to deviate therefrom,[15] subject to the urgency that prevailed.[16]

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[13] 1998 JDR 0116 (SE).
[14] At 10-11.
[15] The rule in question stipulates that every application, other than one brought *ex parte*, must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule. In that regard, Form 2(a) provides for, *inter alia*, a period of 15 days within which a respondent can file his or her answering affidavits.
[16] *Caledon*, at 8.

[29] Returning to the present matter, for the applicant to have afforded ABSA a week to deliver its answering affidavit was plainly unfair. Such urgency as might have existed was clearly self-created. Furthermore, the applicant's reliance on the contracts secured by New Biginnings to justify the urgent setting aside of the previous order was, as shall be explained, misplaced.

[30] The court would, in the circumstances, be entitled to strike the matter from the roll. This would have the effect, however, of deferring the determination of the dispute when there was simply no merit to the application itself. This will be discussed in the paragraphs that follow.

Notice to the applicant

[31] At the heart of the application is the argument that ABSA failed to provide proper notice to the applicant of the commencement of winding up proceedings. In that regard, the applicant contended that section 130(3) of the new Act was pertinent. The provisions thereof stipulated that any affected person,[17] such as the bank, who intended to apply for an order setting aside a resolution adopted by a company to place itself under business rescue, was required to notify other affected persons in the prescribed manner. Under regulation 124 of the Companies Regulations,[18] the bank had to deliver a copy of the court application, in accordance with regulation 7, to each affected person known to it. This meant that a copy of the application could have been transmitted electronically to the applicant.[19] Importantly, noted the applicant, section 130(4) indicated that each affected person has a right to participate in the hearing of the application.

[17] See n 2, above.
[18] The Companies Regulations were published under GNR 351 on 26 April 2011.
[19] Regulation 7 indicates that a notice or a document may be delivered in any manner contemplated in terms of, inter alia, section 6(10) of the new Act. This provides, in turn, for electronic transmission.

[32] In *Griessel and another v Lizemore and others*,[20] Spilg J held that substantial compliance with the above requirements was acceptable. To that effect, an applicant was deemed to have provided adequate notice where notice had been given to most creditors, by number as well as value and importance.[21]

[33] Regarding the facts of the present matter, it is common cause that ABSA never notified the applicant directly in the prescribed manner. The bank's attorneys emailed, instead, a copy of the application to Dlabantu & Associates. This was, on the face of it, problematic. For a creditor that was owed R 15,529,140 by New Biginnings, representing a voting interest of 7.44%,[22] it would have been expected of ABSA to have transmitted a copy of the application directly to the applicant. The last contact with Dlabantu & Associates had been more than eight months prior to the bank's institution of the winding up proceedings; there was no evidence that they held a mandate to accept notice on behalf of the applicant or that they continued to represent it. Considering the relative value and importance of the close corporation's indebtedness to the applicant, the emailing of a copy of the application to Dlabantu & Associates did not amount to substantial compliance with the requirements of section 130(3). It was simply insufficient.

[34] As an affected person, the applicant had a statutory right to participate in the winding up proceedings. Inadequate notice prevented it from exercising such right. Whether there is a basis, however, to grant the relief sought remains to be seen, especially considering that it remains open to the applicant to oppose the final winding up of New Biginnings.

Merits of the application

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[20] [2015] 4 All SA 433 (GJ).
[21] At paragraph [98].
[22] The applicant alleged the amount in its founding papers, but it was also reflected as such in the most recent business rescue plan that was proposed by Mr Phiri, attached to ABSA's application in the winding up proceedings. The voting interest appeared therein, too.

[35] Notwithstanding ABSA's insufficient notification of the applicant, the applicant has failed to address, either satisfactorily or at all, the issue of how the setting aside of the previous order would benefit the general body of creditors. At the very least, on the authority of *Nyhonyha*, the applicant was required to have demonstrated that the relief sought would not be to the disadvantage of any creditor.

[36] The applicant based its approach on the value of the contracts that New Biginnings had secured. This aspect requires closer attention. The table, below, summarises the nature of the contracts disclosed in Ms Mbangula's founding affidavit:

Project	**Client**	**Date**	**Value**	**Status**
Installation of bulk pipeline and repairs to water treatment works	Amathole District Municipality	20 August 2019	R18,911,925	Award of contract subject to outcome of litigation proceedings.
Maintenance of road P37/1, Tweespruit and Excelsior	Free State provincial government	23 Jan 2023	R269,903,452	Contract terminated. New Biginnings has alleged claim of R 80,000,000.
Rehabilitation of road P6-3	Kwa-Zulu Natal provincial government	4 March 2023	R319,051,822	Project in progress. To be implemented by applicant.
Appointment to panel for	Kwa-Zulu Natal	23 October 2023	To be determined	Further project anticipated.

rehabilitation of various roads	provincial government			
Appointment to panel for emergency repairs to water infrastructure	Amathole District Municipality	30 November 2023	To be determined	Subject to outcome of winding up proceedings.
Appointment to panel of civil engineering contractors	Independent Development Trust	3 Jan 2024	To be determined	Subject to outcome of winding up proceedings.
Appointment to panel for re-gravelling of roads, Senqu Local Municipality	Eastern Cape provincial government	8 May 2024	R 5,000,000 per annum, for three years	Project suspended, subject to outcome of winding up proceedings.
Equipping of boreholes, Mnquma and Mbhashe	Amathole District Municipality	30 May 2024	R 12,000,837	Project suspended, subject to outcome of winding up proceedings.
Appointment to panel of contractors, bulk	Rand West City Local Municipality	31 May 2024	To be determined	Subject to outcome of winding up

sewerage infrastructure				proceedings.
Appointment to panel of contractors, civil engineering works	Amathole District Municipality	10 July 2024	To be determined	Subject to outcome of winding up proceedings.
Upgrading of gravel streets, James Calata	Walter Sisulu Local Municipality	18 July 2024	R 8,312,383	Project in progress. To be implemented by applicant.
Upgrading of road DR08606	Eastern Cape provincial government	19 August 2024	R 282,841,532	Award of contract subject to outcome of winding up proceedings.

[37] What emerges from the above is not quite the rosy picture that the applicant painted in its papers. New Biginnings may well have secured its appointment to numerous panels but the allocation of any projects in terms thereof remains subject to the outcome of the winding up proceedings. It should be added that such allocation will, of course, also be subject to possible adjustments to client priorities and (inevitably) the availability of funds.

[38] There are only three projects of any significant value, relative to the extent of the close corporation's overall insolvency.[23] Of these, the first project (road P37/1) was terminated. The applicant alleged that the close corporation had a claim for R 80,000,000 in this regard but the strength thereof and likelihood of recovery in the short-term are completely unknown. The second project (road P6-3) is being implemented by the applicant. The terms and conditions of the verbal agreement allegedly concluded with New Biginnings in this regard are, similarly, completely unknown, meaning that there is no evidence of the projected profitability of the project and how much would accrue to the close corporation. The third project (road DR08606) has yet to be awarded. From the correspondence attached to the applicant's papers, the appointment of New Biginnings in this regard is dependent upon the close corporation's submission of, *inter alia*, proof of tax compliance and financial capacity. Considering its indebtedness to SARS and the state of its finances, it seems highly unlikely that New Biginnings would be successful.

[39] Such operational projects as remain are simply too few and too insignificant in value to make any dent upon the close corporation's *de facto* insolvency. Overall, the contracts to which the applicant referred raise substantially more questions than answers. The uncertainties attached thereto fail to advance the applicant's case and appear, instead, to demonstrate the contrary, i.e. that the setting aside of the previous order will most certainly not be to the benefit of the general body of creditors. At the least, it would be to ABSA's clear disadvantage. The only party that would seem to derive any benefit at all therefrom, besides possibly the close corporation, is the applicant itself.

Relief and order

[40] In relation to the remaining arguments, the evidence presented by ABSA refutes the applicant's assertion that New Biginnings was unrepresented when winding up

[23] It appears to be common cause that New Biginnings' liabilities exceed its assets by at least R 145,000,000.

proceedings commenced. To all intent and purposes, Mr Phiri continued to occupy the role of business rescue practitioner. His possible replacement would not take the matter any further, considering the dubious nature of the contracts relied upon by the applicant to advocate such an approach; it would merely prolong and increase the costs of business rescue proceedings that held very little, if any, prospect of a positive outcome.

[41] The bank contended that section 354(1) was the incorrect basis upon which the applicant could apply to set aside the previous order. This was because the provisions thereof dealt only with winding up proceedings and not business rescue (as contemplated under the new Act). Save to remark that section 354(1) seems to afford a wide enough discretion to stay or set aside the commencement of winding up proceedings that were preceded by the setting aside of a resolution by the company to place itself under business rescue, as is the situation in the present matter, there is no need to explore this aspect further considering the findings made elsewhere.

[42] The applicant has failed to demonstrate that special or exceptional circumstances exist to justify the setting aside of the previous order. The court is not persuaded that there is a proper basis upon which it can exercise the wide discretion afforded under section 354(1) of the old Act.

[43] The only outstanding issue is that of costs. ABSA, as the successful party, is entitled to the recovery thereof, but there is no reason to award these on a punitive scale as the bank sought. Mindful of the nature of the matter, ABSA is entitled to the costs of two counsel where so employed.

[44] In the circumstances, the following order is made:

(a) the application is dismissed; and

(b) the applicant is ordered to pay the first respondent’s costs, including two counsel where so employed.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE:

For the applicant:	Adv De la Harpe SC
Instructed by:	Huxtable Attorneys 26 New Street MAKHANDA 046 622 2692 Law1@huxattorneys.co.za Ref: O.Huxtable/cl/02N024002
For the 1st respondent:	Adv Leathern SC
Instructed by:	Symington De Kok Attorneys 169B Nelson Mandela Drive BLOEMFONTEIN dmoller@symkok.co.za Mia.Germishuys@symkok.co.za 051 505 6600 Ref: D MÖLLER/FMN0233/MG c/o DE JAGER & LORDAN INC 2 Allen Street MAKHANDA marius@djlaw.co.za 046 622 2799 Ref: A304

Date heard: 26 November 2024.

Date delivered: 25 February 2025.