THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case 10604/2020

In the matter between:

STEVEN ELLIS	**Applicant**
And	
RICHARD EDEN	**Respondent**
and in the matter between	
RICHARD EDEN	**Applicant**
And	
STEVEN ELLIS	**First Respondent**
NEIL GORE N.O.	**Second Respondent**

Coram: Rogers J

Heard on: 25 May 2022

Delivered: 6 June 2022 (by email at 09h30)

JUDGMENT

ROGERS J:

Introduction

[1] There are two applications before me. In the first, the applicant is Mr Steven Ellis and the respondent Mr Richard Eden. In that application, which I shall call the enforcement application, Mr Ellis seeks judgment against Mr Eden in the sum of R971,132.28, being the amount reflected as owing by Mr Eden to Mr Ellis in a liquidation and distribution account prepared by a receiver pursuant to an order of this Court dissolving an alleged partnership between the parties. In the second application, Mr Eden is the applicant and the respondents are Mr Ellis and the receiver, Mr Neil Gore, who abides. By way of the second application, Mr Eden seeks the rescission of the order dissolving the alleged partnership. It is common ground that the success or failure of the enforcement application hinges solely on the success or failure of the rescission application.

[2] In order to decide these applications, a lengthy history is unavoidable.

Factual background

[3] In June 2015, Mr Ellis registered a company, Extruct Exhibition (Pty) Ltd (Extruct), which began business in the design, building and manufacturing of shopfitting and exhibition stands. In mid-2017, discussions took place between Mr Ellis and Mr Eden, who had expertise in manufacturing and installing shopfitting and exhibition stands. Mr Ellis' case is that the result of these discussions was a partnership which was terminated by agreement on 13 December 2019. Mr Eden's case is that he became an employee of Extruct, and that although the parties envisaged that he would become a 50% shareholder in Extruct, this never came to pass. He denies that a partnership existed. What ended in December 2019, on his version, was his employment with Extruct.

[4] After the termination (whatever its character) in December 2019, Mr Eden began trading through his own company, Rocket Age (Pty) Ltd t/a Cudos (Rocket). Extruct engaged Rocket as a subcontractor on some projects for a few months, but this did not work out, and by April/May 2020 there was a complete parting of the ways.

[5] On 6 August 2020, Mr Ellis caused two actions to be instituted against Mr Eden. In the first action (dissolution action), he claimed orders dissolving the alleged partnership and appointing a receiver. In paragraphs 4 to 6 of his particulars of claim, he alleged:

> "4 During and about August 2017 and at Cape Town, the Plaintiff and Defendant orally concluded a partnership agreement trading under the name and style of Extruct Exhibitions Proprietary Limited ('the partnership') ('the partnership agreement').
>
> 5. The material express, alternatively tacit, alternatively implied, terms of the partnership agreement were as follows:
>
> > 5.1. The partnership was formed for the express purpose of carrying on the business of manufacturing and installing shopfitting and exhibition stands.
> >
> > 5.2. Each party brought into the partnership money, labour or skill in order to carry on the business of the partnership for the joint benefit of both parties and with the common object of making profit.
> >
> > 5.3. Each party would share equally in the profit and loss of the partnership.
>
> 6. During the currency of the partnership, the Plaintiff was responsible, inter alia, for the business development and sales and the Defendant was responsible, inter alia, for production and installation of the exhibitions."

I flag, at this stage, that the argument for Mr Eden in the rescission application places heavy emphasis on the allegation in paragraph 4 that the partnership traded under the name and style of the company Extruct. The argument for Mr Eden is that this is legally untenable.

[6] In the second action (damages action), Extruct and Mr Ellis were the first and second plaintiffs, while Mr Eden and Rocket were the first and second defendants. The plaintiffs claimed damages of R121,912.77. The details are unimportant, but they concerned the alleged wrongful conduct of the defendants in the period

December 2019 to March 2020, that is, in the months immediately after the termination of the alleged partnership. What is important are the following pleaded allegations, which served as background to the events which occurred after the termination of the alleged partnership:

> "8. During the period August 2017 to 13 December 2019, [Mr Ellis] and [Mr Eden] were partners in a partnership under the name and style of Extruct Exhibitions (Pty) Ltd, where each party brought into the partnership money, labour or skill which was created to carry on the business of manufacturing and installing of shopfitting and exhibition stands for the joint benefit of both parties and with the common object of making profit ("the partnership"). The partnership was orally concluded between [Mr Ellis] and [Mr Eden] during about August 2017 at Cape Town.
>
> 9. During the subsistence of the partnership [Mr Eden] engaged and contracted with various of [Extruct's] suppliers on behalf of, alternatively for the benefit of, the partnership or [Extruct].
>
> 10. …
>
> 11. [Mr Ellis] and [Mr Eden] agreed to dissolve the partnership on or about 13 December 2019. [Mr Ellis] is the sole owner and director of [Extruct] and proceeded to trade under the name and style of [Extruct] after the dissolution of the partnership on or about 13 December 2019.
>
> 12. [Mr Eden] is the sole owner and director of [Rocket] and proceeded to trade under the name and style of [Rocket] after the dissolution of the partnership on or about 13 December 2019."

[7] Both summonses were served personally on Mr Eden on 19 August 2020. By not later than late May 2020, Mr Eden had engaged the firm Van Niekerk & Jansen van Rensburg (VNJR) as his attorneys. On 1 September 2020, VNJR filed a notice of intention to defend the damages action. No such notice was filed in the dissolution action. On 11 September 2020, VNJR nevertheless filed a notice in terms of rule 41A, stating that the defendant did not oppose a referral of the dissolution action to mediation. In response, Mr Ellis' then attorneys, Pothecary Attorneys Inc (PAI), wrote to VNJR on 21 September 2020, stating that Mr Ellis was willing to go to mediation on certain non-negotiable terms. PAI stated that Mr Ellis' mediation offer was open

for acceptance until 25 September 2020, adding that a failure to clearly indicate acceptance or rejection "will result in our client proceeding with legal action."

[8] Mr Eden rejected Mr Ellis' terms for mediation. Consistently with the absence of a notice of intention to defend the dissolution action, VNJR took no further steps in that case. In the damages action, Mr Ellis filed a special plea, plea and counterclaim on 7 October 2020. His responses to paragraphs 8, 9, 11 and 12 of the particulars of claim, which I quoted earlier, are relevant. His plea to paragraph 8 was this:

> "The contents hereof are admitted, and it is submitted that [Mr Ellis] and [Mr Eden] each held a 50% stake in the partnership where [Mr Ellis] would attend to sales and [Mr Eden] would attend to the actual manufacturing and installation of shopfitting and exhibition stands."

Mr Ellis admitted paragraphs 9 to 12 of the particulars of claim, and went on to plead – in the context of paragraph 12 – an oral agreement allegedly concluded on or about 13 December 2019 between Mr Ellis and himself about their future relationship. That alleged agreement does not bear on the partnership and its dissolution. The further conduct of the damages action is not germane to the present proceedings.

The application for default judgment

[9] Returning to the dissolution action, on 8 October 2020 Mr Ellis filed an application for default judgment. On 20 November 2020 the matter served before Wille J in the unopposed court. The Judge raised a query about the allegation that the partnership traded under the name and style of a company. He required the plaintiff to file a clarificatory affidavit, and postponed the matter to 12 January 2021.

[10] On 17 December 2020, Mr Ellis filed a clarificatory affidavit. He confirmed the allegations in the particulars of claim. In response to Wille J's query, he attached various documents which, so he stated, showed that Mr Eden had recognised the existence and dissolution of the partnership. These documents included Mr Eden's admissions in his plea in the damages action. After explaining these documents, Mr Ellis concluded:

> "25 I confirm that Plaintiff and Defendant conducted a business partnership for the mutual benefit of the parties during the period August 2017 to 13 December 2019.
>
> 26. [I] have now been made aware that the arrangement that stood between myself and the Defendant, namely the business partnership trading under the name and style of my company Extruct Exhibition (Pty) Ltd, was irregular. However, I implore this Honourable Court to look at the substance of the arrangement as opposed to the form of the arrangement.
>
> 27. I submit that sufficient proof has been put forward in relation to the existence of a business partnership between myself and the Defendant."

[11] It is convenient at this stage to touch on the documents, other than the plea in the damages action, on which Mr Ellis relied in his clarificatory affidavit. The first was an email which Mr Eden sent to Mr Ellis on 20 December 2019. Mr Eden attached a spreadsheet and asked Mr Ellis, who was on holiday, whether he could find a moment to phone him at a computer so that Mr Eden could take him through the document. Mr Eden said he was certain that the spreadsheet was now correct. The spreadsheet contained a list of entries under the headings "Income" and "Expense", though it seems that perhaps these headings should have been "Assets" and "Liabilities". The "Income" and "Expense" columns total R895,500 and R1,793,215.75 respectively. Beneath these totals was an entry for "Total Debt" of R897,715.75, being the shortfall between the "Income" and "Expense" totals. The final entry was "Split Debt", the figure being R448,857.88, that is, exactly 50% of the shortfall. Although Mr Ellis in his clarificatory affidavit did not explain these matters, he described the spreadsheet as catering for the dissolution of the partnership on Mr Eden's version.

[12] The second document was an email which Mr Ellis sent to Mr Eden on 27 January 2020. He asked for a get-together so that the parties could sort out all the loose ends.

[13] The third document was an email exchange which the parties had on 2 April 2020. Mr Ellis answered Mr Eden's email by inserting his replies into the body of

Mr Eden's email. In his clarificatory affidavit, Mr Ellis stated that the issues raised in the exchange included that the parties had attempted to meet to discuss the dissolution but that there was no consensus. My own reading of the exchange is that it was concerned with the business dealings between the parties after the dissolution of the alleged partnership.

[14] The fourth document was an email Mr Ellis sent to his accountant, Mr L'Amour Penderis, on 7 April 2020, copied to Mr Eden. The subject of the email was "Split – Figures". Mr Ellis said that the "business split" should have been dealt with by an independent person from the outset. He asked Mr Penderis for an estimated timeframe to sort out the figures and also an invoice so that it could be shared 50/50 by Extruct and Rocket. It is unclear to what extent this email dealt with the alleged partnership or with the subsequent business dealings between Extruct and Rocket. In his clarificatory affidavit, Mr Ellis stated that it was his suggestion in this email that the accountant "attends to the dissolution and that each party pay for the costs in equal portions".

[15] The final document was an email sent by VNJR to PAI on 6 July 2020, referring to dealings between the attorneys the previous week. The email was marked "without prejudice". The writer stated that, in an attempt to bring the matter to a close, VNJR had instructions to make the following offer:

> "1. Have a third party accountant verify/conduct the dissolution figures prior to expensive arbitration/Court proceedings.
> Alternatively
> 2. Our client to walk away from the partnership, ceding all assets and accounts to Ellis, each party to pay their own legal costs.

In his clarificatory affidavit, Mr Ellis stated that, although the email was marked "without prejudice", it was highly relevant to prove the existence of the business partnership.

[16] The application for default judgment served before Hlophe JP in the unopposed court on 12 January 2021. Counsel filed a practice note, among other

things summarising the query raised by Wille J and directing the Court's attention to the pages where the clarificatory affidavit could be found. Hlophe JP granted default judgment substantially in the terms prayed, with some amplification regarding the appointment and qualifications of the receiver (dissolution order). The order reads:

> "1. The partnership is hereby dissolved.
>
> 2. A liquidator of no less than five (5) and no more than ten (10) years' standing shall be appointed by the chairperson or a member of the executive management team of SARIPA (South African Restructuring and Insolvency Practitioners Association NPC) within 5 business days of receipt of this Order and the liquidator shall have the authority to realise the whole of the partnership assets, to liquidate the liabilities of the partnership, to prepare a final account and to pay the parties whatever is owing to or by them by virtue of the partnership agreement.
>
> 3. The Defendant shall pay the costs of suit."

Appointment of receiver, variation order and issuing of accounts

[17] It does not appear that the dissolution order was served on Mr Eden. How he became aware of it appears from what follows. Pursuant to a request from PAI to make an appointment in terms of the dissolution order, SARIPA on 26 January 2021 nominated Mr Gore as the receiver. (Although the dissolution order referred to a "liquidator", he was styled by the parties as a "receiver".) Mr Gore accepted his appointment.

[18] In February or early March 2021, Mr Gore had a Zoom call with Mr Eden and the latter's attorney, Mr Luan van Niekerk. What was discussed appears from an email which Mr Gore sent to Mr Eden, cc to Mr van Niekerk, on 25 March 2021. Mr Gore said, with reference to the Zoom call "a few weeks ago", that he "would like to reiterate" his role in the matter. He proceeded:

> " Steven Ellis obtained a High Court order:
>
> 1. An order dissolving the partnership.
>
> 2. An order appointing a liquidator/receiver to realise the partnership's assets, liquidate the liabilities, prepare a final account

and pay the parties whatever is owing to them by virtue of the partnership agreement.

3. Costs of suit.

4. Further and/or alternative relief.

The structure and form of the partnership appeared to have been set up and run in a very strange way in that the partnership ran its business through a company. Be that as it may, I was nominated by SARIPA to take this appointment as receiver and carry out my duties to the best of my ability. The court order in its current form gives me very little powers in which to properly execute my duties. I have therefore applied to court for an extension of my powers … Please find attached the extension of powers annexure. The matter has been set down for 5 May 2021. I understand that you will be served a copy of the application shortly."

Mr Gore then raised various queries about the financial affairs of the partnership.

[19] The application to extend the receiver's powers (variation application) was filed on 29 March 2021, the applicant being Mr Ellis, not Mr Gore. Personal service on Mr Eden by the sheriff at the address which PAI had for him was unsuccessful (the application was left in a post box), but on the same day Mr Ellis' attorney emailed the application to Mr Eden and to VNJR, and he also sent it to Mr Eden in a series of WhatsApp messages. There is nothing to suggest that Mr Eden and his attorneys did not receive the application. On 5 May 2021 Nel AJ granted an order on an unopposed basis (variation order). This order varied the dissolution order by adding, at the end of paragraph 2, the further sentence: "The receiver shall have the additional powers as reflected in the document attached hereto, marked annexure 'A'." The annexure to the variation order (variation annexure) is presumably the same document Mr Gore sent to Mr Eden and his attorney on 25 March 2021.

[20] Paragraph 1 of the variation annexure stated that the receiver was to investigate what assets comprised the partnership between the parties, assess their value and realise if necessary the whole of the partnership's assets, and allocate and distribute the proceeds or assets in accordance with the dissolution order. Paragraph 1.13 stated that the receiver was to prepare a liquidation and distribution account "so

that the Plaintiff and Defendant are each possessed of 50% of the assets and/or the monetary value of the partnership". In terms of paragraphs 1.15 and 1.16:

(a) the receiver had to give the parties at least 14 calendar days' notice to make written representations on the account before making any distribution;

(b) he had to consider such representations and, if found necessary, reframe the account in his sole discretion, and notify the parties of his decision;

(c) his decision on such representations would become final and binding on the parties if they did not approach the Court for relief within 14 days of the decision;

(d) the receiver's final account would become final and binding on the parties if no objection to was made within 14 calendar days.

[21] Following representations by Mr Ellis on the first and second liquidation and distribution accounts, Mr Gore sent the parties reframed first and second accounts on 19 May 2020 and 28 September 202 respectively. Mr Eden has not stated that he did not receive them, and there is evidence – in relation to the second account – that he queried the omission of a particular annexure which was subsequently included in the reframed second account. Each account clearly identified itself as an account in the receivership of a partnership between Mr Ellis and Mr Eden. Schedule 2 to the first account reflected that Mr Eden owed R955,480.50. This amount was carried forward to schedule 2 to the second account, which – with a further adjustment – recorded that he owed R971,132.28. In sending the reframed account to Mr Eden, Mr Gore asked him to pay that amount into a specified bank account.

The launching of the enforcement and rescission applications

[22] Mr Eden did not object to either account within 14 calendar days or at all, but he failed to make payment. As a result, Mr Ellis instituted the enforcement application on 3 November 2021. Attempts by the sheriff to effect service on Mr Eden at two addresses were unsuccessful, as on each occasion the sheriff was told that he had left that address. On 10 December 2021, PAI emailed the enforcement application to Mr Eden at four email addresses and also transmitted the application by WhatsApp to two of Mr Eden's mobile numbers. It was accepted in argument that Mr Eden must have known of the enforcement application by 10

December 2021. No notice of opposition having been received, Mr Ellis's attorneys, B Lubbe and Associates who had recently been substituted for PAI, caused the enforcement application to be set down for hearing on the unopposed roll on 3 February 2022.

[23] On a date which does not appear from the papers, Mr Eden approached new attorneys, Van der Meer and Partners Inc (VDM). He consulted with Mr Van der Meer of that firm on 25 January 2022. In his rescission application, Mr Eden states that he had been unaware of the dissolution action and of the default judgment granted against him. He continues:

> "It was only after the main *[enforcement]* application was served, that my attorney of record explained to me on 25 January 2022 what a judgment by default means and that judgment was granted against me as far back as 12 January 2021."

[24] On 25 January 2022, the date of the above consultation, VDM filed a notice of opposition. As a result, on 3 February 2022 an order was granted by agreement postponing the enforcement application for hearing on the semi-urgent roll on 25 May 2022, with a timetable for the filing of answering and replying papers. When Mr Eden filed his answering papers on 15 March 2022, they were accompanied by the rescission application, with the answering papers serving as the founding papers in the rescission application. The only defence to the enforcement application was Mr Eden's contention that the dissolution order, from which the receiver derived his powers, should be rescinded. In the rescission application, Mr Eden relied on rule 42(1)(a), rule 31(2)(b) and the common law.

Rescission in terms of rule 31(2)(b)

Is rule 31(2)(b) applicable?

[25] It is convenient to start with rule 31(2)(b) and the common law, although Mr Eden's attorney placed most emphasis on rule 42(1)(a). Rule 31(2)(a) applies to the granting of default judgment by the Court where one or more claims in an action are not "for a debt or liquidated demand", and rule 31(2)(b) provides for the rescission of such judgments. Where a claim is for a debt or liquidated demand, rule 31(5)

empowers the registrar to grant default judgment, and reconsideration by the Court is governed by rule 31(5)(d). Both rule 31(2)(b) and rule 31(5)(d) require the aggrieved defendant to take action within 20 days of learning of the default judgment.

[26] I was not addressed on the question whether the claims in the dissolution action were for a "debt or liquidated demand". I think they were. A claim for the dissolution of a partnership and the appointment of a receiver is a claim "for a fixed or definite thing",[1] and there was nothing in the papers to suggest that the existence of the alleged partnership and the agreement to terminate it were not capable of speedy and prompt proof. The cases are not harmonious as to whether, in the case of a claim for a debt or liquidated demand, a plaintiff may seek default judgment from the Court rather than the registrar. In this Division, it was held in *Snyders*[2] that rule 31 in its current form does not remove the Court's jurisdiction to grant default judgment in such cases,[3] and in my experience this is often done.

[27] The learned authors of *Erasmus Superior Court Practice* submit that if a Court, rather than the registrar, grants default judgment on a claim for a debt or liquidated demand, neither rule 31(2)(b) nor rule 31(5)(d) applies, and that a defendant must seek rescission in terms of the common law or rule 42(1).[4] In my opinion, however, there is no rational basis for excluding such a case from the scope of rule 31. The relevant parts of the rule were no doubt drafted on the assumption

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[1] Cf *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 737 *in fine*.

[2] *Standard Bank of SA Ltd v Snyders and eight similar cases* 2005 (5) SA 610 (C).

[3] Id at paras 12-13. This particular finding was not addressed when the judgment was, in other respects, reversed in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA). In the former Transvaal Provincial Division, an application for default judgment was struck from the roll in *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T) on the basis that the application should have been made to the registrar, but a full court in that Division has subsequently held that *Erf 1382 Sunnyside* should not be understood as excluding the Court's jurisdiction, though the "preferred route" is for such matters to be dealt with by the registrar: *Nedbank Limited v Mortinson* [2006] 2 All SA 506 (W) at para 36. In the former Natal Provincial Division, by contrast, the Court's jurisdiction was held to be ousted (*Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah* 1994 (2) SA 422 (N)), and this approach has been followed in the Eastern Cape (*Lindeijer v Butler* 2010 (3) SA 348 (ECP)). I am bound by *Snyders* unless I am satisfied that it is clearly wrong, which I am not. Of course, the fact that the Court's jurisdiction is not ousted does not mean that the Court may not penalise a plaintiff on costs if the more expensive procedure is followed. And it is unnecessary to consider whether a Court, despite having jurisdiction, is entitled to strike the matter from the roll, as was done in *Erf 1382 Sunnyside.*

[4] Van Loggerenberg *Erasmus Superior Court Practice* 2 ed at D1-361 (Service 8, 2019).

that, in the case of a debt or liquidated demand, the plaintiff would follow the less expensive procedure laid down in rule 31(5). But where, on such a claim, default judgment is instead granted by the Court, there is no reason to deprive a defendant of the benefit of rule 31(2)(b) and, conversely, there is no reason why such a defendant should not be bound by the 20-day time limit specified in rules 31(2)(b), as would have the been position in terms of 31(5)(d) had the default judgment been granted by the registrar. Reading rule 31 purposively, I consider it to be necessarily implied that rule 31(2)(b) applies where, for any reason, the Court rather than the registrar has granted default judgment on a claim for a debt or liquidated demand.

[28] If this is so, it does not matter whether Mr Ellis' claims in the dissolution action were "for a debt or liquidated demand". I shall thus consider the case for rescission in terms of rule 31(2)(b), although my later treatment of the case for rescission in terms of the common law rule 42(1)(a) would find application if my interpretation of rule 31(2)(b) is wrong.

Delay in launching the rescission application

[29] Mr Eden was aware of the dissolution order by late February or early March 2021, when he participated in the Zoom call with Mr Gore. At any rate, Mr Gore's email of 25 March 2021 could have left him in no doubt. It will be recalled that since late May 2020 VNJR had been acting for Mr Eden in his disputes with Mr Ellis. VNJR was aware of the dissolution action and was aware that, if Mr Eden did not accept Mr Ellis' terms of mediation, Mr Ellis would proceed with his dissolution action. Mr van Niekerk of VNJR participated in the Zoom call, and Mr van Niekerk was copied on Mr Gore's email of 25 March 2021. It could have come as no surprise to Mr van Niekerk that Mr Ellis had obtained default judgment. It is inconceivable that he would not have explained the import of a default judgment to Mr Ellis in February or March 2021. The *Plascon-Evans* rule[5] operates against Mr Eden as the applicant in the rescission application, but I am in any event satisfied that his assertion that he only learnt of the default judgment on 25 January 2022 is false and can be rejected on the papers.

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[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.

[30] The rescission application was delivered about one year after Mr Eden learnt of the default judgment. It was, thus, hopelessly late. Mr Eden's attorney submitted that I should disregard the delay from 25 January 2022 to 15 March 2022, because it was permissible for Mr Eden to treat his proposed rescission application as a counter-application and to file it as part of his answering papers in accordance with the timetable contained in the order of 3 February 2022. I disagree. The rescission application is not in truth an answer to the enforcement application. It is an independent application which seeks to render the enforcement application moot. But in any event, and even disregarding the further delay beyond 25 January 2022, the rescission application was delivered way out of time.

Mr Eden's double burden

[31] Accordingly, to rely on rule 31(2)(b), Mr Eden has a double burden:

(a) First, he must discharge the burden which rule 31(2)(b) imposes on all defendants seeking rescission to show "good cause", even those who bring rescission proceedings within the 20-day limit. Good cause includes a full and frank explanation for the delinquent party's default. In the context of rule 31(2)(b), that explanation, in the present case, is concerned with Mr Eden's default over the period August 2020-January 2021 which resulted in the dissolution order being granted against him by default. (I shall call this the first burden.)

(b) Second Mr Eden must obtain condonation in terms of rule 27 for his failure to comply with the 20-day time limit in rule 31(2)(b). For condonation, he must again show good cause. Good cause here again includes a full and frank explanation for the delinquent party's default. In the context of rule 27, that explanation, in the present case, would be concerned with Mr Eden's failure, over the period January 2021 to March 2022, to deliver his rescission application within the prescribed time. (I shall call this the second burden.)

[32] Good cause, in both contexts, also requires the Court to assess the delinquent party's prospects of success in the main case. In the case of a delinquent defendant, this is usually expressed as a requirement that he show that he has a bona fide defence. And the defendant must also show that the rescission application

is brought bona fide and not for purposes of delay.[6] In the present case, these would be features of both of the burdens mentioned in the preceding paragraph. I start, however, with the explanation for the default.

The first burden: explanation for default in the dissolution action

[33] As to the first burden, Mr Eden in his founding affidavit alleged that, to the best of his recollection, the dissolution summons was not served on him personally, and he claimed to have been unaware of it until 25 January 2022. He went so far as to express the belief that Mr Ellis "deliberately gave an incorrect address for purposes of obtaining judgment behind my back". The allegation turned out to be false, and in his replying affidavit Mr Eden conceded that he must have received the dissolution summons and handed it to his attorney.

[34] Since Mr Eden defended the damages action but not the dissolution action, the only conclusion to be drawn is that he decided, on advice, not to defend the dissolution action. That he would have received such advice makes sense, because in his plea in the damages action he admitted the conclusion and termination of the partnership agreement. On 6 July 2020, shortly before the institution of the two actions, his attorneys had proposed a resolution which acknowledged the existence of the partnership. The dissolution action merely claimed what would flow from the existence and termination of the partnership. When his expressed willingness to go to mediation in September 2020 fell flat, he and his attorneys must have known that the next step would be default judgment.

[35] Accordingly, the explanation put up in the founding affidavit – which sought to make the case that he was unaware of the dissolution action until after default judgment was granted – was untruthful. In argument, all that Mr Eden's attorney could urge is that Mr Eden should have been advised by his previous attorneys to oppose the dissolution action because the allegation of a partnership "trading under the name and style of" the company Extruct was legally untenable. I shall consider the merits of that legal contention presently. Mr Eden, I must note, has made no

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[6] *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at 575H-576A; *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* [2017] ZASCA 145 at para 12.

allegations about the factual instructions he gave to, or the advice he received from, his previous attorneys. I recognise, of course, that the communications between Mr Eden and his former attorneys are privileged, but if he wished to explain his inaction by blaming his previous attorneys, a candid explanation would have required him to waive the privilege.

[36] For the moment, I conclude on this aspect by finding that Mr Eden knew about the dissolution action; knew that default judgment was likely to be granted against him; decided not to oppose this outcome because at that time he admitted the facts on which the dissolution action was based; and that his explanation, which was not candidly offered in his founding affidavit and which has not been factually substantiated, is at most that his previous attorneys should have advised him, and failed to advise him, that in law his factual admissions did not justify the legal conclusion that a valid partnership came into existence. Wilful default is not an absolute ground for refusing rescission, but it will not often be compatible with good cause, and a decision freely taken to refrain from defending an action will ordinarily weigh heavily against a defendant.[7]

Second burden: explanation for delay in bringing rescission application

[37] Turning to the second burden, Mr Ellis knew of the default judgment by late February/early March 2021 and at any rate by no later than 25 March 2021. He received first and second liquidation and distribution accounts from Mr Gore in May 2021 and September 2021, and thus knew that the receiver was carrying out his duties in terms of the dissolution order. He also knew that the dissolution order was to be varied by way of an application to be heard on 3 May 2021. The explanation for his failure to do anything before 25 January 2022 is a continuation of the discredited explanation that he knew nothing about the dissolution action and dissolution order until he consulted his present attorneys on 25 January 2022. That is obviously untrue, and he is thus again left with his present attorney's submission that during 2021 his previous attorneys should have been advising him to take steps to impeach the dissolution order.

[7] *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at paras 6 and 9.

[38] Mr Eden has thus not given a full and candid explanation for his delinquency over the period August 2020 to March 2022, and the explanation is certainly not satisfactory. I doubt whether the merits of his proposed defence, however strong one might assess them to be, would be enough to justify overlooking his delinquency. Nevertheless, I shall consider the alleged bona fide defence. Mr Eden has advanced a factual defence and a legal defence. The factual defence is that the parties never purported to conclude a partnership agreement. The legal defence is that, even if they purported to do so, there cannot in law be a partnership trading under the name and style of a company.

Bona fide defence: factual matters

[39] As to the factual defence, Mr Eden alleges that he was only ever an employee of Extruct. He received a fixed salary, and he has attached some payslips issued to him by Extruct. The fact that Mr Eden received a fixed monthly payments styled a salary is not inconsistent with a partnership. Mr Ellis, in answering the rescission application, stated that he too had received a monthly salary. Partners may draw regular fixed amounts, which may as between them be treated as salaries (and thus as an expense to be deducted before the division of profits)[8] or as an advance of drawings. The fact that the payslips were in the name of Extruct suggests that the payments were made by the company, but whether that excludes the existence of a partnership depends, among other things, on the legal contention that the involvement of the company Extruct excludes the existence of a partnership.

[40] Mr Eden alleges that he and Mr Ellis had in mind that he would become a 50% shareholder in Extruct. In September 2017 they consulted an attorney, Mr Rudi Heydenrych, about this. In October 2017, Mr Heydenrych sent them a draft shareholders agreement for consideration. Mr Ellis alleges that this draft made provision for Mr Ellis to transfer 50% of his shares in Extruct to Mr Eden. That is not correct. The draft assumed that both of them would be shareholders in the company, but in all other respects the draft was not tailored to their particular circumstances and did not incorporate a sale of shares. A year later, in October 2018, Mr

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[88] See *Liquidators of Grand Hotel and Theatre Co v Haarburger* 1907 ORC 25 at 31; *Cameron-Dow v En Commandite Partnership PJ Laubscher and MC Cameron-Dow* (2015) 36 ILJ 3086 (WCC); [2015] 9 BLLR 958 (WCC) at paras 113-116.

Heydenrych emailed them to complain about the lack of response and about the non-payment of his invoice dated 22 February 2018. In reply, Mr Ellis said that he had not seen the invoice. He stated that there were many things in the draft agreement "that did not work for us personally hence we did not action or sign any agreement further on this". He asked Mr Heydenrych to "let me know the further process on this". Mr Eden says that as at October 2018 he and Mr Ellis still wanted to enter into "some sort of agreement" but, with the passing of time, both of them were content for Mr Eden to remain an employee of Extruct, and the selling of shares was not revisited.

[41] In his answering affidavit in the rescission application, Mr Ellis did not dispute the above facts, but said that they were irrelevant, because Mr Eden never became a shareholder in the company. The fact that two people envisage becoming shareholders in a company does not exclude the possibility of a partnership. They may become partners and remain so until the company is formed. The partnership might even continue thereafter, although the incorporation of a company to conduct the business, and the issuing of shares to the partners, would usually signify the termination of the partnership.[9] Of course, the fact that two people intend to become shareholders in a company does not necessarily mean that they are in partnership until the company is formed. It all depends on the facts. So Mr Eden's allegations about the proposed co-shareholding do not in themselves show that there was not a partnership.

[42] Mr Eden has also commented on the documents which Mr Ellis attached to his clarificatory affidavit, in an endeavour to show that they did not reflect a recognition on his part of the existence of a partnership. The emails and letters, he says, were concerned with the business relationship between Extruct and Rocket after his employment with Extruct ended. As I said earlier, it may be so that some of the correspondence does not explicitly deal with a partnership. However, Mr Eden's explanation about the spreadsheet he emailed to Mr Ellis on 20 December 2019 is far from convincing. He avers that the spreadsheet was dealing with his proposal that Rocket buy some of Extruct's assets for R450,000. The spreadsheet, in my

[9] *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 (Ch) at paras 112-114.

view, is not capable of being so understood. The amount that was “split” between the parties was described as a “debt”, and represented a shortfall which took into account a variety of items unrelated to specific assets, including salaries, wages, rent and an overdraft of R446,696. There is also no satisfactory explanation for his previous attorney’s reference to a partnership in the proposal of 6 July 2020.

[43] Mr Eden rightly anticipated that his admissions in the damages action would come back to haunt him. In his founding affidavit, he stated that any reliance by Mr Ellis on these admissions would be “misplaced”. The reason for this was that his current attorneys had pointed out that it was “obviously incorrect” for him to have admitted the existence of the partnership, and that he could only lay the blame on VNJR “for not advising me properly”. Mr Eden does not say that he did not give full factual instructions to VNJR. Mr Eden’s current attorneys, VDM, could not advise him on what the facts were. The admissions in the plea in the damages action would thus pose a considerable obstacle in the way of a defence that Mr Ellis and Mr Eden did not factually conclude what they understood to be a valid partnership agreement, and those admissions call into doubt the bona fides of Mr Eden’s current contention that the parties never purported to do so.

[44] The factual defence, therefore, would face formidable challenges, though I would not describe it as hopeless.

Bona fide defence: legal matters

[45] The legal defence is that, even if the parties purported to conclude a partnership, it is legally untenable for a partnership to be conducted through a company. The matter is not so straightforward. Clearly, if the only facts are that a company conducts a business for its own benefit, with X and Y being its shareholders, there would be no partnership between X and Y, and this would not be affected by the fact that X and Y mistakenly believed that their relationship was one of partnership.

[46] There may, however, be other facts. For example, in England it was held in *Chahal*[10] that where – I am simplifying the facts – X, Y and Z conducted business in partnership, and the business was later transferred to a company in which the shares were held only by X and Y, the partnership between X, Y and Z continued for 18 years, with the shares in the company being partnership assets. In another English case, *Barber*,[11] the parties entered into a partnership but agreed that the partnership venture would be conducted in the name of a company, since this would facilitate the conclusion of a contract with the counterparty on which the venture depended. The Court held that the venture was a business of the partnership, the company holding the relevant assets on trust for the partners.[12] In *Chahal* the dealings between the partners were casual and undocumented, as sometimes happens with partnerships, whereas in *Barber* there was a detailed partnership agreement.

[47] In the present case, Extruct had existed for about two years before the alleged partnership came into existence. Extruct was under the sole control of Mr Ellis. To the extent that the assets which the alleged partnership used were already in existence in 2017 and belonged to Extruct, Mr Ellis was in a position to make them available to the partnership. It would have been wrong, of course, to style this partnership business "Extruct Exhibitions (Pty) Ltd" rather than "Extruct Exhibitions", but it is the sort of irregularity that might happen with lay people. The true position may not have been apparent to outsiders, but we are not concerned with the enforceability of an arrangement as between outsiders and the company, but with relations between the alleged partners.

[48] Another possibility is that the business remained in the name of the company Extruct, but on the understanding, between Mr Ellis, Mr Eden and the company, that it would henceforth be a partnership asset to which Mr Eden would contribute his

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[10] *Chahal v Mahal & Anor* [2005] EWCA Civ 898 (*Chahal*), confirming, on appeal, a decision to this effect by the High Court.

[11] *Barber & Ors v Rasco International Ltd & Anor* [2012] EWHC 269 (QB) (*Barber*).

[12] For the partners' agreement in that case to conduct the business through a company, see paras 2, 28-9 and 38-9; and for the Court's findings that the company held contracts and funds in trust as partnership assets, see the answers recorded in paras 95, 105, 109, 112 and 172-6. See also Banks *Lindley & Banks Partnership* 19 ed (Banks) at para 24-46.

experience and expertise. This would be akin to the situation in *Barber*, where – for reasons of commercial convenience – it was preferable to present a company as the public-facing entity with which outsiders would deal. In *Barber* the company was regarded as holding assets on trust for the partners. English trust law has some features which our law does not share, and we would not necessarily use the law of trust to describe this relationship. However, the distinction between nominal and beneficial ownership is recognised in our law, as is the concept of an agent for an undisclosed principle. So, as between the partners and a company, the company could be the nominal owner of assets, with the partnership being the beneficial owner; and in dealings with outsiders, the company could act as an agent for the partnership as its undisclosed principal.

[49] Yet another possibility is a partnership between a natural person X (Mr Eden) and a company (Extruct) owned by Y (Mr Ellis). There is no objection in principle to a partnership between a natural person and a company.[13] In the present case, there would have been little practical difference between (a) a partnership between Extruct and Mr Eden and (b) a partnership between Mr Ellis and Mr Eden, with the partnership having become possessed, nominally or beneficially, of the business formally belonging to Extruct. The business could have been carried on, for all outward appearances, in the name of Extruct, with Mr Eden as an anonymous partner.[14]

[50] The parties, who were not legally advised when the alleged partnership was formed in August 2017, were almost certainly not aware of the different legal ways in which the law might categorise and give effect to their agreement. The important point is that there were, in my view, ways in which this could be done, and generally the law should seek to uphold rather than thwart agreements.

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[13] *LAWSA* 2 ed Vol 19 "Partnership" (*LAWSA*) at paras 268 and 277(a); Banks, note 12 above, at para 4.20. An example of such a partnership in England will be found in *Newstead v Frost* [1980] 1 All ER 363 (HL). I note, in passing, that *Newstead* seems to have been a case, similar to *Barber* (note 11 above): all the earnings from the entertainment activities of the natural-person partner were channelled to the partnership through companies (at 366h-367a).

[14] *LAWSA*, note 13 above, at para 258 and fn 16 and at para 260.

[51] These legal issues are not straightforward, and there is not much judicial authority on them, at least not in this country. Mr Eden's legal contentions cannot be dismissed as unarguable, but they are by no means obviously right. For the reasons I have given, a defence that the intended partnership was not one to which the law could give legal effect would probably fail.

[52] Given the marginal nature of Mr Eden's case on the merits, and given his gross delinquency and delay, I am not satisfied that there is good cause, in terms of rule 31(2)(b), to rescind the dissolution order, or good cause, in terms of rule 27, to condone his failure to comply with the 20-day limit in rule 31(2)(b). An additional factor counting against Mr Eden is prejudice. To allow Mr Eden to reopen the dissolution action would put Mr Ellis back to the position he occupied in September 2020, when Mr Eden should have given notice of intention to defend if he wished to oppose the dissolution action. It would also render nugatory and wasted the work done, and related expenses incurred, in the winding up of the partnership business by Mr Gore in the period March-October 2021. The interests of finality militate strongly against exercising this Court's discretion in favour of Mr Eden.

[53] For these reasons, I reject the case for rescission in terms of rule 31(2)(b).

Rescission in terms of the common law

[54] If, as I consider, rule 31(2)(b) is applicable, Mr Eden cannot escape the 20-day time limit by falling back on the common law, since otherwise rule 31(2)(b) would be a dead letter. However, if I am wrong in finding that rule 31(2)(b) is applicable, the case for rescission based on the common law confronts similar difficulties to the case for rescission based on rule 31(2)(b).

[55] First, a defendant seeking common-law rescission of a default judgment must establish good cause, and the scope of that requirement would be much the same as the good cause requirement in rule 31(2)(b).[15] Second, although Mr Eden's claim for common-law rescission is not subject to a 20-day time limit, common-law

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[15] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* 2003 (6) SA 1 (SCA) (*Colyn*) at para 11.

rescission is a discretionary remedy.[16] A claimant seeking a discretionary remedy may be non-suited if he or she delays unreasonably in claiming the remedy, and this applies to common-law rescission.[17] Mr Eden thus needs to satisfy the court that his delay, which was undoubtedly unreasonable, should be overlooked. The 20-day period stipulated in rule 31(2)(b) provides at least a starting point to assess what would be reasonable in the case of a default judgment granted by a Court on a claim for a debt or liquidated demand. For the reasons I have given in my discussion of rule 31(2)(b), I would reject the claim for common-law rescission.

Rescission in terms of rule 42(1)(a)

[56] This leaves the claim for rescission based on rule 42(1)(a). That sub-rule provides that the Court "may" rescind an order or judgment "erroneously sought or erroneously granted in the absence of any party affected thereby". Counsel for Mr Ellis submitted that a defendant cannot be regarded as having been absent if he chose to absent himself. I am not satisfied that this submission is correct, and I shall in any event assume in Mr Eden's favour that the requirement of absence was satisfied.

[57] On that basis, two main issues were argued, namely (a) whether Mr Ellis' particulars of claim in the dissolution action were excipiable and, if so, whether the granting of the dissolution order was "erroneous" within the meaning of the rule; and (b) whether, assuming the order to have been erroneously granted, there is a discretion to refuse relief and, if so, the nature of the discretion.

"Erroneously granted"

[58] I was referred to authority for the proposition that a default judgment is "erroneously granted" if it is granted on a summons that fails to disclose a cause of

[16] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042G-1043B; *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* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (*Zuma*) at paras 80 and 98.

[17] *First National Bank of Southern Africa Ltd v Van Rensburg NO; In re First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) (*First National Bank*) at 681G-H.

action.[18] The argument for Mr Eden is that the particulars of claim in the dissolution action were bad in law and did not disclose a cause of action. In this regard, there may be a distinction between a case where the Judge was not aware that the particulars lacked an essential averment and a case where the Judge considered that question and concluded that the particulars passed muster. Both sides referred me to the helpful summary in *Kgomo*[19] of the principles governing rescission under rule 42(1)(a). Recently, in *Selota*,[20] the Court concluded that a further principle should be added to the *Kgomo* list: it must be shown that the procedural error or irregularity arose because of facts of which the Court that granted the order was unaware, and that the Court would not have granted the order had it been aware of those facts.[21]

[59] In the present case, Wille J flagged the issue which Mr Eden now raises. A clarificatory affidavit was filed. Given the content of the practice note filed before the next hearing, one must assume that Hlophe JP was satisfied that the particulars of claim passed muster in this respect and that default judgment could thus be granted. If *Selota* is right, the supposed excipiability of the particulars of claim was considered, and this cannot now be reopened by way of rescission rather than appeal.

[60] However, I do not need to decide whether the *Selota* extension is right and whether it applies here. I have already discussed, in the context of rule 31(2)(b), the legal aspects of Mr Eden's defence. Having regard to that discussion, the particulars of claim did not in my opinion fail to disclose a cause of action. In assessing whether particulars of claim fail to disclose a cause of action, a Court must be satisfied that the pleading is excipiable on any reasonable reading. The most natural reading of the particulars of claim, in my opinion, is that Mr Ellis and Mr Eden agreed to conduct, and did in fact conduct, a partnership in their personal capacities, but they chose, as the trading name or style for their partnership, "Extruct Exhibitions

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[18] *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (T); *Smit v Olivier* [2011] ZAWCHC 414 at para 13; *Silver Falcon Trading 333 (Pty) Ltd v Nedbank Ltd* 2012 (3) SA 371 (KZP) at paras 4-5.

[19] *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP) at 187F-188C.

[20] *Selota Attorneys v ONR* [2020] 4 All SA 569 (GJ) (*Selota*).

[21] Id at paras 30-2.

Proprietary Limited". They should not have used a corporate name, though the name "Extruct Exhibitions" would have been unobjectionable.

[61] The use of a corporate name does not, without more, show that there was not a partnership between the two individuals. If the case had been opposed, the precise nature of the alleged partnership might have emerged more clearly, and perhaps a different construction might have been placed on the agreement. But in the context of rule 42(1)(a), the only point argued is that the particulars of claim were excipiable as not disclosing cause of action, and I do not accept that argument.

[62] I may add that, even if the dissolution order had not been timeously impeached, it was open to Mr Eden to object to the accounts prepared by Mr Gore on the basis that particular assets or liabilities had been wrongly excluded or included. If this had been done, it might have been necessary for one of the parties or Mr Gore to approach the Court for directions,[22] and in such proceedings the precise nature of the partnership could have been ventilated and clarified. However, Mr Eden chose not to challenge the accounts. Even in the present proceedings, there has been no attempt to attack the accounts on their merits.

Discretion and delay

[63] If I am right that the dissolution order was not "erroneously granted", the question of discretion does not arise, but in case the matter goes further I shall address that question. Rescission in terms of rule 42(1)(a) is a discretionary matter. This was the view I expressed in *Nkata*,[23] where I applied the delay rule on the basis that the applicant was seeking a discretionary remedy. Although the attorney for Mr Eden politely called my judgment into question, what I said is, in my view, uncontroversial. That the Court is given a discretion was stated by the Appellate Division in *Tshivhase Royal Council*,[24] approving a statement to that effect in this Division in *Theron*.[25] This was repeated in *Colyn*, where the Court stated that,

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[22] Cf *LAWSA*, note 13 above, at para 321.

[23] *Nkata v Firstrand Bank Limited* 2014 (2) SA 412 (WCC) at para 27.

[24] *Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase* 1992 (4) SA 852 (A) at 862J-863A.

[25] *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) at 536G.

because the rule is discretionary, rescission does not follow mechanically upon proof of error.[26] These statements have received the imprimatur of the Constitutional Court.[27] It has been said that the purpose of rule 42(1) is “to correct expeditiously an obviously wrong judgment or order”, that the interests of finality dictate that the Court should be approached within a reasonable time, and that it would be a proper exercise of the discretionary power to refuse rescission in the case of unreasonable delay.[28] The cases acknowledging that the remedy is discretionary are legion, although there are differences of opinion about the extent, if any, to which the merits in the main case should be taken into account.

[64] Rule 42(1)(a) does not impose a requirement of “good cause”.[29] This does not mean that considerations of a kind which feature in a “good cause” inquiry may not also come to the fore in an assessment as to whether to grant or withhold a discretionary remedy. If rescission in terms of rule 42(1)(a) is sought promptly after the default judgment comes to the defendant’s attention, the merits would, in my view, pay little if any role in the exercise of the Court’s discretion, and there may in truth be no basis on which a Court could properly refuse rescission. Cases where rescission was thought to follow almost as a matter of course can probably be explained on the basis that in those cases the rescission applications were brought promptly, so that the Court’s reasoning was not directed to the question of delay.[30] The longer and more unreasonable the delay, however, the more the merits in the main case might enter the picture.

[65] For present purposes, however, I am willing to assume in Mr Eden’s favour that I should not concern myself with the merits of the main case. At very least, and

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[26] *Colyn*, note 15 above, at para 5. See also *Morudi v NC Housing Services and Development Co Ltd* [2017] ZASCA 121 at para 14.

[27] *Zuma*, above note 16, at para 53.

[28] *First National Bank*, above note 17, at 681B-G. This case has been widely cited and followed in more recent judgments of our Courts.

[29] *Ferris v Firstrand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) at para 13.

[30] This includes two of the cases cited by Mr Eden’s attorney in argument: *Mutebwa v Mutebwa* 2001 (2) SA 193 (TkH) and *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP). Mr Eden’s attorney also cited *Buys v Changing Tides 17 (Pty) Ltd* [2013] ZAWCHC 150. The judgment in *Buys* does not indicate when the defendant learnt of the default judgment, but Ndita J in para 4 recognised that the Court has a discretion even if it is found that the judgment was erroneously granted.

as I said in *Nkata*, unreasonable delay would influence the exercise of the discretion. Mr Eden's attorney, in argument, appeared to accept that the Court might have at least a "narrow" discretion, but when I pressed him on the circumstances that might feature in the exercise of the "narrow" discretion, I did not receive a clear answer. To the extent that he submitted that the discretion related only to whether an irregularity should or should not be treated as an "error", I disagree. The question whether an order has been "erroneously granted" is not a matter of discretion; it is a legal question capable of only one right answer, even if Judges might differ as to what the right answer is. The discretion recognised in the cases is a discretion arising once it has been shown that an order was "erroneously granted". At the very least, delay must be a factor relevant to the exercise of that discretion, however narrow it otherwise is.

[66] This being so, and assuming that the dissolution order was erroneously granted, I would exercise my discretion against granting rescission, having regard to the gross delay and the unsatisfactory nature of Mr Eden's explanations.

Conclusion and order

[67] For these reasons the rescission application must fail, from which it follows that the enforcement application must succeed. I do not think it is necessary to make the reframed second and final liquidation account an order of court. It is sufficient to enforce Mr Eden's obligations under the account by way of an order for payment. Regarding the date from which interest runs, the most generous reading of the dissolution order as varied, from Mr Eden's perspective, is that the reframed final account became final and binding on him 14 court days after 28 September 2021, and I shall thus grant interest from 19 October 2021. The costs of 3 February 2022 stood over for later determination and should follow the result.

[68] The following order is made:

1. In regard to the rescission application:
   - (a) The application is dismissed.
   - (b) The applicant, Mr Richard Eden (Mr Eden), must pay the costs of suit of the first respondent, Mr Steven Ellis (Mr Ellis).
2. In regard to the main (enforcement) application:

(a) The respondent, Mr Eden, is ordered to pay the applicant, Mr Ellis, R971,132.28 together with interest thereon at the prescribed rate from 19 October 2021 to date of payment.

(b) Mr Eden must pay Mr Ellis' costs of suit, including those reserved on 3 February 2022.

O L ROGERS

Judge of the High Court

For the Applicant in the first application and for the First Respondent in the second application:	B Brown instructed by B Lubbe and Associates
For the Respondent in the first application and for the Applicant in the second application:	S van der Meer (attorney) of Van der Meer and Partners Inc