

REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 2009/52823

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

ISTVAN SZABO

Applicant

And

STAR CONTRACTORS (PTY) LTD

Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** This is an application for a rescission of a judgment that was granted by way of default. The said judgment that was granted by this court in favour of the current Respondent against Bankok Wok Northriding

CC (the CC) on 3 May 2010. This application is based on Rule 42 of the Uniform Rules of the High Court.

2. **Background:** A default judgment was granted against the CC for the payment of R181 853.56; interests in the rate of 15.5 % per annum and costs. The Applicant was the sole member of the CC. The said CC was deregistered on 14 February 2011. Armed with this judgment, the Respondent was able to obtain a judgement against the Applicant at the KwaZulu Natal High Court, Durban on 21 November 2011 in the same amount as the judgment against the CC. The judgment against the Applicant was based on the provisions of sec 26 (5) of the Close Corporation Act, 69 of 1984 which provided for personal liability of members of the close corporations over their debts at the time of deregistration. The judgment against the Applicant was also by way of default after he decided not to oppose it for reasons that would be referred to later. Two issues are addressed in this judgment being the Applicant's *locus standi* to bring this application and the requirements for a rescission of a judgment based on Rule 42.
3. **Locus Standi:** The Respondent opposes the application citing amongst other reasons, the lack of *locus standi* on the part of the Applicant. Judgment was not granted against the Applicant but against the CC of which he was a member. The Respondent argues that it is the CC that should apply for the rescission of the judgment if necessary. However the CC is not in a position to do so since it has since been deregistered and does not exist. It was also argued for the Respondent that the test as to whether the Applicant is an "affected person" as provided in Rule 42 is whether such a party has enough interests that would qualify him to intervene in the original application had he applied. So it was submitted that the Applicant lacks locus standi because

even if the CC was still in existence, him being its member would have lacked the right to be joined as a party to the original application.¹

4. There is in light of this a need to revisit Rule 42. Rule 42 provides,

“(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties...”

[Own Emphasis]

The issue to be decided is whether the Applicant can be classified as “any party affected” in view of the Rule 42 (1). *United Watch and Diamond Co v Disa Hotels*² was quoted by both the Applicant and the Respondent as an authority allowing or barring the Applicant in using Rule 42 as a basis to apply for the rescission of judgment.

5. The Applicant submitted that he has *locus standi* in that he demonstrated sufficient direct and substantial interest in the subject matter of the judgment, entitling him to have intervened in the original application upon which the judgment was granted. He further submitted his interest is legal or interest in the right of, the subject matter of the action which could be prejudicially affected by the judgment. The Respondent in turn contends that the said interest need not be merely financial as it is the case in the current application. In light of these submissions, the court is called upon to

¹ This would be in line with the *Foss v Harbottle* Rule as applied in *Francis George Hill Family Trust v South African Reserve Bank* 1992 (3) SA 91 (A) at 97 B-C and 102 F-I.

² 1972 (4) SA 409 (C).

determine if the interest the Applicant has in this application is “legal” or “mere financial” interest.

6. The Respondent approach is correct in submitting that the interest that a party should have to qualify to bring the application based on Rule 42 should be substantial enough to entitle him to have intervened in the original application upon which the judgment was granted.³ The court would refuse the application for rescission of judgment even if the Applicant is able to demonstrate that the judgment may have been erroneously granted, that is it should not have been granted in the first place, unless it is shown that the Applicant has an interest in the judgment.⁴ Financial interest alone is not sufficient to qualify one to apply for a rescission of judgment based on Rule 42.⁵

7. The Respondent relied on the *Foss v Harbottle* rule in arguing that the Applicant would not have been able to be a party to the original proceedings by virtue of his membership. On that basis, it was argued that he cannot be “the affected person”. I am of the view that this argument does not correctly portray the rule enshrined in the *Foss v Harbottle*. The rule in *Foss v Harbottle* is to the effect that while accepting the general principle that in order to redress a wrong done to the company the action should *prima facie* be brought by the company itself. It recognised that in certain exceptional cases the courts will permit departures from that principle and allow the individual shareholder to bring a derivative action to enforce his company’s rights.⁶

³ *United Watch and Diamond Co v Disa Hotels* 1972 (4) SA 409 (C) at 416.

⁴ *Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd* 1981 (2) SA 52 (T) at 55.

⁵ *Brauer v Cape Liquor Licencing Board* 1953 (3) SA 752 (C).

⁶ *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

8. In *Moti v Moti & Hassim Moti Ltd*⁷ it was held that the exceptions to the rule in *Foss v Harbottle* are three, one of them being “where there is an absolute necessity to waive the rule in order that there may not be a denial of justice.” In *McLelland v Hulett*⁸ it was held that there is no basis for saying that the rule in *Foss v Harbottle* has been received into our law without the exceptions together with which it was framed, and hence our law recognises an exception based on the interests of justice where no other remedy remains. This dictum was followed by this court in *Kalinko v Nisbet and Others*.⁹ In essence, the question should rather be whether in light of the fact that the CC is now deregistered, the Applicant, being its former sole member, would he have been able to act on its behalf to have the judgment rescinded if that judgment was erroneously granted against it. This would ultimately lead to a question as to whether this failure to allow his intervention (based on the *Foss v Harbottle*) would result in a denial of justice and whether in the interests of justice intervention has to be allowed since there is no other remedy available to the CC. I am convinced that in the circumstances, there would have been an exception to the *Foss v Harbottle* rule in favour of the Applicant joining the proceedings as envisaged in *McLelland v Hulett*.¹⁰
9. The Applicant in this matter being the former sole member of the CC, he appears in my view to be the only person who could institute the proceedings in favour of the CC which is now deregistered. He has similar interest that the CC would have had in applying for the rescission of the judgment. An argument to the effect that the interest that the Applicant has in merely

⁷ 1934 TPD 428 at 441.

⁸ 1992 1 SA 456 (D) at 467

⁹ 2002 (5) SA 766 (W).

¹⁰ *Supra*.

financial suggests that had the CC been in existence, its interests would also be merely financial.

10. Counsel for the Respondent argues that since the CC is now deregistered, even if the Applicant's Founding Affidavit may not be disputed (which is the case in this matter) that the judgment was erroneously granted, the court would not be able to do anything because there would never be any person with sufficient interest to allow the rescission of judgment. This argument cannot be allowed to stand especially in light of the uncontested submissions to the effect that judgment was granted against the wrong close corporation simply because it had similar names to those of corporation against whom the proceedings should have been instituted. It is therefore my finding that the Applicant has legal interests which is more than mere financial interest in the judgment that was granted. The Applicant has as such *locus standi* to bring this application.

11. **Judgment erroneously granted.** Rule 42 further requires that the judgment or order should have been granted erroneously in the absence of any party affected thereby. It is common cause that the summons was not served on the Applicant or the CC and that judgment was granted by way of default. The only substantial issue is therefore the interpretation of the rule on what would constitute erroneously granting of a judgment.

12. It was submitted for the Respondent that in order to determine if an order was erroneously granted, the court needs not consider the merits of the case since the "error" referred to in Rule 42 refers to procedural error. This argument is wrong because judgment can be erroneously granted if facts were concealed from the court which if they were made known, judgment

would not have been granted.¹¹ A judgment is therefore erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.¹²

13. The Respondent in this case opted not to file Answering Affidavit in response to the averments made by the Applicant. It was argued by both parties, that in the absence of any Answering Affidavit, the court should take the facts averred by the Applicant as uncontested or as admitted. The Applicant alleges that the summons was issued against Bangkok Wok Northriding CC which came into existence on 13 March 2008. The contract which formed the basis of the claim against the CC was signed on 09 January 2007 between Mimmos Franchising CC trading as Bangkok Wok and Slade Prop Services (Pty) Ltd. The Applicant further avers that the Respondent should have noticed that the CC registration numbers show that it was not in existence when the contract that formed the basis of the application for default judgment was signed, which should have informed it that it had summons issued against the wrong defendant. Had these facts been known to the judge who granted the judgment against the CC, he would not have granted it.

14. In short, the Applicant has shown that he has a legal interest in the judgment granted against the CC and as such, has the necessary *locus standi* to bring this application. The court is also satisfied that the judgment was erroneously granted against the CC.

¹¹ See *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 GNP paragraph 38.

¹² see *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D – G; *Herbstein & Van Winsen* vol 1 at 931, *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348C – 349E; *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA).

15. For these reasons, I make the following order

1. Judgment granted on 3 May 2010 (case no. 2009/52823) is hereby rescinded.
2. The Respondent is ordered to pay the costs of this application.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 15 May 2013

Judgment Delivered: 13 June 2013

For the Applicant: Adv. RC Jansen Van Vuuren
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