

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

10085/2010

5 DATE:

13 OCTOBER 2010

In the matter between:

MAD MEDIA (PTY) LTD

Applicant

and

10 **SAMANTHA MARY NEAL-BELCHER**

Respondent

J U D G M E N T

15 **CLEAVER, J:**

This is an application brought on an urgent basis for an order in terms of Rule 6(12)(c) of the Rules of Court, to reconsider the order made by Griesel, J in this court on 30 September in terms whereof the company, Mad Media (Pty) Limited, was finally liquidated. Alternative grounds are advanced, namely that in terms of Rule 42(1)(a), the order may be rescinded and alternatively, finally that in terms of the common-law it may be rescinded.

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When the matter was called, I indicated to counsel for the applicant that the allegation that the matter was to be dealt with as one of urgency was contested and I heard argument on the question of urgency only. The grounds advanced in the

5 founding papers to support the prayer for urgency are very tersely stated, namely that given the nature of a final order of liquidation, the matter is urgent and that there would not be any prejudice, since on the version of the applicant, security for the full capital sum had been paid into the trust account of

10 the attorneys who had acted for the company in liquidation. That statement is not entirely accurate, because the money had been paid in, subject to certain conditions.

In fairness to counsel for the applicant, he was hard put to

15 advance any cogent reasons as to why the matter ought to be dealt with as one of urgency. It is common cause, I understand, that the company in liquidation had been dormant. It is also common cause that a period of in excess of two months had expired since the granting of the final order and

20 there is clearly no reason why the application could not have been lodged and dealt with in terms of the rules, and why it ought to be dealt with as one of urgency. Counsel suggested that because of the history of the matter, as set out in the papers, I should also find some degree of urgency, but I regret

25 to say that that argument is, in the very least, unpersuasive.

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I am firmly of the view that no grounds have been made out for urgency and there is no reason why this application should enjoy precedence over other matters. I have had to set aside
5 time, when I could otherwise be dealing with applications where are properly before me, in order to hear a matter in which the applicant has, in effect, sought to jump the queue in order to have the matter, which is not urgent dealt with.

10 The law in this respect is clear; that if I find that the matter is not urgent, it is to be removed from the roll. In the normal course of events that would draw an order penalising the applicant by means of a costs order against the applicant. It is complicated in this respect since the company on whose behalf
15 the deponent has purported to act, is in final liquidation, and a costs order against that company would be of little solace to the applicant. That may not have been bar to making such a costs order, had the deponent been properly authorised to bring the application either on behalf of the directors, or
20 perhaps, and I am not sure whether this would be legally correct, on behalf of the provisional liquidator.

However, the deponent's authority is challenged by the respondent and justifiably so, because all that is advanced in
25 support of his authority, is the terse statement reading as
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follows:

5 “The facts deposed to are true, correct and within my personal knowledge, unless the context indicates otherwise. I am duly authorised to depose to the facts as set out herein.”

Well on the basis of that clause, which is not amplified to any meaningful degree, the deponent is not authorised to bring an
10 application on behalf of a company in liquidation. It is common cause that the deponent is an attorney, who is a partner in a firm of attorneys which had represented the company in liquidation. In response to the challenge to the authority of the deponent, the deponent in his reply states as
15 follows:

 “Given the circumstances under which the final order was granted, the deponent is qualified to depose to the facts contained herein, as well as to bring this application.”

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I do not propose to go into the circumstances under which the final order was granted, but whatever such circumstances are, they alone can clearly not authorise the deponent to act on behalf of the company in liquidation.

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Counsel the applicant made available to me, during the course of his address, a reply, which had been furnished this morning, to the request by the respondent to produce in writing the authority of the deponent to act, that being a document entitled

5 "Special Power to Sue and Defend". In this, three parties record that they act on behalf of Mad Media (Pty) Limited:

- 10 "... do hereby nominate, constitute and appoint Adams Attorneys Inc., Unit 3 Doncaster Office Park, Punters Way, Kenilworth with power of substitution to be my true and lawful Attorneys and Agents in my name, place and stead, to appear before the High Court of South Africa or wherever else may be necessary and then and there as my act and deed:
- 15 (a) To defend on my behalf the liquidation claim institute by Samantha Mary Neale-Belcher.
- (b) To institute proceedings in the High Court of South Africa or wherever else may be necessary to defend and institute such action(s) and costs of suit;
- 20 (c) To negotiate with and accept on my behalf any reasonable offer..."

This document is unsigned. In itself it clearly has no reference to an application for rescission of the order. Counsel for the

25 applicant submitted that since it appeared *ex facie* other

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documents put before me, that two of the signatories were directors of the applicant, that that was sufficient to authorise the deponents to bring the application. However, the lack of a date on this power of attorney, is a worrying factor. When the authority was challenged, it would have been a simple matter to provide proper proof of the authority, had such an authority been granted, Counsel for the applicant was left to argue that by inference, the power of attorney granted by these three people, who do not record in which capacities they granted the power, the power of attorney being granted to Adams Incorporated, is sufficient to authorise a single attorney of that firm to apply for the rescission of the order.

The reason why I have dealt with the power in detail is, of course, to be found in the submissions made on behalf of the respondent that in removing the matter from the roll, an order for payment of the costs should be made against the deponent. This would be a relatively harsh step, but in the circumstances it seems to me not unjustified. Authority was provided for the grant of such an order, namely the judgment in Corigrain Trading SA v Resora (Pty) Limited 2004 (2) SA 348 (W). There the court found that a provisional liquidator, who had taken steps to act on behalf of the company in provisional liquidation, had no authority to do so and was ordered to pay the costs personally.

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I have come to the conclusion that a similar order is justified in this matter and the next issue to be decided is whether it is to include the costs incurred by the employment of two counsel.

5 On behalf of the respondent, such an order was urged and as justification I was directed to the allegations of unprofessional conduct, which had been levelled against junior counsel for the respondent at the time that the final order of liquidation was granted. Those allegations were to the effect that
10 respondent's counsel was aware of the fact that the applicant had intended to oppose the final winding up and that accordingly there had been an obligation on her to notify counsel for the applicant that a final order was to be taken.

15 It is clear from the papers before me that that is clearly incorrect. The respondent had known of the return day for some two months and even though the return day had wrongly been set down for hearing during the recess period, counsel for applicant at the time, was able to find the court in which
20 the matter was heard and there is simply no reason why the counsel who was acting for the company at the time, could not similarly have found where the court was sitting. Further argument advanced on behalf of the respondent was that because counsel were called upon to deal with the application
25 on 24 hours notice, senior counsel had, for a second reason,
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to be called in, the first reason, of course, being to deal with the allegations of unprofessional conduct.

I have given earnest consideration to these submissions and I
5 have come to the conclusion that such an order will be justified. In the circumstances, the application is removed from the roll and the costs of attendant on the removal incurred by the respondent, are to be paid by Mr Rusthi Lagadien in his personal capacity. Such costs to include the
10 costs of two counsel.

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CLEAVER, J