IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA) 20/11/13

Case No. 27788/04

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

In the matter of: 20/11/2013 (DATE) ... (SIGNATURE)

CASPER HENDRIK MINAAR Applicant

and

A W VAN ROOYEN N O Respondent

JUDGMENT

KEIGHTLEY AJ:

1 On the 23 February 2012, Van der Merwe DJP, granted an order against the applicant in the following terms ("the Order"):

> *"After reading the papers filed and hearing counsel for the Plaintiff, the Court makes the following order: (BY DEFAULT)*
>
> *1. It is declared, pursuant to the provisions of Section 424(1) of the Companies Act, number 61 of 1973, that the 1st Defendant is*

personally liable without any limitation of liability, for all the debts of the company, Askari Mining and Equipment Ltd (In Liquidation)

2. The 1st Defendant shall pay the costs, including the costs occasioned by the employment of two counsel."

2 The applicant is the first defendant referred to in the Order. He seeks a rescission thereof. Before I give consideration to the rescission application, it is necessary to set out certain background facts.

Background facts

3 In addition to the applicant, there were four further defendants cited in the proceedings that led to the Order being granted. The applicant and the second to fourth defendants had all been directors of the company in liquidation referred to in the Order, Askari Mining and Equipment Ltd ("Askari").

4 It is common cause that the applicant had been a consultant with Askari from 1999, until he was appointed as its financial director in May 2000. He resigned with effect from 1 November 2001. The fifth defendant, one De la Pierre, was the CEO of another company, Gilboa Investments Ltd ("Gilboa"), which had entered into negotiations with Askari, and had subsequently signed a "subscription agreement" in terms of which it was to become the majority shareholder in Gilboa. In his capacity as CEO of Gilboa, the fifth defendant also became involved in the running of affairs of Askari.

5 Askari was provisionally liquidated in June 2003, and finally liquidated in July

2008. On 11 March 2004, the Master appointed retired Judge President CF Eloff as Commissioner for purposes of an inquiry into the affairs of Askari in terms of section 417 of the Companies Act, No 61 of 1973 ("the Companies Act"). I will deal with the relevant findings of the Commissioner's report later. Suffice to say at this stage that subsequent to the report, in May 2008, the liquidators instituted an action against the defendants in terms of which they sought an order under section 424(1) of the Companies Act holding the defendants personally liable for all the debts of Askari in liquidation. It was this action that ultimately led to the granting of the Order. I should clarify that a succession of liquidators was involved over the years as plaintiffs in the action. The current respondent is the present incumbent.

6 The action took some time to wend its way to court. The applicant and second to fourth defendants appointed the same attorney to represent them. This was initially one Mr Roux and, subsequently, one Mr Assenmacher. The applicant and second to fourth defendants filed a joint plea in August 2009 in which they denied the allegations against them.

7 Thereafter, the matter was set down for trial on 22 February 2012. The possibility of a settlement of the matter arose during 2011. The applicant confirms in his founding affidavit that he recalls that settlement proposals were "*on the table*", and he attaches a letter dated 2 April 2011 in this regard.

8 At the beginning of October 2011, the applicant was informed, presumably by his attorney, that he was required to attend a pre-trial conference. The pre-trial was scheduled for 30 November 2011.

9 The applicant held the view at this stage that the other defendants wanted to settle the matter by offering a settlement amount to the liquidators. However, he felt that he had not done anything wrong, or acted recklessly, and that he did not have money for a costly defence. He says that he accordingly sought the advice of a member of his church congregation, Mr Oosthuizen, who was also an attorney. Mr Oosthuizen advised the applicant to attend the pre-trial, and to "*stay with*" the defendants' joint attorney. In the meantime, Mr Oosthuizen would informally, and not as an attorney of record, see if he could negotiate a possible withdrawal of the action against the applicant.

10 On 30 November 2011, the day of the scheduled pre-trial, the applicant sent an email to Mr Assenmacher. The content of the email is important for purposes of the rescission application, and I quote it in full (in the original Afrikaans):

> *"Ek verneem dat die "Pre Trial" vandag plaasvind. Ook dat daar moontlik 'n skikkingsvoorstel gemaak gaan word. Ek wil graag op record wees dat ek nie deel is van enige skikking. Dit staan my kollegas vry om 'n skikking to reel, en my standpunt benadeel hopelik nie enige regte of optrede aan hulle kant nie.*
>
> *Indien julle 'n skikking bereik en die Teenkant wil my steeds alleen verder in the Hof kry, sal ek my eie verdediging hanteer. Ek sal ssm (so spoeding moontlik) 'n nuwe prokureer van rekord kry en jou laat weet.*

My besluit is gebaseer op die feit dat ek nie geld het vir 'n skikking (ook nie vir verdere regskoste) en dus die saak na die beste van my vermoed moet hanteer. Ek bly ook oortuig dat ek nie skuldig is nie, hoewel ek geensins die bewyslas en kompleksiteit van die saak onderskat nie.

Dankie vir die moeite tot nou en sterkte vir jou en Barry met die "pre trial" an alles."

11 The applicant did nothing more about the trial pending against him, save that it is common cause that after the pre-trial conference Mr Oosthuizen approached the liquidators' attorney in an attempt to have the case against the applicant dropped. It is also common cause that Mr Oosthuizen's approach was not successful, and that the liquidators' attorney advised Mr Oosthuizen that his client intended to continue the proceedings against the applicant. The applicant says that Mr Oosthuizen never advised him of this.

12 On 17 February 2012, the applicant received a telephone call from Mr Assenmacher advising him that he was withdrawing as his attorney. The applicant did not seek any information from Mr Assenmacher as to what the status of proceedings was as far as he, the applicant, was concerned.

13 The applicant did not attend the hearing on 22 February 2012 despite the fact that he knew of the trial date. In his founding affidavit, the applicant avers that he was informed about the pre-trial meeting at the beginning of October 2011 "*because the matter had been set down for trial for 22 February 2012*". On the

applicant's own version, therefore, he had knowledge of the trial date from at least early October 2011, and his belated attempt to deny this knowledge in reply must be rejected.

14 The case against all the other defendants had been settled on 17 February 2012 after protracted negotiations commencing on the evening of the pre-trial conference. On the scheduled day of the trial, counsel for the liquidators moved that the settlement agreement with second to fourth defendants be made an order of court (there was an existing separate settlement with De la Pierre). The liquidators also moved for an order against the applicant.

15 The learned Judge indicated to counsel for the liquidators that he had problems with the draft orders presented to him. One of these problems was that he was not prepared to grant a judgment sounding in money against the applicant. He was of the view that he could only grant declaratory relief under section 424(1) of the Companies Act. The matter stood down until the next day so that the necessary amendments could be made to the draft orders. On the following day after further issues had been ironed out the learned judge granted the Order against the applicant.

16 The next point in the narrative concerns what occurred after the Order was granted. The applicant was served with a warrant of execution on 30 July 2012. It is not clear on what basis the warrant of execution was issued, given the declaratory nature of the Order. However, that is not an issue presently before me. On being served with the warrant, the applicant contacted Mr Oosthuizen for his assistance. Over the next two months the parties discussed

the possibility of settlement: the liquidators were prepared to settle on an amount of R500 000. 00. On 29 October 2012, the applicant's counter-offer of R100 000. 00 was rejected.

17 It was only on 14 December 2012 that the applicant instituted the application for rescission of the Order.

The rescission application

18 The applicant relies on Rule 42(1)(a) and the common law as the legal bases on which he founds his application for rescission. He also relies, "*if necessary*" on Rule 31(2)(b). This is not an appropriate legal basis for rescission in the present matter. Rule 31(2)(b) applies to situations where a defendant fails to file a notice of intention to defend or a plea.[1] The applicant filed both. Accordingly, in my view, the rescission application is more properly founded on Rule 42(1)(a) and the common law, and I will confine myself to the question of rescission on these two bases.

19 Rule 42(1)(a) provides that:

> "*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)n order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby*".

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1 Athmaram v Singh 1989 (3) SA 953 (D); Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (WLD) at 578C; Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E)

20 In his founding affidavit, the applicant avers that the Order was erroneously granted because "*if his Lordship Mr. Justice Van der Merwe had been aware of the facts as set out below, he would not have granted the judgment*". The "*facts set out below*", to which the applicant refers, comprise the entire substance of the founding affidavit, covering (according to the headings in the affidavit) the relevant background, the judgment, the reasons for the applicant not attending the trial date, the warrant of execution and the applicant's alleged bona fide defence.

21 The applicant fails to identify in his founding papers precisely what fact or facts were critical such that they would have led the learned Judge to refuse the Order, had he been aware of them. Instead, the applicant's approach was to set out a long narrative of facts on the assumption that this Court would glean from them something that might lead to the conclusion that the order was erroneously granted. In my view, it is improper to approach an application for rescission in this manner. An applicant bears the *onus* of satisfying the Court that he or she has met the requirements for rescission under Rule 42(1)(a). Therefore, it is incumbent on the applicant to specify with sufficient particularity what fact or facts caused the alleged error on the part of the Court in granting the order in question. This duty is not satisfied by setting out a long narrative of facts, as the applicant has done in this case.

22 In any event, even if one has regard to the overall narrative of facts set out by the applicant, I am unconvinced that they establish a ground for rescission under Rule 41(2)(a). As I indicate in dealing with the applicant's common law basis for rescission later in this judgment, his complaint focuses on the failure

of his attorney to communicate with him about the trial against him. He says that this led to a *bona fide* belief on his part that the case against him was not proceeding.

23 The Supreme Court of Appeal consistently has rejected this type of complaint as founding a proper case for rescission under Rule 42(1)(b). The Appellate Division set out the position as follows in De Wet & Others v Western Bank:[2]

> *"The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16(4). There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before Van Reenen J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39(3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39(1) on the counterclaim. The fact that the appellants had not been advised*

[2] 1979 (2) SA 1031 (A) at 1038D-F

timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42(1)(a)."

24 The Supreme Court of Appeal confirmed this approach in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)[3] and held that:

> "*The same reasoning applies in this case. The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge.*" (emphasis added)

25 I am of the view that the facts of the present case fall squarely within the same category as the cases cited above. Even assuming, for present purposes only, as I deal with this issue in more detail later, that the applicant's attorney was remiss in communicating with him, this was not the kind of error at which Rule 42(1)(a) is aimed.

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3 2003 (6) SA 1 (SCA) at G-H

26 Accordingly, I find that the case for rescission based on Rule 42(1)(a) made out in the founding papers not warrant an order of rescission.

27 However, counsel for the applicant revealed an additional string to the applicant's bow in his submissions to court. In his heads of argument, and his oral submissions before me, counsel for the applicant, Mr Davis SC, contended that an order under section 424(1) of the Companies Act is of such a nature that it cannot be granted by way of a default judgment without the court hearing evidence to substantiate the claim.

28 In amplification of this, Mr Davis SC submitted as follows:

28.1 A court may not grant a declaration under section 424(1) merely on a *prima facie* case. For this submission, he relies on Joh-Air (Pty) Ltd v Rudman[4]and Philotex (Pty) Ltd v Snyman[5].

28.2 In order for a court to grant a declaration under section 424(1) it must be able to make an individual value judgment on a particular defendant's knowledge, intent and involvement in the conduct under scrutiny.

28.3 A court cannot do so without hearing evidence, even if a defendant does not appear at the hearing.

28.4 The effect of a court granting relief under section 424(1) without hearing evidence is to make an order on nothing more than a *prima facie* case.

28.5 A court is not competent to do so, and such an order will be vulnerable to

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4 1980 (2) SA 420 (T)
5 1998 (2) SA 138 (SCA)

rescission under Rule 42(1)(a) on the basis that it was erroneously sought and granted.

29 It is common cause on the papers that no evidence was led before Van der Merwe DJP. Accordingly, Mr Davis SC submits that the Court was not competent to grant the Order by default, and it falls to be rescinded under Rule 42(1)(a).

<u>Section 424(1) and whether it was competent for the Court to grant a declaration without hearing evidence</u>

30 The issue of whether it is competent for a Court, in an application for a declaration under section 424(1) of the Companies Act, to grant default judgment without hearing evidence is a novel one. Mr Davis SC was unable to direct me to any authority dealing with the precise issue raised in this case, nor was I able to find any such authority.

31 Section 424(1) of the Companies Act deals with the liability of directors and others for the fraudulent or reckless conduct of the business of a company. It provides that:

> "*When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the*

Master, the liquidator, the judicial-manager, any creditor or member or contributory of the company, declare that any person shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

32 Rule 39(1) is also relevant to the issue. It provides that:

> "*If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.*"

33 The crux of Mr Davis SCs' submissions is based on the statement in Henochsberg[6] to the effect that the words "*when it appears … the Court may*" in section 424(1) "*do not import that the Court may make a declaration merely on a prima facie basis; the onus is on the applicant to establish his case on a balance of probabilities.*" Henochsberg cites Joh-Air (Pty) Ltd v Rudman,[7] and Philiotex (Pty) Ltd v Snyman[8] in support of his statement, and Mr Davis SC relies on these cases.

34 The statement of the law in Henochsberg is correct. However, this does not

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6 Henochsberg on the Companies Act, Vol 2, APPI-293
7 Above, n4
8 Above, n5

mean that the conclusion Mr Davis SC seeks to draw from this is sound. To understand properly the import of the Joh-Air and Philotex decisions for purposes of the particular issue raised in this case it is necessary to place these cases in context.

35 The critical issue raised in the Joh-Air case centred on a submission by the applicant (appellant on appeal) that:

> "*the application contemplated in terms of section 424(1) is to be distinguished from any other form of application and that by failing to so distinguish the application and in deciding the matter on a balance of probabilities the Judge a quo erred. It was further submitted that the applicant was required to establish only a prima facie case to entitle the applicant to the declaration ... .*"[9] (emphasis added)

36 It was in respect of this submission that the court held that a *prima facie* case was insufficient. This was confirmed by the Supreme Court of Appeal in the Philotex case, which held that:

> "*The onus is upon the party alleging recklessness to prove it and, these being civil proceedings, to establish the necessary facts according to the required civil standard, which is on a balance of probabilities.*"[10] (emphasis added)

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[9] At 424G-H
[10] At 142H-I

37 It is clear from these *dicta* that the court in both cases was dealing with the issue of the requisite standard of proof to be applied in applications under section 424(1). These cases establish that, as with any other application in a civil matter, the requisite standard of proof is a balance of probabilities, and they reject the notion that a lower, *prima facie* standard of proof applies. Thus, when Henochsberg states that a court may not grant a declaration on a *prima facie* case, it means on the basis of a *prima facie* standard of proof. It is not a reference to the *prima facie* nature of the facts and evidence before the court, which means something different:

> "*Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.*"[11]

38 As the learned authors of the The South African Law of Evidence[12] point out, with reference to the meaning of "*a prima facie case*": "*The answer … depends on what one means by the expression 'expression prima facie'* for … it has been used to mean different things with different effects." Thus, the Courts' references to the insufficiency of a *prima facie* case in section 424(1) proceedings in the Joh-Air and Philotex cases must be understood with specific reference to the sense intended, i.e. a reference to the standard of proof required. The meaning of the expression "*prima facie case*" in those cases

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11 Ex parte Minister of Justice: In re V V Jacobson and Levy 1931 AD 466 at 478

12 Zeffert, Paizes & Skeen The South African Law of Evidence (2003) p123

cannot simply be transplanted into another case that raises different issues.

39 Unlike the Joh-Air case, the issue that is raised in the present matter does not centre on the appropriate standard of proof. This case concerns the basis upon which a Court may competently decide, in a situation where a defendant does not appear at the trial, that it is satisfied that the plaintiff is entitled to succeed in its claim. Most critically, it concerns the procedural options open to the court in making this determination, and its approach to the available facts and evidence.

40 Neither of the two cases relied on by the applicant dealt with this issue. Both cases were determined on a fully opposed basis, and the question of default did not arise. In addition, in both cases, the order that was sought under section 424(1) included a provision directing the respondents or defendants concerned to pay a specified sum in respect of the company's debts. As I have indicated, Van der Merwe DJP refused to make such an order in this case. The relevance of this latter point will become more apparent below.

41 Accordingly, in my view the Joh-Air and Philotex decisions are not authority for Mr Davis SC' contention that it is not competent to grant a section 424(1) declaration by default without hearing evidence. In order to evaluate this contention, it is necessary to widen the scope of inquiry.

42 The Constitution expressly recognises the inherent power of the High Courts to protect and regulate their own process.[13] The power to regulate the processes of court must be exercised within the framework laid down by the Uniform

13 Constitution of the Republic of South Africa, 1996, section 173

Rules of Court and any relevant legislation.

43 Rule 39(1) provides that where a defendant fails to appear at a trial the court may give judgment in favour of the plaintiff if the court is satisfied that the plaintiff has discharged the burden resting on him or her. The Rule goes further in providing that the court may do so without the necessity of evidence in a claim which is for a "*debt or a liquidated demand*".

44 The Rules do not define this term, although it has been held to be a claim for something that is fixed, certain or an ascertained amount.[14] A debt or liquidated demand is not limited to claims for the repayment of a sum of money.[15] Claims for the transfer of property, cancellation of contracts, ejectment, a declaration that a defendant had no right to occupy a farm and a perpetual interdict restraining him from trespassing on the farm have all been treated as claims for debts or liquidated demands.[16] Claims for damages generally are not treated as being a claim for a liquid demand, as the quantum of damages claimed must be proved.

45 What is clear is that there is a wide spectrum of claims that potentially fall within the category of debts or liquidated demands for purposes of Rule 39(1). The decision as to whether a claim falls within this category, and can be dealt with effectively without the necessity for leading evidence, is a matter left to the

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14 Fatti's Engineering Co Ltd v Vendick Spares Ltd 1962 (1) SA 736 (T)

15 Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK 1995 (3) SA 659 (T) at 662A

16 Cillers et al Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa (5ed) pg 749 and the authorities cited there;
Farlam et al Erasmus Superior Court Practice B1-198 to B1-200 and the authorities cited there.

discretion of the court in each particular case.[17]

46 Unfortunately, because the applicant did not raise this particular ground of rescission in his founding papers, the facts pertaining to the hearing before Van der Merwe DJP are not fully traversed in the papers. However, there is sufficient evidence, in my view, to support the conclusion that the learned Judge was alive to the issues raised by Rule 39(1), and that he applied his mind as to how best to proceed in dispensing with the issues before him. Indicative of this is the fact that he had clearly deliberated over the case before the trial commenced. He told counsel for the plaintiff that he had various problems with the orders that were sought. One of these was that he was not prepared to grant an order against the applicant in the form of a money judgment, but was only prepared to grant it in the form of a declaration.

47 This is consistent with the general practice of the High Courts, described above, in terms of which orders sounding in money will not be granted by default without evidence being led if the quantum of the claim must be proved. As I have indicated, declarations of rights or obligations, on the other hand, can be dealt with as debts or liquidated demands for purposes of default judgment, rendering it unnecessary in such cases to lead evidence in support of the claim. In my view, the learned Judge's insistence on a declaration, rather than granting an order in the form of a money judgment demonstrates that he dealt with the matter as a claim involving a debt or liquidated demand in respect of which it was not necessary for him to require the leading of evidence.

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17 Fatti's Engineering Co Ltd v Vendick Spares Ltd, n9 above at 739G

48 The question to be decided for purposes of these rescission proceedings is not whether the learned Judge was incorrect in doing so, in the sense that another judge might have done things differently. Rule 42(1)(a) permits a rescission only in circumstances where there is an irregularity in the judicial process. The Supreme Court of Appeal dealt with the question of the appropriate ambit of this Rule in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)[18]. In this judgment, with regard to the foundations of rescission in our law, the Court said the following:

> "*The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment. That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a*

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18 Above, n3

discretion to order it, which must be exercised judicially. Not every mistake or irregularity may be corrected in terms of the Rule."[19]

49 The Court further noted that there was a trend in the Courts over the years not to give a more extended application to the Rule to include all kinds of mistakes or irregularities.[20]

50 I am satisfied that this case does not give rise to a mistake or irregularity that falls within the ambit of Rule 42(1)(a).

51 I have already expressed the view that the available facts concerning the proceedings before Van der Merwe DJP demonstrate that in granting the Order without requiring that evidence be led, he exercised his discretion to treat the case as one falling within the proviso in Rule 39(1). The Order states expressly that it was granted after "*reading the papers filed and hearing counsel for Plaintiff.*"

52 I cannot find that it was irregular for the learned Judge to proceed on the basis that he did: the particulars of claim were explicit in the averments against the defendants on their alleged reckless conduct; the applicant and second to fourth defendants had elected to rely on a common defence by filing a joint plea; thereafter, all of the defendants, bar the applicant, elected to enter into settlement agreements with the liquidators rather than attempt to sustain this defence at trial; this fact was known to the learned Judge, and he was

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19 At 5J-7B, references omitted
20 At 7E

requested to make the agreement with the applicant's co-defendants an order of court; the applicant did not appear at the trial, and nor did he communicate with the plaintiff or its attorneys before the trial. In these circumstances, it was entirely appropriate for the learned Judge to proceed on the basis that it was not necessary for the plaintiff to lead evidence for purposes of obtaining a declaration by default.

53 I am fortified in my view by the judgment in the case of Abraham v City of Cape Town.[21] In this case a similar point was raised to the one before me, albeit not involving section 424(1) of the Companies Act. In that case, judgment by default had been granted against the applicant in a delictual claim involving a motor vehicle accident. At the trial, the Court accepted an affidavit dealing with the aspect of damages, but no evidence was led on the merits of the claim. In a subsequent rescission application, the applicant contended that the Court had acted erroneously (for purposes of Rule 42(1)(a)) in not applying its mind to the question of whether or not it was appropriate that evidence should be led to prove negligence on the part of applicant and to confirm that there was no contributory negligence on the part of respondent.

54 In rejecting this contention and refusing to grant rescission under Rule 42(1)(b), the Court stated the following:

> "*This Court's point of departure should in my view be that it is for each presiding officer to decide for him- or herself, dependent on the facts of each case, whether to hear oral evidence or not. I am*

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21 1995 (2) SA 319 (C)

unpersuaded that the mere theoretical possibility that there may have been contributory negligence on the part of a plaintiff would be sufficient cause for a Court to insist rigidly that oral evidence should be led in every such case where a default judgment based on delict is sought. I use the word 'theoretical' advisedly, because ex facie the pleadings or evidence concerning the damages sustained by a plaintiff, the possibility may be apparent that such contributory negligence may be present. <u>In such a case the Court may well in the exercise of its discretion decide to call for oral evidence</u>. However, where such a contention is not raised by a defendant nor evident ex facie the pleadings, the mere fact that the Court has the power to apportion damages where contributory negligence is proved does not seem to me to be a valid reason for fettering the discretion of the Court in the manner contended for." [22] (emphasis added)

55 In the <u>Abraham</u> case the defendant, unlike the applicant in this case, had not filed a plea. Despite this difference, in my view the principle stated by the Court in the *dictum* cited above is applicable in a case such as the one before me. The salient point made is that when it comes to default judgments and the proviso under Rule 39(1) comes into consideration, each presiding judge has the discretion to decide for him- or herself whether or not it is necessary for the plaintiff to lead evidence. The Judge retains this discretion even in circumstances where the pleadings or facts of the case may raise a particular

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22 At 324J-325B

issue. In granting the Order without requiring the plaintiff to lead evidence, Van der Merwe DJP was doing no more than exercising his discretion to do so.

56 Mr Davis SC sought to persuade me that an application for relief under section 424(1) is of a special nature and should not be treated in the same manner as other claims that are covered by the proviso in Rule 39(1). He pointed to the fact that a court is required to make a value judgment before granting an order under section 424(1), and suggested that a court cannot properly do so unless it hears evidence.

57 It is so that a court must exercise a value judgment. The Supreme Court of Appeal described this as follows in Fourie v Newton:[23]

> "*What is required is not the application of the exact science of hindsight, but a value judgment bearing in mind what was known, or ought reasonably to have been known, by individual directors at the time the decisions were made.*"

58 However, the standard by which a director's conduct must be measured under section 424(1) is an objective one. As the Supreme Court of Appeal held in Philotex:

> "*The test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has*

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23 [2011] 2 All SA 265 (SCA) at para 45

to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge: S v Van As *1976 (2) SA 921 (A) at 928C-E."*[24]

59 To the extent that there is a subjective element to the assessment of a director's conduct, it is limited to this extent and does not alter the inquiry into a subjective one. In addition, the conduct envisaged is not limited to the taking of positive steps in connection with the conduct of the company's' business. It may also include support for, or concurrence in such conduct. It must also be borne in mind that a director has a duty to observe the utmost good faith towards the company and to exercise reasonable skill and diligence, and has an affirmative duty to safeguard and protect the affairs the company. A director may be held to be a party to reckless conduct "*even in the absence of some positive steps by him in the carrying on of the company's business.*"[25] These factors are all indicative of the fact that liability under section 424(1) is not dependent on establishing active, individual conduct, and actual knowledge and intent on the part of a particular director in every case.

60 Taking all of this into account, I cannot accept Mr Davis SC' submission that the value judgment a court must make before it grants an order under section 424(1) requires, in every case, that evidence must be led. Nor can I accept his submission that it was irregular for the learned Judge to grant the Order without hearing evidence to establish the applicant's individual knowledge and intent.

24 Above, n3 at p143G

25 Henochsberg, n3 above, APPI - 302(1) and the authorities cited there

This is not what section 424(1) requires.

61 As I have pointed out, there were sufficient facts before the learned Judge to allow him to exercise his discretion on whether it was necessary for the plaintiff to lead oral evidence in order to satisfy him that the plaintiff had made out its case. There is nothing in section 424(1) to indicate that the Legislature intended default judgments in respect of this section to be dealt with any differently than other civil cases. As this Court has already found in the Joh-Air case, with reference to the question of the applicable standard of proof, section 424(1) proceedings are to be treated like all other civil proceedings.

62 I conclude, therefore, that it was competent for the learned Judge to make the Order in the manner that he did, and that there was no irregularity or error in the process to support a rescission under Rule 42(1)(a).

63 The applicant's claim for relief under Rule 42(1)(a) must fail.

64 The remaining issue to consider is whether the applicant is entitled to relief under the common law.

Is the applicant entitled to relief under the common law?

65 In order to succeed under the common law an applicant for rescission of a judgment taken against him by default must show good or sufficient cause.[26]

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26 Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape), n3 above at 9C; De Wet & Others v Western Bank 1977 (4) SA 770 (T)

66 The Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which prima facie has some prospect of success.[27]

67 The two essential elements of sufficient cause under the common law are, firstly, a reasonable and acceptable explanation for the default, and, secondly, a *bona fide* defence which *prima facie* carries with it some prospects of success. An applicant must satisfy both of these elements, and it is not sufficient if only one of them is met.[28]

68 As regards the applicant's explanation for his failure to attend the trial to pursue his defence, he states that he "*assumed with a bona fide belief and with right that this matter has been settled and that no further action will be taken against the Defendants, including myself*". In amplification of this, he says that he was told by one of his fellow defendants that the matter had been settled. He had always been called upon by the other defendants or their joint attorney to attend to the matter, but he did not receive any such request after 30 November 2012, which was the day of the pre-trial and the applicant's email to his attorney referred to earlier. Even when his attorney phoned the applicant on 17 February 2012 to advise him that he was withdrawing as his attorney, the applicant says he was not informed that the respondents intended to proceed with the action against him. The applicant says that he always intended to defend the case against him.

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27 Colyn, op cit, at 9E and the authorities cited there.

28 Chetty v Law Society, Transvaal 1985 (2) SA 756 (AD) at 765B-F

69 In short, the applicant relies on the alleged failure by his attorney or anyone else to advise him expressly that the matter was proceeding against him, and his alleged *bona fide* belief that it was not to proceed. Unfortunately for the applicant, the following salient facts refute the case he puts up in this regard:

69.1 He knew of the trial date.

69.2 He had been advised to attend the pre-trial conference by Mr Oosthuizen but elected not to do so. He gives no explanation for this.

69.3 He had expressly indicated in his email of 30 November 2012 that he would not be part of any settlement, and that he would continue to defend himself in the matter, even if this necessitated obtaining the services of a new attorney. In the circumstances, it is difficult to understand how the applicant could have held the *bona fide* belief that the settlement of the matter with the other defendants included a decision not to proceed against him.

69.4 Furthermore, Mr Oosthuizen had approached the liquidators' attorney after the pre-trial was held with a view to attempting to have the case against the applicant withdrawn. The applicant knew that this had not been successful. The undisputed evidence of the respondent's attorney in the rescission application is that he had told Mr Oosthuizen that the liquidators intended proceeding against the applicant.

69.5 The applicant fails to advance any evidence of any steps he took, between 30 November 2012 until the warrant of execution was served on him in July 2012, to ascertain the status of the case against him.

69.6 Even after he learned of the Order when the warrant of execution was served on him in July 2012, it took a further five and a half months before the applicant instituted the rescission proceedings. During this time he explored settlement with the liquidators, but he took no steps, as a person with a *bona fide* intent to defend himself would do, to institute rescission proceedings as a matter of caution and without delay.

70 In the face of these facts, I cannot find that the applicant's explanation for his default was reasonable and acceptable. On the contrary, it appears to me that the applicant deliberately adopted a supine approach to the litigation once it became clear that his co-defendants were intent on pursuing a settlement with the liquidators. Although he says that he always intended to defend himself, this statement is not consistent with his subsequent conduct. A defendant who *bona fide* intends to defend an action against him does not sit supine, waiting for others to inform him of what is transpiring with his case, and irrationally assume, when he is not so informed, that the case has miraculously gone away.

71 This Court has held, in <u>De Wet & Others v Western Bank Ltd</u> that defendants have a responsibility to communicate with their legal representatives and that they "*cannot divest themselves of their responsibilities in relation to the action and then complain vis-à-vis the other party to the action that their agents, in whom they have apparently vested sole responsibility, have failed them.*" In that case the Court rejected the defendants' explanation that they took it for granted that their attorney would protect their interests. It held that they had demonstrated a complete lack of interest in the proceedings and were the

authors of their own conduct.[29] It strikes me that similar conclusions can be drawn with regard to the applicant's conduct in the present case.

72 Accordingly, I find that the applicant has failed to satisfy this Court on the first of the two essential elements for rescission under the common law.

73 Strictly speaking, this means that I do not have to consider whether the respondent has established that he has a *bona fide* defence that has prospects of success. I proceed to do so in order to demonstrate that this is not the kind of case where a very strong defence may outweigh any defect in an applicant's explanation for his or her default.

74 In this regard, it is significant that the claim against the applicant and his co-defendants was instituted after the inquiry by the Commissioner under section 417 of the Companies Act. The Commissioner's report made, among others, the following findings:

74.1 "*Your Commissioner considers that the enquiry achieved the purpose of identifying and establishing conduct on the part of the erstwhile directors of the company which could found an action under section 424. Experience tells one that actions of that sort are often difficult to proceed to success, but at least enough was brought to light to enable the legal advisors of the creditors to advise whether such an action should be instituted.*"

74.2 "*In the opinion of your Commissioner the evidence adduced in the*

29 Above n26, at 780B-G

enquiry affords at least prima facie proof of the involvement of Messrs Hoon, Minaar, van Bergh, Bensh, Van Straaten, Oosthuizen and de la Pierre in the reckless management of the Company." (emphasis added)

75 It is clear from the report that in the Commissioner's estimation, there was shared responsibility by all of the directors, and other named individuals, for the reckless management of the company. It would have been surprising had the Commissioner excluded the applicant from this list, as he was the Financial Director.

76 The applicant includes in both his founding and replying affidavits, his version of events, in an attempt to show that whatever the position of the company and the conduct of other directors and players may have been, he was not responsible for the reckless management of Askari. In view of the position the applicant held in the company, and the nature of the claims of reckless management included in the particulars of claim, it is difficult to find any merit in the applicant's contention. The respondent refuted these contentions in its answering affidavit. Critically, the deponent to the respondent's affidavit, who is the respondent's attorney, stated that "*I am in possession of approximately five boxes full of Lever Arch files and in every one of them there are documents damning to the case of the Applicant.*" Astoundingly, the applicant's response to this averment in his replying affidavit is:"*Noted*". He went on to say that there may have been errors of interpretation after all the time that had elapsed.

77 In the face of the findings in the Commissioner's report, and the applicant's acceptance that the respondent had five boxes of files damning to the

applicant's case, I cannot accept that the applicant has a *bona fide* defence to the case of any real merit.

78 In addition, it is important to refer back to the underlying principle of finality of judgments. This principle promotes certainty in the law and ultimately serves the broad objectives of the interests of justice. In a case like the present, the interests of justice would not be served by accepting without due reserve, that the applicant may have a defence to the case against him. The interests of Askari's creditors, and the importance of ensuring that liquidation processes are finalised, would be severely prejudiced if I were to order rescission on the outside chance that the applicant might be able to mount a defence.

79 I accordingly find that the applicant has failed to persuade this Court on the second essential element for rescission under the common law.

80 The applicant's alternative claim for relief under the common law must also fail.

Order

81 I make the following order:

81.1 The application is dismissed.

81.2 The applicant is ordered to pay the respondent's costs.

R.M KEIGHTLEY AJ

Acting Judge of North Gauteng High Court

HEARD ON: 20 NOVEMBER 2013

FOR THE APPLICANT: N DAVIS SC

INSTRUCTED BY: THERON, JORDAAN & SMIT INC

FOR THE RESPONDENT: C. J VAN COLLER

INSTRUCTED BY: VEZI & DE BEER INCORPORATED