



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: D11087/2022

In the matter between:

HEMANTH RAJKUMAR SINGH

Applicant

and

BLUE LABEL DISTRIBUTION (PTY) LTD

First Respondent

BARKERS

Second Respondent

ORDER

Having read the papers and after hearing counsel, the following order is made:

1. The application for rescission is dismissed.
2. The first respondent is to pay the applicant's costs on scale C.

JUDGMENT

Date delivered: 9 January 2025

Masipa J

Introduction

[1] This is an application for the rescission of an order granted on 1 February 2023 in favour of the first respondent. The order declared the applicant personally liable for the debts of Proud Heritage 217 (Pty) Ltd (in liquidation) under s 424 of the Companies Act 61 of 1973 (the Companies Act). The applicant seeks rescission under rule 42(1)(a) of the Uniform Rules of Court and at common law, and is contending that the order was erroneously sought and granted. The applicant also seeks a punitive costs order against the second respondent.

[2] The respondents oppose the application, and are contending that the applicant has failed to satisfy the jurisdictional requirements for rescission under rule 42(1)(a) and the common law. They further argue that the applicant delayed unreasonably in bringing this application, which lacks merit.

Factual Background

[3] The order sought to be rescinded was granted in the absence of the applicant during the hearing on 1 February 2023. According to the respondents, proper notice of the proceedings was provided, and the applicant failed to appear or oppose the application. The applicant disputes this, arguing that the second respondent gave an undertaking to adjourn the matter, which was not honoured, thereby rendering the proceedings procedurally irregular.

[4] The applicant also contends that the respondents failed to disclose the binding authority of *Minnaar v Van Rooyen NO*,¹ which, according to the applicant, precludes the granting of a default order without oral evidence in applications under s 424 of the Companies Act.

[5] The respondents argue that the order was lawfully granted and maintain that no agreement for adjournment existed. While they acknowledge an email dated 31 January 2023 referencing the removal of the matter from the roll, they contend that this communication did not constitute an unconditional agreement not to proceed with the application.

¹ *Minnaar v Van Rooyen NO* [2015] ZASCA 114; 2016 (1) SA 117 (SCA) (*Minnaar*).

Issues for Determination

[6] The issues for determination are as follows:

- (a) Whether the applicant has met the jurisdictional requirements for rescission under rule 42(1)(a), specifically whether the order was granted in his absence and whether it was erroneously granted.
- (b) Whether the applicant has shown 'good cause' for rescission under the common law by providing a reasonable explanation for his default and demonstrating the existence of a bona fide defence with prospects of success.
- (c) Whether the application was brought within a reasonable time.
- (d) Whether the applicant is entitled to a punitive costs order against the second respondent.

Analysis

[7] Rule 42(1)(a) provides for rescission where an order was 'erroneously sought or erroneously granted in the absence of any party affected thereby.' The applicant must satisfy two jurisdictional requirements:

- (a) The order was granted in his absence; and
- (b) The order was erroneously granted.

[8] The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*² clarified that 'absence' under rule 42(1)(a) refers to procedural exclusion, not voluntary absence despite proper notice. In this case, the respondents demonstrated that the applicant was duly notified of the proceedings. Despite the email, nothing prevented the applicant from attending court and ensuring that their interests were protected.

[9] On the second requirement, the applicant contends that the order was erroneously granted due to the court's lack of awareness of binding authority being *Minnaar*. However, *Minnaar* is distinguishable. That case involved an unopposed trial under rule 39(1), where no evidence was led. In contrast, this matter concerns an application under s 424, supported by affidavits presenting prima facie evidence of

² *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 and others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

the applicant's alleged misconduct. The failure to present *Minnaar* to the court does not render the order 'erroneous' under rule 42(1)(a).

[10] To succeed at common law, the applicant must show 'good cause,' which entails:

- (a) A reasonable and acceptable explanation for his default; and
- (b) A bona fide defence with prospects of success (*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)).³

[11] The applicant has provided no explanation for his failure to oppose the application. He relies on the email correspondence from 31 January 2023 as evidence of an undertaking not to proceed. The email explicitly referenced an intention to seek directions regarding affidavits and provided an unqualified guarantee against proceeding with the application. Accordingly, so argued the applicant, the first respondent's legal representatives had an obligation to bring the contents of the email of 31 January 2023 to the attention of the court. This would have explained the applicant's non-appearance and allowed the court to exercise its discretion adequately.

[12] I do not agree with the respondents' contention that they were entitled to seek judgment on the basis that the applicant was in default, nor with their assertion that the matter had become unopposed. The second respondent informed the court that the applicant was out of time to file an answering affidavit. Despite this, the respondents sought to have the matter adjourned to 10 March 2023, a date to be allocated by the Registrar of the Court. However, the respondents, acting in bad faith, subsequently elected to proceed with the matter on an unopposed basis and obtained judgment by default, notwithstanding the email undertaking to have the matter postponed.

[13] It is evident that, until the court remarked on the applicant being out of time, the respondents had been intent on seeking an adjournment. Following the court's observations, the matter was stood down to allow the first respondent's counsel to

³ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

obtain instructions. When the matter was recalled, a draft order, substantially identical to the relief sought in the notice of motion, was handed up, and the order was granted as sought.

[14] Regarding *Minnaar*, the court in that case emphasized the necessity of oral evidence to substantiate claims under s 424 of the Companies Act. However, unlike *Minnaar*, where no evidence was led, such as in the present case which involved the filing of affidavits containing prima facie proof of the applicant's conduct. As stated earlier the current matter is distinguishable from *Minaar* as evidence was given under oath. The applicant has failed to demonstrate that his alleged defence has any reasonable prospect of success since all relied on in his rescission related to *Minaar* to prove that he had a bona fide defence.

[15] Although rule 42(1) does not prescribe a specific time limit, rescission must be sought within a reasonable period.⁴ The order was granted on 1 February 2023, yet the applicant filed this application several months later without any explanation for the delay. This unreasonable delay further undermines the merits of the application.

[16] The applicant has failed to meet the jurisdictional requirements for rescission under rule 42(1)(a) or to establish 'good cause' under the common law. The application is further undermined by the unreasonable delay in its filing and the absence of a bona fide defence.

Costs

[17] The applicant seeks a punitive costs order against the second respondent on the basis of alleged misconduct. However, I find that there is insufficient evidence to substantiate the allegations of impropriety. The record reflects that the decision for the matter to proceed was made by the court, and the matter was stood down for the purpose of obtaining instructions. There is no evidence to indicate the source from which the instructions to proceed ultimately emanated. Accordingly, the punitive costs order sought by the applicant is not justified.

⁴ *Gcasamba v Mercedes-Benz Financial Services SA (Pty) Ltd and another* 2023 (1) SA 141 (FB).

[18] Nonetheless, I am of the view that the respondents acted in bad faith by proceeding with the matter in contravention of the undertaking previously provided. Such conduct warrants the imposition of a costs order against the respondents, notwithstanding that the application for rescission is unsuccessful. In light of the circumstances, the costs shall be awarded on the highest permissible scale.

Order:

[19] In light of the above, the following is ordered:

1. The application for rescission is dismissed.
2. The respondent is ordered to pay the applicant's costs on scale C.

MBS Masipa J

APPEARANCE DETAILS:

For the Applicant:	L B Broster SC
Instructed by:	Rakesh Maharaj & Company, KwaDukuza
For the Respondents:	J L Miranda
Instructed by:	Bakers Attorneys
Matter heard on:	14 November 2024
Reasons for Judgment delivered on:	9 January 2025