

**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 considered the matter, the following order is made:

1. The application for leave to appeal is dismissed with costs.

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

Delivered: 7 May 2025

MASIPA J:

Introduction

[1] This is an application for leave to appeal against the judgment delivered by this court on 9 January 2025, in which the applicant's rescission application was dismissed with costs. The application for rescission sought to set aside the default judgment granted on 1 February 2023, which declared the applicant personally liable for the debts of Proud Heritage 217 (Pty) Ltd (in liquidation) in terms of s 424 of the Companies Act 61 of 1973.

[2] The applicant seeks leave to appeal to the Supreme Court of Appeal, contending that this court erred in dismissing the rescission application and in its interpretation and application of legal principles relating to Rule 42(1)(a), the requirement for oral evidence in section 424 applications, and procedural fairness.

The Test for leave to appeal

[3] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that— (a)(i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

As stated in *Ramakatsa and Others v African National Congress and Others* [2012] ZACC 31, a higher threshold must be met, namely a realistic, reasonable prospect of success, and not merely an arguable case.

[4] The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into State Capture* 2021 (11) BCLR 1263 (CC) at para 53-54, and the Supreme Court of Appeal in *Mkhitha v MEC for Health, Eastern Cape* [2016] JOL 36940 (SCA), confirmed that leave should not be granted unless there exists a real, not remote, prospect that another court would arrive at a different conclusion.

Applicant's Grounds

[5] The applicant's principal grounds of appeal are that this court erred in distinguishing the SCA decision in *Minnaar v Van Rooyen* NO 2016 (1) SA 117 (SCA) and in finding that affidavits sufficed to sustain a s 424 application in unopposed motion proceedings without oral evidence. The applicant's reliance on *Minnaar* is misplaced. As noted in my earlier judgment and confirmed by the respondents, *Minnaar* involved an unopposed action trial under Rule 39(1) without any evidence led. In contrast, this case was an application brought in motion proceedings under s 424, supported by affidavits providing prima facie evidence of misconduct. The applicant's now in his leave to appeal questions whether the affidavit together with the annexures, in the absence of any opposition from the Respondent becomes evidence which, on a balance of probabilities, discharges the onus the Applicant has.

[6] It is trite that the standard in civil cases is proof on a balance of probabilities. The respondents established this threshold by way of uncontested affidavits and annexures in the application. There was no requirement in our law, nor in *Minnaar*, to call oral evidence where such affidavits remained unchallenged. It was however argued by the applicant that the SCA in *Philotex (Pty) Ltd v Snyman and Others* 1998 (2) SA 138 (SCA) at 142H-I emphasized that ‘The remedy is a punitive one; a director can be held personally liable for liabilities of the company without proof of any causal link between his conduct and those liabilities: *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) at 672E. 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 standard, which is on a balance of probabilities.’ It was accordingly submitted that oral evidence ought to be required irrespective of the procedure adopted.

[7] A further, factor raised by the applicant as a ground of appeal was that the Court erred in holding that the order was not erroneously granted within the meaning of Rule 42(1)(a), as there was allegedly an undertaking to adjourn the matter. Particularly, that the procedural irregularities and bad faith conduct by the respondents, particularly relating to undertakings in email correspondence, deprived the applicant of a fair hearing, in violation of section 34 of the Constitution. Further, that the factual matrix mirrors *Society of Advocates of Natal v Merret* 1997 (4) SA 374 (N) and *Marudi v NC Housing Services* [2018] ZACC 32, warranting intervention.

Respondents’ Grounds of Opposition

[8] The respondents oppose the application, arguing that the rescission application failed to meet the jurisdictional requirements under Rule 42(1)(a) or the common law. The applicant’s claim of an undertaking for adjournment based on an email sent on 31 January 2023 was canvassed in the rescission application. It was clear that while the respondents acknowledged such communication, it did not amount to an unconditional agreement not to proceed. The matter was duly set down and stood down for instructions, with the applicant ultimately defaulting. It was submitted for the respondent that the applicant’s procedural complaints were

misplaced as no exclusion or procedural irregularity occurred any default was voluntary.

[9] It was further argued that no reasonable prospect exists that another court would find differently, as this court correctly distinguished *Minnaar* and properly applied the law to the facts. Additionally, the respondent argued that the affidavits in the s 424 application contained sufficient evidence to sustain the order and no bona fide defence was established. Further that s 424 of the Companies Act expressly refers to application proceedings. Consequently, the respondent argued that the application for leave lacks merit and fails to demonstrate compelling grounds or reasonable prospects of success.

Evaluation

[10] It is trite that in application proceedings, affidavits do not only constitute pleadings but are also evidence. See *Kleynhans v Van der Westhuizen NO 1970 (1) SA 565 at 568E*. The applicant's argument rests predominantly on the assertion that *Minnaar* necessitates oral evidence in all s 424 matters. This court, however, found *Minnaar* distinguishable correctly, in my view as it dealt with an unopposed trial under Rule 39(1), not an application supported by affidavits as provided for in s 424.

[11] While *Minnaar* confirms the need for evidence in unopposed actions, it does not exclude affidavit evidence in unopposed applications, where procedural rules differ, and the founding affidavit constitutes both evidence and pleadings. In *Philotex* at 144A-C it was accepted that despite the need to determine whether the conduct of Director(s) was reckless or not, the proceedings were by way of application. In that case, no oral evidence was led. The facts in the current matter are also distinguishable to those in *Business Partners Ltd v World Focus 754 CC 2015 (5) SA 525 (KZD)* since there, the claim which was for damages was incorrectly categorised as falling under s 15 of the Insolvency Act which action proceedings ought to have been instituted.

[12] The applicant's further reliance on *Merret* and *Marudi* is also unpersuasive. The facts of those matters involved procedural exclusion or deceit of a kind materially absent here. While this court found the respondents' conduct ill-advised in

light of the prior email, the applicant was not legally excluded and could have safeguarded his position.

[13] Regarding prospects of success, no credible basis has been demonstrated that the SCA would likely overturn this court's findings on either the procedural sufficiency of the s 424 application; or the absence of jurisdictional grounds for rescission. Nor has any other compelling reason been shown, within the meaning of section 17(1)(a)(ii), to warrant the appeal being heard, as there is no conflicting authority requiring resolution.

[14] The applicant failed to provide a reasonable explanation for the delay in bringing the rescission application, nor did he demonstrate a bona fide defence with prospects of success on the merits, as required by *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A). No effort was made by the applicant to evidence any bona fide defence to the merits of the matter relating to s 424 in the rescission application. His focus was mainly on the issue of a postponement. An attempt is now made in hindsight to address that issue which in my view is late.

[15] As for the procedural point, the Constitutional Court in *Zuma* held that Rule 42(1)(a) is confined to cases of procedural exclusion, not voluntary absence despite due notice. This matter clearly falls into the latter category.

[16] Having considered the applicant's submissions, including the points raised regarding *Minnaar*, the standard of proof in s 424 proceedings, and alleged procedural irregularities, I am not persuaded that there are reasonable prospects that another court would come to a different conclusion. Nor has the applicant advanced any other compelling reason, such as conflicting authority or public interest, to justify a hearing before the Supreme Court of Appeal or to the full court. In the circumstances, I am not satisfied that there are reasonable prospects of success on appeal, nor is there any compelling reason for the appeal to be heard.

Order

[12] The application for leave to appeal is dismissed with costs.

Details of the Hearing

Heard: 9 January 2025

Delivered: 7 May 2025

Appearances:

For the applicants: L B Broster SC

Instructed by: Rakesh Maharaj & Company, KwaDukuza

For the respondents: J L Miranda

Instructed by: Bakers Attorneys