REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 50088/2017

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

..... 2019/8/23

SIGNATURE DATE

In the matter between:

NOBRE, RUI MIGUEL RODRIGUES	First Applicant
R N GRIFFIN INVESTMENTS (PTY) LIMITED	Second Applicant
and	
SNEECH, BARRY HYLTON	First Respondent

THE COMPANIES AND INTELLECTURAL PROPERTY COMMISSION Second Respondent

BLUE DOT PROPERTIES 56 (PTY) LTD Third Respondent

IN RE:

SNEECH, BARRY HYLTON Applicant

and

THE COMMISSIONER OF THE COMPANIES AND INTELLECTURAL PROPERTY COMMISSION Respondent

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JUDGMENT

LE GRANGE AJ:

[1] Before me is an application for rescission of an order granted by VAN DER SCHYFF AJ in this court on 3 November 2017 on the application of Barry Hilton Sneech ("**Sneech**"). The order was one:

1. Declaring the deregistration of the company known as Blue Dot Properties 56 (Pty) Ltd ("**the Company**") on 17 September 2010 to be void in terms of section 83 of the Companies Act 71 of 2008; and
2. Ordering the commissioner of the Companies and Intellectual Properties Commission (CIPC) to do all such things as may be required to forthwith reinstate the registration of the company; and

3. Ordering the commissioner of CIPC to record Sneech as a director of the company retrospectively to 8 January 1999.

[2] The rescission application is brought in terms of Uniform Rule of Court Rule 42(1), *alternatively* the common law.

[3] Applicants' case can be summarised as that the order was erroneously sought and erroneously granted in their absence on the basis thereof that:

(a) The first and second applicant, being director and 100% shareholder of the Company respectively, had a substantial interest in the application for the restoration thereof; and the registration of Sneech as director (hereafter referred to as "**the restoration application**"), and could an order not have been granted without them being joined.

(b) Sneech lacked the necessary *locus standi* to have brought the restoration application, as Sneech's *de facto* directorship has been terminated by operation of law.

(c) Sneech failed to disclose material facts and information, which, if he had done so, would have prevented the court from entertaining the restoration application.

As to (a) *supra*

[4] In their papers and during argument, applicants stressed their view that the sole issue *in casu* is whether the first and second applicants had (and have) a direct and substantial interest in the restoration application. If so, the court ought to grant a rescission order without more.

[5] As part of their case, applicants in their founding affidavit [1] stated that:

> *"it is extremely disconcerting that Van der Schyff AJ considered the application without requiring service on us."*

[6] To this end, it was stated in **INSAMCOR v DORBYL LIGHT & GENERAL ENGINEERING 2007 (4) SA 467 at 476 par [26]** that:

> *"One of the considerations a court will inevitably have regard to, in the exercise of its discretion in a restoration application, is the potential prejudice the restoration may cause to third parties."*

[7] So, what did the court *a quo* consider, if anything, pertaining to the interest of the director and/or shareholder of the company, in the restoration application? From the papers before me, I can make no other inference as that the court *a quo* knew that the applicants were respectively, shareholder and director of the company to be restored; and after consideration of their possible interest in the restoration, did not deem it necessary to have them joined to, or give them notice of, the restoration application. I say this for the following reasons:

(i) Sneech in his founding affidavit in the restoration application, has mentioned at various instances, that the first and second applicants are respectively director and shareholder of the Company to be restored.

(ii) This led to the court *a quo*'s request: to be addressed on who should be informed of the application in order to consider any possible prejudice that any third party may have. See: Sneech's. 'supplementary' heads of argument, filed on 3 November 2017 and in support of his registration application which stated:

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[1] Founding Affidavit, para 27, page 6, Bundle page 16

"At the court hearing on 30 October 2017, the Honourable Judge raised an important issue as to who should be informed relating to the reregistration of the company to see whether it could have any affect on any interested party."

(iii) During argument Sneech confirmed that this was dealt with in the court *a quo*. Applicants' counsel also used this in their argument to indicate how Sneech, after him being confronted by the court *a quo*, deflected the question and the obligation to join the applicants, by arguing that, as the applicants deregistered the Company without him (Sneech) being joined thereto, therefore he need not join them in the restoration application. The 'two wrongs cannot make a right'-argument.

[8] As to the decision of the court *a quo* to have made an order in the absence of the applicants after consideration of their potential prejudice which the restoration may cause, the court *a quo* therefore of the view that the applicants did not have the necessary interest to be joined at the time of the order, I am of the view that I am *functus officio*[2].

[9] This takes me, to the other side of the same coin. Do the applicants now have the necessary interest (*locus standi*) to bring the rescission application in terms of Rule 42 or the common law.

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[2]See: Naidoo and Another v Matlala NO. and Others 2012 (1) SA 143 (GNP) at p 153 par [6]: *"In general terms a judgement is erroneously granted if there existed at the time of its issue a fact of which the court was unaware of, which would have precluded the granting of the judgement and which would have induced the judge, if aware of it, not to grant the judgement."*; and the further references made therein.

[10] I can start off by expressing my view that there can be no doubt that the applicants (as director and shareholder of the Company) have and had an interest in the affairs of the Company. The test for purposes of Rule 42 and the common law is however more restrictive, that is, whether the shareholder and director had a legal interest, to the extent that they are being prejudiced (or could be prejudiced) by the order which they seek to set aside. See in this regard: **UNITED WATCH & DIAMOND CO (PTY) LTD AND OTHERS v DISA HOTELS LTD AND ANOTHER 1972 (4) SA 409 (C) at 414 - 415** where Corbett J held that:

> *"Whether the application be founded upon Rule of Court 42 (1) (a) or upon the common law rule relating to the non-disclosure of material facts in an ex parte application, it is clear that it is only a limited class of persons who are entitled to bring an application of this nature. The Rule of Court specifically speaks of the application being brought by 'any party affected'; and it is manifest that the Court would not entertain an application under the common law at the instance of a disinterested third party. This much is transparently clear; but what is not so clear is how that limited class of persons is to be defined. In this connection neither Mr. Friedman nor Mr. Grosskopf appeared to draw any positive distinction between the Rule of Court and the common law rule, and I accept that the position as to locus standi is broadly the same under both.*
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> ...
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> *In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi under rule 42 (1)(a), an applicant must show a direct and substantial interest in the judgment or order that the applicant wishes to have varied or rescinded. This means a legal interest in the subject-matter of the action or*

application which could be prejudicially affected by the order in that action or application. This judgment has been cited with approval on numerous occasions, including by this court in, inter alia, Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A) at 62." (Own emphasis)

[11] It has been held, that: (i) a financial or economical interest in a matter only, will not suffice. Substantial prejudice must be shown.[3]; and that (ii) a desire to place relevant information before the Court must not be confused with the right to intervene in order to do so.[4]

[12] Therefore in my view, 'prejudice' is necessary to unlock an application for rescission. The onus is on the applicants to convince the court that they have *locus standi* to bring the rescission application (be that by way of Rule 42 or the common law, there being no difference) by convincing the court that the restoration order did, or could, prejudicially affect them.

[13] *In casu*, the applicants have made averments pertaining to their interest or *locus standi* that can be summarised as follows:

(aa) The applicants had (and have), as director and shareholder respectively, a sufficient direct and substantial interest in the company and its restoration.

(bb) Far-reaching and serious allegations, all of which are denied, are made against the applicants, and that the applicants ought to have been afforded the opportunity to oppose the restoration application and to answer to these allegations.

(cc) The company certainly has no claim against either of the applicants.[5]

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[3] United Watch & Diamond Co (Pty) ltd and Others supra at 417 H
[4] United Watch & Diamond Co (Pty) ltd and Others supra as referred to in Strydom v Engen Petroleum Ltd 2013 (2) SA 187 (SCA) at para (23)
[5] Founding Affidavit, para 99.8, page 45, Bundle page 54

[14] Pertaining to (aa) *supra* and the first applicant's interest: Sneech is of the view (this having been presented to the court *a quo* for consideration in the restoration application) that the restoration of the company, will have no prejudicial effect on the director, wherefore he need not be joined. See paragraph 8 of the founding affidavit to the restoration application where Sneech aver that: *"the reinstatement of the company the same will not have any negative effect on the director and he will have the opportunity to defend himself in subsequent actions."*; See also the averment in paragraph 9: *"then director will be fully entitled to raise any defences to the company's claims against him at that time."*

[15] Pertaining to (bb) *supra* and the second applicant's interest: Sneech, is of the view (this also having been presented to the court *a quo* for consideration in the restoration application) that the restoration will ultimately lead to a yield in surplus to the benefit of the shareholder(s).

[16] Both these views were repeated by Sneech in his answering affidavit in opposition of the rescission application before me and need consideration whether they are valid.

[17] Similar facts came before the Supreme Court of Appeal in **DE VILLIERS AND OTHERS v GJN TRUST AND OTHERS 2019 (1) SA 120 (SCA) at 128 par [25]** and was it held by Van der Merwe JA (Shongwe ADP, Seriti JA, Rogers AJA and Schippers AJA concurring) that:

> *"In the rescission application the appellants averred that the s 420 order adversely affected their interests in that they were not afforded the opportunity to respond to the serious allegations of impropriety that had been made in the s 420 application. This misses the point. Although the purpose of the s 420 application was to enable the liquidators to claim from the appellants, the subject-matter of that application was the*

restoration of the dissolved company to a company in liquidation and not the enforceability of the alleged claims against the appellants. The prosecution of these claims will no doubt take place by due process, during which the appellants will be afforded the full opportunity to protect their rights. In his replying affidavit in the rescission application, the first appellant in fact declared that he had no reason to seek protection from investigation by the liquidators. Thus, no legal interests of the appellants were adversely affected by the s 420 order. (Own emphasis)

[18] It follows that, the mere fact that a party is a director and/or shareholder of a company (albeit having a substantial interest in the company through office or shareholding) does not provide that party with the necessary legal interest or *locus standi* for purposes of a rescission application, either in terms of Rule 42 or the common law.

[19] *In casu*, applicants also missed the point and failed to aver, and thus convince me, of any prejudice to them resulting from the order. In the result, I hold that the applicants have no *locus standi* to challenge the order granted in this court on 3 November 2017.

In the result, the following order is made:

(1) The application is dismissed with cost.