THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20407/2014

In the matter between:

CASPER HENDRIK MINNAAR **APPELLANT**

And

A W VAN ROOYEN NO **RESPONDENT**

Neutral Citation: *Minnaar v Van Rooyen NO* (20407/2014) [2015] ZASCA 114 (10 September 2015)

Coram: Lewis, Tshiqi, Majiedt, and Dambuza JJA and Baartman AJA

Heard: 24 August 2015

Delivered: 10 September 2015

Summary: The grant by default of an order under s 424(1) of the Companies Act 61 of 1973, where no evidence has been adduced, is erroneous within the meaning of Rule 42(1)*(a)* of the Uniform Rules of Court: order set aside on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Keightley AJ sitting as court of first instance).

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with:

'The default judgment granted against the applicant on 23 February 2012 is set aside. The costs of the application shall be costs in the cause.'

JUDGMENT

Lewis JA (Tshiqi, Majiedt, and Dambuza JJA and Baartman AJA concurring)

[1] Mr Casper Minnaar, the appellant, appeals against the refusal to grant the rescission of an order made against him by default. The order was made by Van der Merwe DJP (in the North Gauteng High Court) in terms of s 424(1) of the Companies Act 61 of 1973, applicable at the time when the default judgment was sought. It read:

'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 who was knowingly a party to the carrying on of the business in the manner aforesaid, 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.' (My emphasis.)

[2] Default judgment, under s 424(1), was sought against Minnaar on 22 February 2012 by the then liquidator of a company, Askari Mining and Equipment Ltd (Askari), who had instituted action against Minnaar and four other former directors, on the basis that they had acted recklessly in the conduct of the affairs of the company and should thus be liable for all the debts of the company. The respondent, Mr A W van Rooyen, is the current liquidator of the company.

[3] The order sought by the liquidator, and granted by the court, read:

'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 . . . that the 1st Defendant [Minnaar] 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.'

[4] Some ten months later, Minnaar sought the rescission of the default judgment in the Gauteng Division, Pretoria, in terms of rule 42(1)*(a)* of the Uniform Rules of Court, and under the common law. Keightley AJ refused relief under the rule because she held that the order had not been erroneously sought, and refused relief under the common law on the basis that Minnaar was in wilful default.

[5] Minnaar, a chartered accountant, was appointed as a consultant to Askari in 1999, and then as its financial director in 2000. He resigned as a director in November 2001. Askari was provisionally liquidated in June 2003, and finally liquidated in July 2008. In March 2004, Eloff JP, then retired, was appointed by the Master of the High Court to conduct an enquiry into the affairs of Askari in terms of s 417 of the 1973 Companies Act. Eloff JP advised 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'. But, he pointed out, 'Experience tells one that actions of that sort are often difficult to process 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.'

[6] The only passage in the report of the enquiry that is in the record, and which deals with Minnaar's role, stated that he had testified about the 'main financial transactions of the company while he was its financial director. He contributed significantly to the establishment of the facts on the strength of which the main creditors of the company may be able to establish that the affairs of the company were conducted recklessly.' In May 2008, the liquidators indeed instituted action against the five directors claiming an order that they be held personally liable for the debts of Askari.

[7] All the directors appointed the same attorney to represent them. And they issued a joint plea to the claim denying the allegations against them. The matter was set down for trial on 22 February 2012. Before then, however, the directors and then liquidators had started discussing a settlement. Early in 2011 settlement proposals were discussed, on Minnaar's own version. In October of that year Minnaar was advised that he was required to attend a pre-trial conference scheduled for 30 November 2011. He wrote to the attorney for the directors, on that day, by email, saying that he knew about the pre-trial conference and that settlement proposals would be made. He said that he was placing it on record that he would not be part of any settlement. His colleagues, he said, were free to settle the claims against them, but he was convinced that he had done no wrong, and in any event could not afford to pay what the liquidators were asking.

[8] In the same email Minnaar also advised that he would handle his own defence and would appoint a new attorney as soon as possible. Indeed, he said in the founding affidavit, he approached an attorney whom he knew from church, a Mr Oosthuizen, on an informal basis, and Oosthuizen had approached the liquidators' attorney, attempting to persuade him to withdraw the claim against Minnaar. Oosthuizen was unsuccessful. Despite this, Minnaar failed to take any steps to appoint an attorney to represent him at trial. He did not heed Oosthuizen's advice to

attend the pretrial conference and to retain his former attorney. And when his former attorney spoke to him on 17 February 2012 to confirm that he was withdrawing as Minnaar's representative, Minnaar made no enquiries as to the status of the action against him.

[9] Yet despite knowing of the trial date, he did not attend court on 22 February 2012. When the trial was called by Van der Merwe DJP, the liquidators asked for default judgment in terms of rule 39(1) of the Uniform Rules of Court. That rule provides:

'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.'

Whether the order was competent is a matter to which I shall turn shortly.

[10] Minnaar alleged that he had learned about the order only when a warrant of execution was issued and served on him on 30 July 2012. He had then instructed Oosthuizen to discuss settlement with the liquidators. Discussions took place until the end of October 2012. They did not reach agreement. In December 2012 Minnaar applied for the rescission of the default judgment. Keightley AJ refused the application on the basis that the order had not been erroneously sought or granted, and that the common law, which requires sufficient cause to be shown to obtain rescission, did not avail Minnaar because he had been supine in the face of the action against him: he was in wilful default. She gave leave to appeal to this court on the basis that the question whether an order in terms of s 424(1) of the Companies Act could be granted by default was a novel one and should receive the attention of this court.

[11] Rule 41(1)*(a)*, on which Minnaar relied both in the court a quo and on appeal, provides:

'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) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

. . . '

Keightley AJ found that the proviso to rule 39(1) allowed for a default judgment declaring liability under s 424(1) of the Companies Act to be granted. She held that the words 'debt or liquidated demand' were not limited to claims for the repayment of money, but would include a declaration of rights, claims for the transfer of property, cancellation and ejectment, amongst other relief permissible, without the adducing of evidence.

[12] The learned judge pointed out that cases dealing with liability under s 424(1) required proof on a balance of probabilities, but said that cases such as *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) and *Philotex (Pty) Ltd & others v Snyman & others*1998 (2) SA 138 (SCA) dealt with the requisite standard of proof in s 424(1) applications and not with the prima facie nature of the evidence before the court.

Where there is prima facie proof of recklessness or fraud, which is not countered, she said, it becomes proof on a balance of probabilities. In this regard she relied on the dictum of Stratford JA in *Ex parte the Minister of Justice: in re Rex v VV Jacobson and Levy* 1931 AD 466 AD at 478-9:

'"*Prima facie*" evidence in its more 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*.'

She thus rejected Minnaar's argument that relief under s 424(1) cannot be granted by default. She referred also to *Abraham v City of Cape Town* 1995 (2) SA 319 (C), where judgment by default was granted in a delictual claim for damages, despite the fact that no evidence was adduced orally. In that case, however, there was an affidavit before the court on which it relied in determining damages.

[13] On appeal Minnaar argues that evidence must be led in order to determine liability under s 424(1): the court must determine whether a director's conduct is reckless or whether the business of the company was carried on with the intention to defraud creditors of the company. The plaintiff must prove this on a balance of probabilities, and the court must assess the evidence. In this matter, no evidence at all was led. The court had before it only the particulars of claim, in which the liquidators made allegations about the conduct of the directors of Askari, which were denied in the joint plea. I have referred to the report of Eloff JP: we do not know if that was before the court, but it was in any event not sufficient to prove reckless conduct. The Commissioner did no more than raise the prospect of action against the directors.

[14] Mr van Rooyen, the liquidator, argues, however, that Van der Merwe DJP exercised a discretion in granting default judgment. He declined to make an order sounding in money, and would grant only a declaration that Minnaar was liable for the debts of the company. While it is correct that a court exercises a discretion in granting judgment by default, it cannot make a finding of recklessness on a balance of probabilities when there is no evidence before it.

[15] As Howie JA said in *Philotex* (at 142H-J) recklessness is not lightly found.

'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 . . . . 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.'

[16] None of the allegations against Minnaar were supported by evidence. None was led. There was thus no proof at all, let alone prima facie proof, of whether his conduct had been fraudulent or reckless. Default judgment should, therefore, not have been granted. The question that then arises is whether it was erroneouly sought and erroneously granted within the meaning of rule 42(1)*(a)*.

[17] This, as the court a quo said, is not an issue that has been previously been traversed by any court. That is not surprising. It is inconceivable that an order would be made declaring a director liable for the debts of a company on the basis of reckless or fraudulent conduct where no evidence is led to support the allegations made.

[18] Minnaar submits that the order was not legally competent. Authorities that deal with rule 42(1)*(a)* tend to suggest that a default judgment will be rescinded where there has been a procedural irregularity, such as no notice of set down having been given to a party. A comprehensive list of such cases is set out in *Erasmus Superior Court Practice* by D E van Loggerenberg and P B J Farlam Volume 1 (Revision Service 45, 2014) B1-308ff. In *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) Streicher JA stated (para 25) that 'a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware . . . . See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) in paras 9-10'. In *Colyn* a notice had been lost in the defendant's attorney's office, and the defendant accordingly did not appear when the plaintiff applied for summary judgment. Jones AJA held that no procedural irregularity had occurred and that summary judgment had not been erroneously granted.

[19] In this matter, in my view, the liquidators were not entitled procedurally to default judgment against Minnaar without leading evidence. By its very nature, the right to the relief sought under s 424(1) of the Companies Act had to be proved on a balance of probabilities. The liquidators were not entitled to rely on allegations made in the particulars of claim and denied in the defendants' joint plea. At the very least they should have lead witnesses to show that the directors had acted recklessly or with intent to defraud creditors. The order in terms of s 424(1) was thus erroneously sought, and, as a result, erroneously granted. It must accordingly be rescinded in terms of rule 42(10*(a)*.

[20] There is thus no need to consider whether Minnaar's default was deliberate such that he would not be entitled to relief under the common law. Van Rooyen argued, however, that when the application for rescission was brought, Minnaar was seeking the court's indulgence and that he should not be entitled to the costs of the application. Moreover, his account of why he had not appeared in court on the trial date was not entirely credible or consistent. I agree, and consider that the costs of the application should be costs in the cause.

[21] I order that:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with:

'The default judgment granted against the applicant on 23 February 2012 is set aside. The costs of the application shall be costs in the cause.'

_____

C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	N Davis SC (with him C L H Harms)
Instructed by:	Theron Jordaan & Smit Inc, c/o Stopforth Swanepoel & Brewis Inc Pretoria Symington & De Kock, Bloemfontein
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