



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01123ADJ2022

In the matter between:

LAUREN ORRITT

Applicant

and

COLIN STUART BLACHER

Respondent

Presiding Member: Lindelani Daniel Sikhitha

Date of hearing: 05 December 2022

Date of handing down of decision: 09 January 2023

Summary: *Rescission application — regulation 142(3)(b)(ii) of the Companies Regulations, 2011 — rule 42 of the Uniform Rules of the High Court — requirements for rescission of court orders — applicant participated in the proceedings — the applicant was afforded ample opportunities to call expert witness — applicant voluntarily chose to close her case — Companies Tribunal is functus officio — rescission application is refused.*

DECISION (Reasons and Order) IN RE:

Application for a Postponement

Per: Lindelani Daniel Sikhitha

A. INTRODUCTION

[1] The Applicant in this matter is Lauren Orritt and she brought an application for rescission of the orders made by Mrs. Lucia Glass in *Lauret Orritt v Colin Stuart Blacher* (CT00799ADJ2020)¹ and *Colin Stuart Blacher v Lauret Orritt* (CT00828ADJ2021)². The two orders were handed down by the Companies Tribunal on the 02nd day of August 2022.

[2] The Respondent in this matter is Colin Stuart Blacher. The Respondent is cited as Applicant in the matter of *Colin Stuart Blacher v Lauret Orritt* referred to above and he is cited as Respondent in the matter of *Lauret Orritt v Colin Stuart Blacher* referred to above.

[3] On the 15th day of August 2022, the Applicant filed an application for rescission of the following two decisions of the Companies Tribunal:

3.1 *Orritt v Blacher* (CT00799ADJ2020); and

¹ The neutral citation of this matter *Orritt v Blacher* (CT00799ADJ2020) [2022] COMPTRI 39 (2 August 2022).

² The neutral citation of this matter is *Blacher v Orritt* (CT00828ADJ2021) [2022] COMPTRI 38 (2 August 2022).

3.2 *Blacher v Orritt* (CT00828ADJ2021).

[4] The rescission application in this matter was brought in terms of regulation 142(3)(b)(ii) of the Companies Regulations, 2011 (“the Regulations”).³ This application was initially heard by me on the 24th day of October 2022. During the presentation of the oral arguments of the aforesaid application, I did enquire from the Applicant if she had outlined the basis of the rescission application she has launched as outlined in the matter of *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*⁴.

[5] In my view, the aforementioned enquiry forms part of the jurisdictional basis whereupon the Companies Tribunal may adjudicate the current application for rescission of its decisions in the *Orritt v Blacher* and *Blacher v Orritt* matters. More pertinently, I enquired during the hearing as to whether the Applicant had met the requirements for rescission of court orders as outlined in terms of rule 42 of the Uniform Rules of the High Court. I also enquired as to whether the Applicant has established any other grounds upon which the Companies Tribunal may rescind or vary its decisions. Lastly, I enquired from the Applicant if it is competent for the Companies Tribunal to review and set aside its own decisions.

³ Regulation 142(3)(b)(ii) reads as follows:
“An application in terms of this regulation must-
(b) depending on the context-

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded.”
⁴ (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

[6] The Applicant did concede that she had not provided the grounds upon which her application for rescission of the decisions of the Companies Tribunal are based. As a result, the Applicant brought an application for postponement of the hearing of her application for rescission in order to allow her time to file a supplementary affidavit aimed at curing the defects which had been highlighted in paragraphs 5 and 6 above. After hearing and consideration of the arguments in favour and against the requested postponement, I granted the postponement and made the following order and issued the accompanying directives as well:

“[34] I have noted that the transcripts have already been delivered by the Registrar of the Companies Tribunal. In the circumstances, I vary the order and directives I made orally on the 24th day of October 2022 and make the following order instead:

34.1 Application for a postponement is hereby granted;

34.2 The application for rescission of the two decisions of the Companies Tribunal that are now neutrally cited as *Orritt v Blacher* (CT00799ADJ2020) [2022] COMPTRI 39 (handed down on 02 August 2022) and *Blacher v Orritt* (CT00828ADJ2021) [2022] COMPTRI 38 (handed down on 02 August 2022) is hereby postponed *sine die*;

34.3 The Applicant and the Respondent are ordered to adhere to the following directives with regard to time frames:

34.3.1 The Applicant is directed to serve and file her supplementary affidavit together with any supporting documents within a period of 10 (ten) business days from the date of delivery this order to her;

34.3.2 The Respondent is directed to serve and file his supplementary answering affidavit together with any supporting documents within a period of 10 (ten) business days from the date of service of the Applicant's supplementary affidavit and any supporting documents on him;

34.3.3 The Applicant is directed to serve and file her supplementary replying affidavit together with any supporting documents, if any, within a period of 5 (five) business days from the date of service of the Respondent's supplementary answering affidavit and any supporting documents on her.

34.4 There is no order as to costs."

[7] The parties did comply with my directives and did file their respective supplementary affidavits as directed in my decision issued on the 25th day of October 2022. The application was heard on the 05th day of December 2022 and the parties were specifically directed to file closing written heads of argument dealing with the issue of exclusion from calling an expert witness

and the issue of *functus officio*. The parties were given until the 09th day of December 2022 to file their respective written closing heads of argument. The parties did indeed comply with the directive and did file their respective closing written heads of argument on the due date.

B. APPLICANT'S SUBMISSIONS IN SUPPORT OF THE APPLICATION FOR RESCISSION

[8] The Applicant brought an application in terms of which she is seeking a rescission of the two decisions of the Companies Tribunal in the *Orritt v Blacher*⁵ and the *Blacher v Orritt*⁶ matters that I have already referred to above. The grounds that the Applicant is relying upon in bringing her application for rescission of the two decisions of the Companies Tribunal can be summarised as follows:

8.1 In line with the requirements for rescission of court orders as provided for in Rule 42 of the Uniform High Court Rules, the Applicant submits that her request for rescission of the Companies Tribunal decisions fall within the ambit of what is provided for in Rule 42.

8.2 In line with what the Constitutional Court had held in the Zuma matter, the Applicant submits that she is required to show the Companies Tribunal that one of the two aspects of Rule 42 of the Uniform Rules of the High Court have been met in order for the Companies Tribunal

⁵ See footnote number 1 above.

⁶ See footnote number 2 above.

to be able to exercise its discretion to rescind the orders that it made in the *Orritt v Blacher*⁷ and in the *Blacher v Orritt*⁸ matters.

8.3 The first ground that is relied upon by the Applicant in bringing the current application for rescission is based on the allegation that the Applicant was precluded from calling an expert witnesses to give expert evidence relating to the loan accounts of the Respondent. The relevant allegations in relation to this ground can be summarised as follows:

8.3.1 The Applicant needed to call an expert witness to give evidence which would deal with the issue of the loan accounts of the Respondent as outlined in the financials from 2019.

8.3.2 The Applicant does confirm that she was advised, three days prior to the final hearing to bring an accountant to give expert evidence with regard to the loan accounts as alleged by the Respondent.

8.3.3 According to the Applicant there was no accountant who was comfortable to comment on the loan accounts when there was no documentary proof.

8.3.4 When the Applicant requested during the hearing to be given an opportunity to call an expert witness, the presiding member of the Companies Tribunal had said that that she would be

⁷ See footnote number 1 above.

⁸ See footnote number 2 above.

able to bring in an accountant to comment on the loan accounts of the Respondent.

8.3.4 The Applicant's basis for alleging that she was precluded from calling an accountant to give expert evidence is simply that no accountant could have been able to justify any figures contained on the loan accounts of the Respondent, because there were no figures and proofs to justify those loan accounts.

8.3.5 None of the three accountants that had been involved in the business could quantify any of the loan accounts of the Respondent, because there were no documents which recorded the loan accounts.

8.3.6 The loan accounts were fabricated by the Respondent to justify his conduct of stealing money from the business. She is making such an allegation despite the fact that she conceded that she accepted and signed the financials which contained the loan accounts of the Respondent to be reflecting the correct state of financial affairs of the company.

8.3.7 The Applicant is also alleging that she was precluded from calling an expert witness because the presiding member of the Companies Tribunal refused to grant her a postponement. She is making such an allegation despite her concession that the discussion on whether or not to grant postponement is dependent on the discretion of the presiding member. There

is no where on the record where there is a record of the Applicant's application for a postponement in order to call an expert witness to give expert evidence.

8.4 The other ground upon which the Applicant is basing her application for rescission is that the presiding member proceeded to deal with the two disputes between the Applicant and the Respondent on the wrong basis that the facts of the two cases are the same. The relevant allegations in relation to this ground can be summarised as follows:

8.4.1 The facts of the Applicant's case against the Respondent and the Respondent's retaliatory case against the Applicant are totally different.

8.4.2 In terms of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act") it was the Applicant's duty as a director to report the conduct of the Respondent to the police, and to obviously proceed in the best interest of the company, to have the Respondent removed as the director the company.

8.4.3 Subsequent to the filing of the initial affidavits, there were further numerous transactions that were done by the Respondent which the Applicant raised in her to the Companies Tribunal evidence, both orally and in writing. The Applicant alleges that she submitted four (4) bundles of documents containing sufficient evidence of misconduct of the Respondent.

- 8.4.4 it does not seem that the presiding member of the Companies Tribunal actually utilised the evidence that was presented by the Applicant in arriving at her decision. The Applicant did provide sufficient evidence which shows that the Respondent was derelict and negligent as a director of the company.
- 8.4.5 There was no proper procedure followed by the Respondent when bringing his case for the Applicant's removal as a director of the company.
- 8.4.6 In addition, the Respondent's case against the Applicant differed materially with the Applicant's case against the Respondent.
- 8.4.7 Despite such material difference, the presiding member of the Companies Tribunal did not give any due consideration to the evidence that the Applicant had presented for the removal of the Respondent as director of the company. This constituted an error on the part of the presiding member of the Companies Tribunal.
- 8.5 The Applicant failed to provide any tangible grounds and/or reasons to support her assertions that the Companies Tribunal is not barred from rehearing the applications brought by the Applicant and the Respondent in the *Orritt v Blacher* and in the *Blacher v Orritt* matters. Despite providing scholarly views dealing with the principle of *functus officio* the Applicant could not provide any ground or reason which

support the contention that the Companies Tribunal is not *functus officio* to rehear the two applications.

C. RESPONDENT'S SUBMISSIONS IN OPPOSITION OF THE APPLICATION FOR RESCISSION

[9] The Respondent made the following submissions in opposition of the application for rescission of the Companies Tribunal decisions in the *Orritt v Blacher* and in the *Blacher v Orritt* matters:

9.1 In the *Morudi and Others v NC Housing Services and Development Co Limited and Others*⁹ and the *Zuma* matters, the courts were dealing with rescission applications of the court orders in instances where the applicant was prevented from attending the hearing. The facts are therefore different because in the current application for rescission of the two Companies Tribunal decisions, the Applicant had been present at all material times during the hearings that were held before the presiding member of the Companies Tribunal.

9.2 The Applicant is saying, while making reference to Rule 42 of the Uniform Rules of the High Court, that she was prevented from calling an expert witness to give expert evidence by the presiding member of the Companies Tribunal.

9.3 The Respondent submits that such an allegation is based on lies. As a matter of fact, the Applicant was given countless opportunities to call

⁹ (CCT270/17) [2018] ZACC 32; 2019 (2) BCLR 261 (CC) (25 September 2018).

an accountant to give expert evidence during the hearing. The Applicant was specifically asked to present expert evidence to rebut the issue of the loan accounts of the Respondent as she was alleging that they are fraudulent.

9.4 The only reason why the Applicant could not call an accountant to give expert evidence is because she had no witness that could support her claims that the loan accounts are fraudulent.

9.5 The Companies Tribunal did inform the Applicant in writing through an email communication to call an expert witness. The relevant parts of the email communication from the Registrar of the Companies Tribunal read as follows:

“You are requested to prove via an expert witness, i.e. an accountant, to explain the financials of the company, Claimburg Accommodation, regarding moneys illegally paid to Mr Blacher’s personal loan account, and allegedly stolen moneys from the company account. We will subpoena a witness in terms of Regulation 160 of the Companies Act.”

9.6 The Applicant’s response to the aforementioned email communication from the Companies Tribunal was in the form of clarity seeking question and the relevant parts thereof read as follows:

“Thank you for the below email. Is this expert required for Wednesday’s hearing?”

9.7 The Registrar of the Companies Tribunal did respond to the aforementioned clarity seeking question of the Applicant in the following manner:

“We acknowledge receipt of the below email. We confirm that the witness is requested to appear on Wednesday.”

9.8 After receiving the clarity regarding her question and as to when the expert witness should appear, the Applicant asked a further clarity seeking question that was directed at the Registrar of the Companies Tribunal. The relevant parts of her clarity seeking question read as follows:

“Thank you, Selby. Apologies, but I am confused. Must I find an expert, or do you have an expert?”

9.9 It is therefore clear that the Applicant was afforded an opportunity to call an expert witness and she voluntarily decided not to call one. It follows therefore that her claim that she was precluded from calling an expert witness to give expert evidence to rebut the loan accounts of the Respondent are therefore without any basis and it should therefore be rejected.

9.10 It is also important to bring it to the attention of the Companies Tribunal that the Applicant did, as a matter of fact, sign and accept the financials in relation to which she wanted to call an expert witness to dispute the loan accounts of the Respondent. These financial were ultimately approved and accepted by registered auditors of the company.

9.11 Based on the acceptance and approval of the financials, it is therefore presumed that the Applicant accepted that the financials reflects the state of financial affairs of the company at the time. In other words, it is presumed, until the contrary can be proved, that the Applicant accepted and approved the loan accounts of the Respondent.

9.12 It is common cause that the Applicant was given ample opportunities by the presiding member of the Companies Tribunal to call an expert witness for purposes of giving expert evidence regarding the loan accounts of the Respondent which forms the basis of her complaint.

9.13 In addition, the Applicant did not produce any supplementary affidavit from an expert to corroborate her allegations that the loan accounts of the Respondent are fraudulent.

9.14 When dealing with the issue of the opportunity that was given to the Applicant with regard to the loan accounts of the Respondent, the presiding member of the Companies Tribunal stated the following:

“Orritt will have an opportunity to respond to Blacher’s case, and if necessary, if she wishes to call an expert witness, and any other issues that – that she has that she would like to address on case number 828, she is welcome to do that then.”

9.15 In addition, the presiding member of the Companies Tribunal stated the following which is relevant to the issue under determination in this rescission application:

“Are you going to read the email now? Because it is hearsay evidence, unless you bring an expert to testify to that letter.

You should know that we cannot carry on like this with no evidence. If you say something, you must prove it. And I am trying to find out, are you trying to prove something?"

9.16 The current application for rescission of the two decisions of the Companies Tribunal is the exact *modus operandi* of the Applicant. She has the tendency of throwing out statements and making false accusations which are unsubstantiated by any shred of evidence.

9.17 It is common cause that the Applicant closed her case without any coercion from the presiding member of the Companies Tribunal. At no point did the Applicant indicate that she cannot close her case because she still has to call an expert witness to give expert evidence regarding the alleged fraudulent loan accounts of the Respondent.

D. THE LAW APPLICABLE TO APPLICATIONS FOR RESCISSION OF COURT ORDERS

[10] I have noted that regulation 142(3)(b)(ii) of the Regulations does not provide any details with regard to the procedure to be followed when bringing an application for variation or rescission of the decision of the Companies Tribunal. In addition, regulation 142(3)(b)(ii) of the Regulations does not outline the requirements that an application for variation or rescission of the decisions of the Companies Tribunal must comply with.

[11] Be that as it may, regulation 154 of the Regulations did envisage the aforementioned dilemma during conduct of hearing before the Companies

Tribunal. The relevant parts of regulation 154(1) of the Regulations read as follows:

- “(1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter—
- (a) may give directions on how to proceed; and
 - (b) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Regulations, the member may have regard to the High Court Rules.”

[12] I then proceeded to consider the procedure that is followed by the High Courts. I also considered the requirements that an application for rescission of court orders is required to comply with in terms of the High Court Rules and procedure (practice). I found Rule 42 of the Uniform Rules of the High Court to be relevant for purposes of this exercise and it reads as follows:

“Variation and rescission of orders

- (1) *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;*

- (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
 - (c) *an order or judgment granted as the result of a mistake common to the parties.*
- (2) *Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*
- (3) *The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”*

E. THE APPLICABLE CASE LAW AND ANALYSIS OF THE FACTS

[13] It follows therefore that the Companies Tribunal should follow the procedure and the requirements outlined in rule 42 of the Uniform Rules of the High Court when dealing with applications for variation or rescission of its decisions. The procedure and requirements outlined in rule 42 of the Uniform Rules of the High Court were fully dealt with in *Zuma*¹⁰ matter and the Constitutional Court, stated the following regarding the requirements for rescission of court orders:

“[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42,

¹⁰ See footnote number 4 above.

after all, postulates that a court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”¹¹

[14] In *Zuma*¹², the Constitutional Court explained that the word “*absence*” in rule 42(1)(a) of the High Court Rules “*exist[s] to protect litigants whose presence was precluded, not those whose absence was elected*”. It therefore held that the requirements of the first aspect had not been met, given that Mr Zuma was given notice of the case against him, as well as sufficient opportunities to participate in the matter; but he nonetheless elected not to participate. Essentially, the court’s finding was that a litigant’s strategic election not to participate does not constitute “*absence*” for purposes of rule 42(1)(a). The relevant parts of the judgment of the Constitutional Court read as follows:

“[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words “granted in the absence of any party affected thereby”, as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants

¹¹ *Zuma* footnote 4 above at paragraph 53.

¹² See footnote number 4 above.

who, afforded procedurally regular judicial process, opt to be absent.

[57] At the outset, when dealing with the “absence ground”, the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party’s absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court’s decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

[58] In *Lodhi 2*, for example, it was said that “where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously”. And, precisely because proper notice had not been given to the affected party in *Theron N.O.*, that Court found that the orders granted in the applicants’ absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given

effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[59] Similarly, in *Morudi*, this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced.²⁵ This Court concluded thus:

‘[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.’

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule

42(1)(a), rendering the order rescindable. Whilst that matter correctly emphasises the importance of a party's presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well

within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application. Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted. I need say no more than this: Mr Zuma's litigious tactics cannot render him "absent" in the sense envisaged by rule 42(1)(a)."¹³

[15] I have applied the requirements to be met when bringing an application for rescission of the decisions of the Companies Tribunal to the current rescission application and I have noted that the decisions were granted in the presence of the Applicant. I have also noted that the Applicant fully participated in the proceedings that were held before the Companies Tribunal which culminated in the decisions that she had applied to have rescinded.

[16] Our jurisprudence is clear on the issues under consideration in this application for rescission. Where a litigant, who is given notice of the case against them

¹³ Zuma footnote number 4 above at paragraphs 56 to 61.

and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted. Similarly, if a litigant had fully participated in proceedings before the court, such a litigant cannot lodge a rescission application within the scope of the requirement of rule 42(1)(a) of the High Court Rules.

[17] Regarding the second requirement for rescission of court orders in terms of rule 42(1)(b) of the Uniform Rules of the High Court, the Constitutional Court stated the following which I consider to be relevant in this matter:

“[62] Mr Zuma’s purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1)(a). He has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because “there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment”.

[63] It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render

erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in *Lodhi*:

‘A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.’¹⁴

[18] The Constitutional Court continued to state the following with regard to the requirements of rescission of court orders:

“[68] Whether we consider this application in terms of rule 42 or in terms of the common law, to which I will turn my focus next, the insuperable problem that Mr Zuma is confronted with is that the law of rescission is clear: one cannot seek to invoke the process of rescission to obtain a re-hearing on the merits. The reason for this is that, as stated by this Court in *Daniel*: “the general principle is that once a court has duly pronounced a final order,

¹⁴ *Zuma* footnote number 4 above at paragraphs 62 to 63.

it becomes *functus officio* and has no power to alter the order”. Of course, rule 42 creates an exception to the doctrine of *functus officio*, but only in narrow circumstances. As stated in *Chetty*—

‘a distinction is drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. In the case of a default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission In the case of a final and definitive judgment, whether by default or not, granted after evidence had been adduced, the Court was regarded as *functus officio*.’”

- [19] Regarding the second aspect, the Constitutional Court stated that to show that an order was erroneously granted an applicant seeking rescission must show that at the time the order was made, there existed a fact which, had the judge been aware of it, would have induced such judge not to grant the order. The Constitutional Court observed that the issues that Mr Zuma intended to raise as possible defences had already been considered at length in the judgment of the contempt of court application. For that reason, the Constitutional Court noted that Mr Zuma could not show that if not for the purported rescindable “errors” the court would have reached a different conclusion.

[20] In her founding papers, the Applicant is required but has failed to demonstrate that if it was not for the alleged rescindable “ambiguities” or “errors” or “omission”, the Companies Tribunal would have reached a different conclusion. It is trite that orders of the Companies Tribunal are subject to review and appeal by the High Court. In addition, these decisions are rescindable for reasons outlined in rule 41(1) of the High Court Rules. The legislature has carefully augmented the common law grounds of rescission by expressly providing for narrow grounds of rescission by crafting rule 42 of the Uniform Rules of the High Court.

[21] It is clear that the grounds of rescission in terms of rule 42(1) of the Uniform Rules of the High Court are very narrow and this was done for a good reason. It is trite that every rescission of a court order constitutes an exception to the ordinary rule that court orders are final, but only subject to review and appeal. By its nature the law of rescission invites a degree of legal uncertainty. So, to avoid chaos, the grounds upon which rescission can be sought have been deliberately carved out by the legislature.

F. FINDINGS

[22] I have considered the arguments presented by the parties and in particular the Applicant as well as relevant case law in my determination of the application for rescission of the two decisions of the Companies Tribunal in the *Orritt v Blacher* and *Blacher v Orritt* matters. The application for rescission of the aforementioned decisions of the Companies Tribunal is premised on two grounds, namely:

22.1 The Applicant alleges that she was precluded by the presiding member of the Companies Tribunal from calling an expert witness to give expert evidence in relation to the loan accounts of the Respondent; and

22.2 The Applicant further alleges that the presiding member of the Companies Tribunal proceeded to deal with the two disputes between the Applicant and the Respondent on the wrong basis that the facts of the two cases are the same.

[23] As I have outlined above, our jurisprudence is very clear on the issue under consideration in this application for rescission. Where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a) of the Uniform Rules of the High Court. And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted.

[24] Similarly, a litigant who fully participated in proceedings before the Companies Tribunal, such litigant cannot lodge a rescission application within the scope of the requirement of rule 42(1)(a) of the Uniform Rules of the High Court. I therefore find that the Applicant failed to adduce evidence to sustain her allegation that she was precluded from calling an expert witness to give expert evidence regarding the loan accounts of the Respondent. On the contrary, evidence contained on the record shows that the Applicant was afforded ample opportunity to call an expert witness to give evidence to support her allegations that the loan accounts are fraudulent. Instead of seizing the

Applicant chose not to call any expert witness and she ultimately and voluntarily so, closed her case.

[25] The Applicant alleges that subsequent to the initial affidavits, she presented evidence both orally and in writing which shows that there were further numerous transactions done by the Respondent. The Applicant alleges that she submitted four (4) bundles containing the evidence of misconduct of the Respondent. The bundles provided contained sufficient evidence which show the Respondent's derelict and negligent actions as a director. The Applicant alleges that it does not seem that the presiding member of the Companies Tribunal actually utilised the evidence that was presented by the Applicant in arriving at her decision.

[26] The Applicant further alleges that there was no proper procedure followed by the Respondent when bringing his case for the Applicant's removal as a director of the company. In addition, she alleges that the Respondent's case against the Applicant differed materially with the Applicant's case against the Respondent. Despite such material difference, the presiding member of the Companies Tribunal did not give any due consideration to the evidence that the Applicant had presented for the removal of the Respondent as director of the company. This constituted an error on the part of the presiding member of the Companies Tribunal.

[27] It is settled in our law that one cannot seek to invoke the process of rescission for purposes of obtaining a re-hearing of the merits of a matter. The reason for this is that there is a general principle to the effect that once a court has duly pronounced a final order, it becomes *functus officio* and has no power to

alter the order. Of course, rule 42 of the Uniform Rules of the High Court creates an exception to the doctrine of *functus officio*, but it does so only in narrow circumstances as outlined by the Constitutional Court in the *Zuma*¹⁵ matter.

[28] It is clear from the record and the decisions of the presiding member in relation to the two matters that her final and definitive orders, were granted after evidence had been adduced by both parties. I therefore find that the Companies Tribunal has become *functus officio* and cannot re-hear the two applications. However, the Applicant is at liberty to approach the High Court to review the decisions of the Companies Tribunal based on any ground she deems fit.

THE ORDER

[29] Based on my analysis and my findings outlined above, I am therefore making the following order:

29.1 Application for rescission of the decision of the Companies Tribunal in the matter that is now neutrally cited as *Orritt v Blacher* (CT00799ADJ2020) [2022] COMPTRI 39 (handed down on 02 August 2022) is hereby refused;

29.2 Application for rescission of the decision of the Companies Tribunal in the matter that is now neutrally cited as *Blacher v Orritt*

¹⁵ See *Zuma* footnote number 4 above at paragraphs 62 to 63.

(CT00828ADJ2021) [2022] COMPTRI 38 (handed down on 02 August 2022) is hereby refused; and

29.3 There is no order as to costs.

LINDELANI DANIEL SIKHITHA
Member of the Companies Tribunal
09 JANUARY 2023