



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 6 October 2023

Case No. 2023-093107

In the matter between:

WILLEM LUND

Applicant

and

THE STATE

First Respondent

REGIONAL COURT PRESIDENT MODIBEDI DJAJE

Second Respondent

REGIONAL COURT MAGISTRATE BERTIE ROUX

Third Respondent

MINISTER OF JUSTICE

Fourth Respondent

JUDGMENT

WILSON J:

- 1 On 2 March 2021, the applicant, Mr. Lund, was convicted in the Regional Court on four counts of stock theft. On 28 September 2021, he was sentenced to 12 years' imprisonment. The Regional Court refused his application for leave to appeal, but, on a petition determined sometime in

January 2023, this court granted leave to appeal against Mr. Lund's convictions and sentence.

2 On 27 March 2023, Mr. Lund applied for bail pending appeal. The Regional Court granted bail and released Mr. Lund on a bond of R10 000. The second respondent, the Regional Court President, then referred the decision to grant bail pending appeal to this court on special review, under section 304 (4) of the Criminal Procedure Act 51 of 1977 ("the Act"). On 31 August 2023, Africa AJ (with whom Moosa J agreed), reviewed the decision to grant Mr. Lund bail and set it aside. Mr. Lund was directed to report to the Johannesburg Prison by no later than 14 September 2023.

3 Mr. Lund then applied urgently to me to rescind Africa AJ's decision under rule 42 (1) (a), which provides for the rescission of an order erroneously sought or granted in the absence of an affected party. I heard the matter on 12 September 2023, reserved judgment, and suspended the order detaining Mr. Lund until 6 October 2023.

4 Mr. Lund advances his rescission application on two bases. The first is that he was given no opportunity to make submissions to Africa AJ and Moosa J before their decision was issued. The second is that this court lacks the jurisdiction to set aside the grant of bail under section 304 (4) of the Act. In my view, these are both arguable grounds. However, it would not be appropriate for me to say anything more than that, because I do not think it is wise for me, sitting as a single Judge, to rescind an order granted by two other Judges of this Division.

5 It is well-established that a single Judge deciding a question of law is bound by a decision on the same point by two Judges in the same Division. The questions of whether or not Mr. Lund should be heard and whether or not Africa AJ and Moosa J had jurisdiction under section 304 (4) to decide the review as they did were not explicitly raised before them. But their decision was clearly made on the assumption that they had jurisdiction and that they were not required to give Mr. Lund a hearing before they determined the review.

6 The difficult question of whether I am technically bound by Africa AJ's and Moosa J's assumptions rather than their explicit conclusions, can and should be avoided by referring the rescission application to a Full Court. That is what I intend to do.

7 Obviously, given that Mr. Lund has raised arguable grounds for rescission, and that his incarceration pending the Full Court hearing would cause him irreparable harm, the suspension I placed on the Africa AJ's and Moosa J's order should remain in place until the rescission application is finally determined.

Order

8 Accordingly –

8.1 The rescission application is referred to Full Court of this Division.

8.2 Paragraphs 1 and 2 of the order of Moosa J and Africa AJ made under case number R14/2023 remain suspended until the rescission application is finally determined.

8.3 The costs of the urgent application are reserved.

S D J WILSON
Judge of the High Court

HEARD ON: 19 September 2023

DECIDED ON: 6 October 2023

For the Applicant: JP Spangenberg
Instructed by Spangenberg Attorneys

For the First Respondent: E le Roux
Instructed by the National Prosecuting Authority