REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 08951/2017

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>
(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED.
April 2023 .... DATE SIGNATURE

In the matter between:

RAMMUTLANA BOELIE SEKGALA **Applicant**

and

THE BODY CORPORATE OF PETRA NERA **Respondent**

In re

THE BODY CORPORATE OF PETRA NERA **Applicant**

and

RAMMUTLANA BOELIE SEKGALA **Respondent**

JUDGMENT ON RESCISSION

ENGELBRECHT, AJ

INTRODUCTION AND BACKGROUND

[1] This is an application for the rescission of a provisional sequestration order granted by my brother Lamont J on 8 September 2020.

[2] There is a long and somewhat convoluted history that is relevant to the adjudication, and which deserves some attention.

[3] Little over five years ago, on 13 March 2017 the Body Corporate of Petra Nera (the Body Corporate) brought an application asking that the estate of Mr Rammutlana Boelie Sekgala (Mr Sekgala) be provisionally sequestrated and that the estate be placed in the hands of the Master of the High Court. The Body Corporate also sought an order "*That the Provisional Order serves as a rule nisi returnable on such date as this Honourable Court deems fit on which date the Respondent or any other interested party may show cause as to why the provisional sequestration order should not be granted*".[1]

[4] In support of its application, the Body Corporate alleged that Mr Sekgala had failed and/or refused to pay certain levies that were due and that his failure to satisfy a judgment debt was deemed an act of insolvency. The Body Corporate alleged that, at the time of the application, Mr Sekgala had 19 judgments against his name and that it was clear that he was "*avoiding several creditors and is insolvent*". It also pointed out that "*The debt of the Respondent is ever increasing and on a monthly basis is credited against the Respondent's statement*".

[1] Emphasis supplied.

[5] After Mr Sekgala pointed out that he had obtained rescission orders in the actions in which the Body Corporate had been granted default judgments, the Body Corporate filed a supplementary affidavit in which it explained that Mr Sekgala had failed to plead and that it had lodged default judgment applications once more. The Body Corporate explained that the debt to it had escalated to an amount in excess of R600 000,00 (six hundred thousand Rand) and that Mr Sekgala had failed to pay levies for several years. The Body Corporate identified fourteen judgments against Mr Sekgala in respect of outstanding levies involving properties he owns with six different body corporates and totaling an amount of more than R800 000,00 (eight hundred thousand Rand). The Body Corporate submitted that "*Considering the total amount of the Respondent's debt, it is clear that he cannot meet his commitments and it is submitted that he is commercially insolvent*".

[6] In May 2020, the Body Corporate filed a further supplementary affidavit indicating that the outstanding amount owed to it alone had grown to almost R850 000,00 (eight hundred and fifty thousand Rand). Once more, the Body Corporate pointed out that several judgments had been recorded against Mr Sekgala. In essence, the Body Corporate relied on factual and commercial insolvency under section 9 of the Insolvency Act.

[7] In response Mr Sekgala basically said that the amounts were not due and payable, without explaining why this was so.

[8] The provisional sequestration application eventually came before my brother Spilg J. On 22 June 2020 he granted an order placing Mr Sekgala under provisional sequestration, together with an order that "*The provisional order serves as a rule nisi, returnable on 25 August 2020, on which date the Respondent or any interested*

party may show cause as the provisional sequestration order should not be granted".[2]

[9] When the matter came before Court on 25 August 2020, it was rolled over to 26 August 2020. On 26 August 2020, the rule *nisi* was extended to 8 September 2020.

[10] On 8 September 2020, the matter came before Lamont J. Mr Sekgala was in attendance, and he made submissions in support of his position that a final sequestration order could not be granted. Amongst these submissions was one on the basis that the order made by Spilg J did not call upon Mr Sekgala to show cause why his estate should not be sequestrated "*finally*". This, on the basis of the wording reflected and underlined hereinabove. Mr Sekgala's position was the wording of the rule *nisi* was inconsistent with the requirements of section 11(1) of the Insolvency Act 24 of 1936 (Insolvency Act). This much is reflected in paragraph 20 of the founding affidavit in the rescission application, and was also explained to me in argument.

[11] It would appear that Lamont J accepted the submission that a final sequestration order could not be made in the circumstances. In what appears to be an attempt at a practical solution to the problem identified – that the rule *nisi* had failed properly to call on Mr Sekgala to make submissions on why a final order ought not to be made – the learned judge issued a fresh order, again recording that Mr Sekgala's estate is provisionally sequestrated and placed in the hands of the Master of the High Court and calling upon any interested party to show cause by 10 November 2020 why Mr Sekgala's estate should not be sequestrated finally.

[2] Emphasis supplied.

[12] The matter was not enrolled for 10 November 2020, apparently in consequence of an administrative error. The rule *nisi* issued by Lamont J lapsed.

[13] On 17 November 2020, the Body Corporate brought an urgent application to revive the rule *nisi*. My brother Makume J revived the rule nisi on 11 December 2020 and extended it to 5 February 2021. On 5 February 2021 my brother Vally J extended the rule nisi to 15 March 2021, and on that date Makume J extended the rule nisi to 24 May 2021. In the meantime, Mr Sekgala brought an application for the rescission of the revival order of 11 December 2020.

[14] Then, on 21 May 2021, Mr Sekgala brought the application to rescind Lamont J's provisional order dated 8 September 2020 that is the subject-matter of the present application.

[15] The application for final sequestration came before my brother Makume J on 24 May 2021. In accordance with an issued directive, it was to be heard together with the application for the rescission of the revival order. On 28 May 2021, Makume J issued his judgment: he dismissed the rescission application in respect of the revival order, and placed Mr Sekgala under final sequestration. Mr Sekgala sought leave to appeal that order and judgment. Leave was not granted. His petition to the Supreme Court of Appeal was dismissed.

THE BASIS FOR THE APPLICATION

[16] In the founding affidavit, Mr Sekgala explained that the basis for the rescission application is that "*the provisional sequestration order of 08 September 2020 was erroneously sought and/or granted in my absence within the meaning of Uniform Rule 42(1)(a)*". He asked for the rescission under Uniform Rule 42(1)(a), and on the

basis that this Court is empowered under section 149(2) of the Insolvency Act to rescind any orders granted under the statute.

[17] Moreover, Mr Sekgala proffered reasons why the 8 September 2020 order was to be rescinded under the common law.

17.1. He explained that he had not filed an opposing affidavit because, prior to that date there had not been an order in place properly calling him to show cause why his estate should not be sequestrated finally, as contemplated by section 11(1) of the Insolvency Act and that the matter had not been set down for 8 September 2020.

17.2. As regards his defence, he submitted that the relief sought and/or granted on 8 September 2020 was "*for a second provisional sequestration order, over and that already granted by the court on 03 July 2020 [sic]. It is respectfully submitted that this approach is not sanctioned by statute and therefore incompetent, upon a proper construction of sections 10, 11 and 12 of the Insolvency Act, read together. Put differently, the relief sought and/or granted was in breach of express statutory provisions and was therefore unlawful and unconstitutional*". Mr Sekgala also made the point that the jurisdictional factors for the exercise of power under section 12 of the Insolvency Act had not been met and that the exercise of the power to grant such an order was improper, because disputes relating to his indebtedness to the Body Corporate remained pending. Finally, he adopted the position that the issue of the provisional sequestration order was *res iudicata* and therefore that no order for provisional sequestration could competently be granted.

CENTRAL QUESTIONS

[18] Further to the joint practice note prepared by the parties and the submissions received on 11 April 2023, the central questions in this matter requiring consideration by this court are:

18.1. whether the provisional order of Lamont J can be rescinded now that Mr Sekgala has been finally sequestrated; and

18.2. if so, whether the requirements for rescission have been met; and

18.3. if so, this is an appropriate case for this court to exercise its discretion to rescind an earlier order.

[19] In my view, the question whether the provisional order of Lamont J can be rescinded at this stage and whether this is an appropriate case for this court to exercise its discretion to rescind are intertwined. I propose therefore to deal with the requirements for rescission and, in the course of that discussion, deal with the issue.

[20] This judgment does not address other issues, such as the alleged late filing of the Body Corporate’s answering affidavit and arguments about whether the rule *nisi* had to be extended in terms when there were postponements or rolling over of the matter. This, in circumstances where Mr Sekgala indicated in oral argument that he no longer relies on those points.

RULE 42(1)(A)

Introduction

[21] Rule 42(1) of the Uniform Rules of Court provides:

"The court <u>*may*</u>*, 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".

[22] The purpose of Rule 42(1)(a) is to "*to correct expeditiously an obviously wrong judgment or order*", and the court does not have a discretion to set aside an order in terms of the sub rule where one of the jurisdictional facts does not exist.[3]

[23] An application for rescission under 42(1)(a) must thus satisfy four requirements.

23.1. <u>First</u>, the applicant must be a party affected by the judgment;

23.2. <u>Second</u>, the judgment must have been granted in the absence of such a party;

23.3. <u>Third</u>, the judgment must have been erroneously sought or granted; and

23.4. <u>Fourth</u>, if the above three criteria are met, the applicant must also satisfy the court that it should exercise its discretion in favour of granting the rescission.

<u>The first requirement: affected party</u>

[3] *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 702H.

[24] Mr Sekgala is obviously a party affected by the judgment. The ultimate consequence of the granting of that order was that the jurisdictional prerequisite of the existence of a provisional order could be met when Makume J considered whether Mr Sekgala's estate could be sequestrated finally.

[25] Mr Du Plooy for the Body Corporate made the submission that Mr Sekgala's standing to bring the application must be brought into question, since a final sequestration order has been made. Mr Sekgala submitted in response that the rescission application is not in the nature of an application that he is precluded from bringing whilst his estate has been finally sequestrated.

[26] Standing is a threshold requirement. It is "*divorced from the substance of the case*" and is to "*be decided in limine, before the merits are considered*".[4] Under the common law, a person has legal standing to institute proceedings if they have a "*direct and substantial interest*" in the right that is the subject matter of the litigation that the outcome of the judgment could prejudice.[5]

[27] In *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd*, Corbett J (as he was then) set out the test for determining legal standing in the context of a rescission application:

> *"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, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted*".[6]

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[4] *Giant Concerts CC v Rinaldo Investments* 2013 (3) BCLR 251 (CC) para 32.

[5] *Four Wheel Drive Accessory Distributors CC v Ratton NO* 2019 (3) SA 451 (SCA) para 7; *United Watch and Diamon Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415B to 415-H.

[6] 1972 (4) SA 409 (C) at 415A-B.

[28] Mr Sekgala satistfies this requirement. In any event, the objection to standing was not properly raised in the founding affidavit.

Second requirement: absence

[29] Mr Sekgala was not absent from the proceedings that led to the order of 8 September 2020. Indeed, on his own version Mr Sekgala made submissions to Lamont J, arguing that a final order could not be granted. It would appear that the very submissions made by Mr Sekgala motivated Lamont J to issue a provisional order once more, and providing for a return date by which Mr Sekgala was to show cause why the order was not to be made final.

[30] The requirement of absence was not met.

[31] Mr Sekgala submitted that it was. For this proposition, he relied on the judgment in *Katritsis v De Maecado:*[7]

> *"'Moreover, not only is he who does not attend at all on the day fixed to be accounted a dallier and defaulter, but also, he who does indeed attend, but does not take in hand the business for the taking in hand of which the day had been appointed. For instance, a plaintiff appears and makes no claim: or a defendant does not challenge the plaintiff's claim when he should do so. He who though present makes no defence is surely reckoned in the position of one who is not there; and he who when called upon does not plead is deemed to have been futile and is expressly classed as contumacious."*

[7] 1966 (1) SA 613 (A) at 618D-E.

[32] The extract relied upon does not assist. Mr Sekgala did present opposition. It was his very opposition that resulted in the order made. On Mr Sekgala's own version, he opposed the granting of a final sequestration order because he had not been called to show cause why such an order ought not to be granted, and therefore the learned judge granted the order that he did. Whether the order actually made was granted erroneously is a separate question, which is dealt with under the third requirement. But the one thing that Mr Sekgala cannot say, on his own version, is that he was "*absent*" in the sense of not putting up a defence.

[33] I do not find persuasive the argument that Mr Sekgala had not been given an opportunity to put up a position regarding the granting of a provisional order and a further rule *nisi*. Lamont J granted "*lesser*", alternative relief so as to ensure that the interests of justice were served. He carefully balanced the rights and interests of Mr Sekgala and the Body Corporate in that he did not grant final relief, but ensured that an opportunity was given for the proper ventilation of the issues, in light of the submissions that had been made to him. At worst, the first paragraph of Lamont J's order was superfluous (the order of Spilg J having already placed Mr Sekgala's estate in the hands of the Master). Mr Sekgala cannot be heard to say that he had not been given an opportunity to explain why a provisional sequestration order was not to be granted.

[34] I point out that, since the requirement of absence is not met, there is no need to deal with the remaining requirements. I do so, however, in circumstances where Mr Sekgala as an unrepresented applicant deserves to understand the court's position on all aspects of the case.

Third requirement: order erroneously sought and granted

[35] The meaning of a rescindable error under rule 42(1)(a) has been explained in several judgments.

35.1. In *Freedom Stationery (Pty) Ltd v Hassam*,[8] the Supreme Court of Appeal held that:

"*when an affected party invokes Rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. … [T]the failure of an affected litigant to take steps to protect his interests by joining the fray ought to count against him*."[9]

35.2. Further, in *Van Heerden v Bronkhorst*,[10] the Supreme Court of Appeal held that the error must be unknown to the judge:

"*Generally, a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment*."[11]

[8] 2019 (4) SA 459 (SCA).
[9] Ibid para 25.
[10] [2020] ZASCA 147 para 10.
[11] See also *Daniel v President of the Republic of South Africa* 2013 (11) BCLR 1241 (CC) para 6: *"The applicant is required to show that, but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was made and which would have precluded the granting of the order in question, had the Court been aware of it."*

35.3. And in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*,[12] the Constitutional Court confirmed that an applicant seeking to demonstrate that an order was erroneously sought or granted 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*".[13]

[36] In the circumstances, there are four elements to a rescindable error:

36.1. First, the error must be procedural in nature;

36.2. Second, the court must have been unaware of the procedural error at the time judgment was granted (in other words, an applicant for rescission may not rely on a fact known to the presiding officer);

36.3. Third, the error must be such that had the court been aware of the error, the court would not have the granted the judgment; and

36.4. Fourth, even if there is a procedural error, the court must consider whether the applicant for rescission took adequate steps to protect its interests, notwithstanding the error.

[12] 2021 JDR 2069 (CC).

[13] *Zuma*, supra, para 62, citing with approval *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D-G.

[37] Mr Sekgala submits that the order was erroneously granted, because it was not legally competent for the court to have made it.[14] In essence, this submission turns on the interpretation Mr Sekgala affords to section 11(1) of the Insolvency Act. It provides that:

"*If the court sequestrates the estate of a debtor provisionally it must simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestrated finally."*

[38] Simply put, Mr Sekgala says that the order of Spilg J already sequestrated his estate, but called upon him to show why a provisional order of sequestration could not be made. For that reason, he submits, when the matter came before Lamont J he was not in a position to make an order that could competently be made under section 11(1).

[39] Mr Sekgala's submissions place form over substance. In accordance with the trite principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[15]

"*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions <u>in the light of the document as a whole and the circumstances attendant upon its coming into existence</u>. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision*

[14] Reliance is placed on *Athmaram v Singh* 1989 (3) SA 953 (D) at 956D and 956I and *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others* 1996 (4) SA 411 (C) at 417G-H.
[15] 2012 (4) SA 593 (SCA).

appears; <u>the apparent purpose to which it is directed and the material known to those responsible for its production</u>. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or business-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", <u>read in context and having regard to the purpose of the provision and the background to the preparation and production of the document</u>."[16]

[40] The apparent purpose of section 11(1) is to provide an opportunity to a respondent to make submissions why a final sequestration order is not to be made. The order of Spilg J was intended to provide Mr Sekgala with that opportunity, although the error in the framing of the notice of motion carried forward into the order made. When Lamont J made his order, he corrected the obvious error, this time providing for an opportunity to show cause why a final order could not be made. It would be untenable to allow Mr Sekgala to cast Lamont J's effort to ensure compliance with the purpose of section 11(1) of the Insolvency Act to suggest that the order made was not competent. It is not obvious by any means that Lamont J was not empowered to grant a further opportunity to Mr Sekgala to state his case by re-affirming the provisional sequestration and offering an opportunity to Mr Sekgala to show cause as contemplated in the order. Importantly, Mr Sekgala appears to have

[16] At para 18. Emphasis supplied.

overlooked the fact that, in terms of section 9(5) of the Insolvency Act, the court hearing an application for sequestration of an estate may "*make such other order in the matter as in the circumstances appear to be just*".

[41] In any event, Mr Sekgala cannot make out a case that Lamont J would not have made the order had he been aware of some fact unknown to him when in fact he did. Quite the opposite: the "*facts*" on which Mr Sekgala relies were made in submission to Lamont J.

[42] The requirement that the order had been erroneously sought and granted is therefore equally not met. The application based in Uniform Rule 42(1)(a) falls to be dismissed on this basis, in addition to the fact that the order had not been granted in the absence of Mr Sekgala.

Fourth requirement: discretion to be exercised

[43] Rule 42(1)(a) postulates that a court "*may*" — i.e., not "*must*" — rescind or vary an order if the applicant meets the other requirements. The Constitutional Court has explained that Rule 42(1)(a) is merely an empowering provision that affords the court a discretion.[17] It does not compel the court to grant the rescission if all the jurisdictional requirements are met. The same observations apply in respect of section 149(2) of the Insolvency Act.

[44] In the absence of compliance with the requirements of absence and an order erroneously sought or granted, this court is not in a position under Uniform Rule 42(1)(a) to exercise a discretion in favour of granting the order for rescission.

[17] *Zuma*, supra, para 53.

[45] Moreover, even if I am wrong in my assessment on both the questions of absence and whether the order was erroneously sought or granted, it would appear to me that the facts in this case would in any event not have provided a basis for the exercise of my discretion.

[46] In *Chetty*,[18] it was held that the discretion is "*influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case*".[19]

[47] The issue is this: the order sought to be rescinded was already issued on 8 September 2020. It took Mr Sekgala more than eight months to issue this application, in circumstances where he was well aware of it. Indeed, in submission before me, he asserted that he received the order via e-mail and that he "*immediately*" formed the view that the order ought not to have been granted. He did nothing at the time.

[48] And it gets worse for Mr Sekgala, because the order that he seeks to rescind in fact lapsed in November 2020. That required of the Body Corporate to bring an application to revive the lapsed order. For that order to be revived, Makume J had to consider whether it was appropriate for it to be revived. He did so consider, and formed the conclusion that the order was to be revived. That order was also sought to be rescinded, and once more the issue was considered. Finally, when the final sequestration order was granted, the issue was considered once more: Makume J had to satisfy himself that a provisional order had been made as a jurisdictional prerequisite for the granting of the final order. He had to do so once more when he considered the application for leave to appeal, which was dismissed. The upshot of

18 *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).
19 Ibid at 761D-E.

all of this is that the question of the propriety of Lamont J's order has been considered several times – implicitly at the very least.

[49] Mr Sekgala's estate has been finally sequestrated. What he seeks to achieve through this rescission application is to obtain a finding that a provisional sequestration order had not validly been granted and to rely on that as a basis to contend that the final order is a nullity. Even if he could satisfy the requirements of Uniform Rule 42(1)(a) – which he did not – I would be loath to exercise my discretion in favour of the granting of an order for rescission. The papers available to me paint a picture of someone who has, at every turn, taken technical points and who has shunned the opportunity properly and in substance to show why he is not indebted to the Body Corporate and others who have come to explain Mr Sekgala's indebtedness to them. That approach has marked the proceedings before this court and in the Magistrate's Court. The Supreme Court of Appeal and the Constitutional Court have, in different contexts, warned against parties employing a "*Stalingrad*" approach. I cannot tolerate such an approach in this court, even if the remaining requirements were met.

[50] In this context, I record that Mr Sekgala made reference to the constitutional right to access to court. Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) provides in the relevant part that "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court*". With that right comes the responsibility to accept the authority of the courts, and to make use of the opportunity afforded to put up a proper defence. The right encompasses the responsibility not to abuse the court process by taking several technical points and to continue to clog the already overburdened court system with a myriad of rescission applications and applications for leave to appeal on grounds that simply cannot be sustained. In the present

matter, countless court hours have been taken up to advance the application launched in 2017 to finality. Now Mr Sekgala wants another bite at the cherry, and to unravel the consequence of various orders and judgments. It would be inimical to the section 34 right to allow him to do so, for it would lead to yet further litigation that, given the facts available to this court, would probably result in the same outcome. To put it simply: it is not Mr Sekgala alone that enjoys the section 34 right; the Body Corporate is also the beneficiary of that right. The dispute it has raised has been resolved by the application of law decided in the course of a process where Mr Sekgala had been given various opportunities to state his case. There would be no basis for this court to rescind the Lamont J order, and thereby undo all of that.

[51] That said, I also consider the matter under the common law, in circumstances where Mr Sekgala placed reliance on the common law in addition to his reliance on Uniform Rule 42(1)(a).

THE COMMON LAW

[52] In terms of the common law, a court may rescind an order when judgment is granted by default if good cause is shown. The court's discretion must be exercised after proper consideration of all relevant circumstances. This generally entails that the applicant must (i) provide a reasonable and acceptable explanation for default which must show the absence of willful or negligent default; (ii) show that the application is *bona fide* and not merely to frustrate the party on the other side; and (iii) shows that on the merits he has a *bona fide* defence which *prima facie* carries prospects of success.[20]

[20] *Colyn v Tiger Food Industries Ltd* 2003 (6) SA 1 (SCA) para 11; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-E.

[53] The Constitutional Court has recently held that the first and third requirements must be met before a court may grant rescission under the common law.[21]

[54] In the present case, as discussed, there was not default: Mr Sekgala was present in court and he made submissions. This indicates that the common law cannot be relied on to make out a case for rescission. Moreover, it is hard to come to the conclusion that the present application is *bona fide*. Mr Sekgala knew of the order for a long time and did nothing about it; only when all other efforts in pursuit of his Stalingrad approach to the litigation had come to nought did he approach this court for the rescission of Lamont J's order. By then several horses had bolted. If Mr Sekgala's motives were *bona fide*, he would have acted sooner and not shown an apathetic attitude. The facts suggest that Mr Sekgala is simply intent on frustrating the efforts of the Body Corporate and other creditors to obtain their fair share of Mr Sekgala's estate.

[55] The real issue is that there is not a *bone fide* defence that is raised. The facts showed a great level of indebtedness on the part of Mr Sekgala, one that was ever-growing as he pursued his efforts to avoid provisional and final sequestration of his estate. The high-water mark of his defence was that he did not owe levies. But why did he not owe levies? Did he pay them, on his version? Or was he somehow excused from paying them? If so, on what basis? Mr Sekgala never took the opportunity to put up a defence that made sense. As Makume J recorded in the judgment in the application for leave to appeal against the order finally sequestrating Mr Sekgala's estate: "*The Applicant has failed to deal with the averments placed before court as regards his indebtedness to the Respondent, Nedbank, Wilbar Woods, Body*

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21 *Zuma*, supra, para 71; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 85.

Corporate, King fisher Close Body Corporate as well as Chelsea Body Corporate. The total debts amounts to more than R8 million” and “*The fact that he has managed to have the default judgments granted against him rescinded did not wipe out the debts”*.[22]

[56] In all of these circumstances, I find that there is no basis for rescission made out under the common law.

COSTS

[57] This brings me to the question of costs. It is not an easy one to deal with: I indicated that Mr Sekgala apparently enjoyed the necessary standing to bring the application. However, since his estate has been finally sequestrated, it could create undesirable consequences to make a costs order against Mr Sekgala. I accept the submissions made on behalf of the Body Corporate that it would be prudent to order that the costs be costs in the sequestration.

ORDER

[58] In the circumstances, I make the following order:

58.1. The application for the rescission of the order of Lamont J of 8 September 2020 under case number 8951/2017 is dismissed.

58.2. The costs of the application shall be costs in the sequestration.

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[22] At paras 14 and 15.

M Engelbrecht

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 13 April *2023.*

Heard on : 11 April 2023

Delivered: 13 April 2023

Appearances:

For the Applicant: in person

For the Respondent: A Du Ploy

instructed by Richards Attorneys