REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 08951/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

3 July 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 LEAVE TO APPEAL

ENGELBRECHT, AJ

INTRODUCTION AND BACKGROUND

[1] On 13 April 2023, this Court dismissed an application for the rescission of a provisional sequestration order. On 17 April 2023, the applicant (Mr Sekgala) filed an application for leave to appeal, and the Registrar set the matter down for argument on 19 June 2023.

[2] The facts and circumstances relevant to the matter are set out in the main judgment. I do not intend to repeat them here. In essence, Mr Sekgala, whose estate has been finally sequestrated, sought by way of the rescission application to unscramble the egg: if the order for provisional sequestration is rescinded, then the *sine qua non* for the final sequestration order would no longer exist.

[3] The grounds for seeking leave are numerous. The substance of the application is that an injustice was done when the rescission application was dismissed. Mr Sekgala asserts that the reasoning in the judgment was informed by facts not set out in the rescission application itself, but rather by "*historical research*", and that he was not given an opportunity to engage with additional facts relied on. That complaint is similar one of the grounds for rescission dealt with in the main judgment, namely that although Mr Sekgala had presented argument before Lamont J, the 8 September 2020 order of provisional sequestration was to be treated as one granted by default, because the order ultimately granted was different from the one sought and in any event was one that was not capable of being granted in the circumstances given the peremptory language in section 11(1) of the Insolvency Act 24 of 1936 (Insolvency Act). My dismissal of that submission forms another basis for the grant of leave. The judgment is also criticized for constituting an improper exercise of discretion, *inter alia* on the basis that the delay in bringing the rescission

application was not inordinate (relying for the purpose on a finding that the delay was a "*far cry*" from 20 years that had been found in a different case to constitute an abuse). Mr Sekgala also relies on an alleged misdirection on the facts and raises a complaint that the answering affidavit in the rescission had to be regarded as *pro non scripto* for having been filed out of time, which is an about-turn from the position adopted before me in argument in h emain application: as I explained in the main judgment, Mr Sekgala said that he was not pressing the point on lateness of the filing of the answering affidavit.

[4] The respondent (the Body Corporate) opposes the application for leave to appeal.

THE TEST FOR LEAVE TO APPEAL

[5] For leave to appeal to be granted in this matter, I have to be satisfied that the requirements of section 17(1)(*a*) of the Superior Courts Act 13 of 1995 (Superior Courts Act) are met – that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

[6] The use of the word "*would*" in section 17(1)(a)(i) of the Superior Courts Act, indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against (see *Ferriers v Wesrup Beleggings CC* 2019 JDR 1148 (FB) at § 7). In *Acting National Director of Public Prosecutions v Democratic Alliance* 2016 JDR 1211 (GP) the Full Bench of the Gauteng Division, Pretoria referred with approval to what was said by Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen and 18 Others*, namely:

> *"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The*

former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[7] The bar on prospects of success is high. I accept that, since section 17(1)(a) lists the requirements disjunctively, I may also grant leave if there is some other compelling reason to grant leave. In the present case, there is no such other compelling reason. There is no novelty or issue of public importance that arises, and no conflicting judgments on any issue central to the rescission that would warrant consideration on appeal. For purposes of this judgment, the only issue there is whether Mr Sekgala would enjoy reasonable prospect of success on appeal.

DISCUSSION

[8] The application for leave to appeal reminds one of the adage "*a little knowledge is a dangerous thing"*. Mr Sekgala, who has represented himself through the long history of this matter, has done an admirable job of conducting research in an effort to support the position advanced. Unfortunately, decontextualized reliance on judgments that are invariably distinguishable on the facts or dealing with the legal position in an entirely different context can lead a lay person astray.

[9] A pertinent example is the criticism of the finding that there had been an inordinate delay in bringing the application, with Mr Sekgala comparing his position (a delay of about eight months) with an extreme case of delay in prosecution of an action to assert that his delay was not unreasonable. The question of inordinate delay is

bound up with the facts and context of each matter. Considerations as the absence of a proper explanation for periods of delay, and the period of delay given the particular context are factual matters that must be brought into account. In the present case, Mr Sekgala was unable to offer a satisfactory explanation for the delay of eight months in bringing the rescission application, in addition to which the delay in bringing the application meant that the order sought to be rescinded had been overtaken by events, notably the grant of a final sequestration order (which Mr Sekgala was unsuccessful in challenging). A delay of eight months in bringing a rescission application has, in any event, been held to have been inordinate in for example *Sebenza Shipping Consultancy v Phakane* ([2003] 8 BLLR 832 (LC).

[10] When a party learns that a default judgment has been granted against him or her and that party believes there are grounds upon which to rescind it, it is imperative that such a party acts promptly. Not only does a judgment have consequences for the parties immediately involved, but it may also affect third parties (as is the case with provisional and final sequestration). That is why there is a requirement that rescission applications be instituted within a reasonable time. In the present case, there was a very real and practical consequence of the delay: Mr Sekgala's estate has been finally sequestrated. The order sought to be undone was variously extended, revived and ultimately served as the jurisdictional prerequisite for the grant of the final order. The effects of the delay in the particular circumstances of the case has had significant consequences.

[11] The problem with inappropriate reliance on case precedent arises also in the context of the criticism that information outside the founding and answering affidavits was recounted in the recordal of relevant facts, by reference to judgments dealing with "*unspecified knowledge of the judge"*, a decision *mero motu* to call for an

inspection *in loco* and for determining a matter on the basis of a legal point not raised in the pleadings. In the present case, this Court was concerned with a rescission application. Whether the jurisdictional facts for the grant of rescission existed depended not only on what the parties said in the rescission application, but also a consideration of the pleadings and orders that had gone before, and which were relevant to the question. The facts set out in the judgment were not based on "*unspecified knowledge"*, but on the litigation history evident from the papers and orders that were (appropriately) uploaded to CaseLines for purposes of considering the prayer for rescission. Importantly, the decision to grant or deny an application for rescission depends on the exercise of a discretion, so that no Court could ignore the relevant background and the perspective provided by the litigation history. I could not ignore, for example, that the order of Lamont J had lapsed, and that Makume J then reinstated it on 11 December 2020. I could not leave out of account that an unsuccessful attempt had also been made to rescind the order of Makume J. Surely, I could not pretend that a final sequestration order had not been made. And I could not ignore what was taken into account by the various courts as reasons for giving effect to the Lamont J order. Mr Sekgala enjoys no prospects of convincing another court that my bringing into account these matters was inappropriate.

[12] Be that as it may. The real nub of the application for leave to appeal is whether the jurisdictional requirements of absence from the proceedings and an erroneous order were present. Mr Sekgala argues that my conclusion on absence relies on an interpretation that is incongruent with the constitutional right to access to court, and that my finding that Lamont J was entitled and empowered to make the order that he did is inconsistent with the plain and peremptory language of section 11(1) of the Insolvency Act.

[13] I find that there are not reasonable prospects on the basis of the arguments advanced that on either of these questions another Court would come to a different conclusion than the one reached in the main judgment, as follows.

[14] On the first issue, the problem with the broadness of the meaning of absence that Mr Sekgala would have this court adopt is that it would create an untenable situation. These courts would be flooded with rescission applications if every party present in court could apply for rescission on the basis that the order made was one not in the exact terms sought, but rather one crafted to suit the exigencies of the case in light of the submissions received. I am not persuaded that any other court would conclude that Lamont J had made an order in the absence of submissions by Mr Sekgala. On his own version, Mr Sekgala was present and sought to persuade my learned brother to discharge the earlier order. His argument was not successful, but he did enjoy a measure of success in that a final order of sequestration was not made on the appointed day. Substantively speaking, all that the order of 8 September 2020 did was to make clear that Mr Sekgala was called upon to explain why a final order ought not to be granted. He was given the procedural right that he was entitled to.

[15] As to the second point. It is no longer the state of our law that "*plain language*" is the be all and end all of interpretation.

15.1. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) the Supreme Court of Appeal called for an objective process of interpretation that leads to the adoption of a sensible meaning. A "*sensible*" meaning is to be preferred to one that leads to insensible or un-businesslike results, or one which undermines the apparent purpose of the clause under consideration. The court, faced with competing

interpretations, must make a determination on which meaning to be preferred within the context of the document in which it appears.

15.2. The Constitutional Court endorsed *Endumeni* in *University of Johannesburg v Auckland Park Theological Seminary* 2021 (1) SA 1 (CC), explaining that context and language must be considered together from the outset; indeed it considered it settled law that interpretation is to be approached "*holistically: simultaneously considering the text, context and purpose"*.

[16] No court could interpret section 11(1) of the Insolvency Act without bringing into account the apparent purpose of the provision (to provide an opportunity to a respondent to make submissions why a final sequestration order is not to be made) and the content of section 9(5) of the Insolvency Act (allowing a Court hearing an application for sequestration of an estate to "*make such other order in the matter as in the circumstances appear to be just"*). The overarching consideration must be justice and equity, not only to one party but to both, and the efficient use of court resources. Why should a court faced with a concern that an order originally made in provisional sequestration proceedings had not properly called upon the respondent to set out his or her case not make a further order that addresses that concern? Why should the original order be discharged and fresh proceedings be instituted? There is simply no legal basis for concluding that there is such a requirement.

[17] For these reasons, I am not persuaded that another court would conclude that Lamont J, in making the order, purported to exercise a power that he did not have. Notably, as I have mentioned, Makume J revived the order and ultimately final sequestration of Mr Sekgala's estate followed. Mr Sekgala's efforts to undo those

orders were unsuccessful. None of the courts that were confronted with Mr Sekgala's position on the Lamont J order accepted his arguments as correct.

[18] In any event, as is pointed out in the main judgment, the requirement of a rescindable error is one of a procedural nature. The points that Mr Sekgala makes turn on the substantive interpretation of law, which is a question for appeal and not an appropriate basis for rescission.

[19] Moreover, 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. The relevant facts and submissions were before Lamont J.

[20] There are no prospects that another Court would come to the conclusion that the prerequisites for rescission have been met, or that the discretion of this Court had been exercised inappropriately or capriciously.

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

21.1. The application for leave to appeal is dismissed.

21.2. There is no order as to costs.

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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 and time for hand-down is deemed to be on 03 July 2023 at 16:00.*

Heard on : 19 June 2023
Delivered: 03 July 2023

Appearances:

For the Applicant:	in person
For the Respondent:	A Du Ploy
	instructed by Richards Attorneys