IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21/21875

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: No
07/05/2024 DATE	______________________ SIGNATURE

In the matter between:

ERIC ANTHONY WOOD Applicant

and

TRANSNET SECOND DEFINED BENEFIT FUND Respondent

In re:

TRANSNET SECOND DEFINED BENEFIT FUND Applicant

and

ERIC ANTHONY WOOD Respondent

JUDGMENT ON LEAVE TO APPEAL

YACOOB J:

1. The applicant for leave ("Mr Wood") was the respondent in the main application, in which the respondent in the application for leave ("the Fund") was successful in its application to sequestrate him.

2. Mr Wood bases his application for leave on a contention that the court has applied an incorrect test to whether the Fund has discharged its onus, and also on the submission that the Fund's case is built on documentary hearsay evidence which is inadmissible.

3. It is submitted for Mr Wood that the Fund bears something that is called a "full onus", which is an onus more than on a balance of probabilities, but rather an onus that will not be disturbed if the matter is referred to oral evidence and the evidence tested by cross-examination. It was submitted that the court did not deal with this issue in the main judgment. The court did deal with the issue, having found that the authority relied upon, *Priest v Collett*, did not support the proposition.[1] I am not satisfied that another court will come to a different conclusion on this ground.

4. The second issue is the question of hearsay evidence. It is submitted for Mr Wood that almost every single piece of evidence before this court is hearsay evidence, that these are not civil proceedings and that hearsay evidence cannot be admitted because the proceedings are not civil proceedings.

5. In support of the submission that the proceedings are not civil proceedings, reliance was placed on *Collet v Priest*[2] and King Pie *Holdings (Pty) Limited v King Pie Pinetown (Pty) Limited*.[3]

6. The AD authority does not support the contention. That case deals not with whether sequestration proceedings are civil in nature, but whether they are an "action or a suit". This was because the legislation granting appeal jurisdiction to the Cape Provincial Division referred to a "civil action or suit", and the AD found that sequestration proceedings were not an action or suit because one party was not claiming a right from another. The finding was specific and does

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[1] 1930 372 CPD
[2] 1931 AD 2090 at 298-299
[3] 1998 (4) SA 1240 (D) at 1247 D-G and 1248 D-F

not find broader application, and certainly does not find relevance or application here.

7. The *King Pie* case dealt with whether winding up proceedings were "civil proceedings'' as contemplated in section 359(1)(a) of the old Companies Act, which were suspended by a voluntary winding-up. Again, the question dealt with, and the pronouncement made, was specific to the circumstances and was not one of general application to the nature of winding up or sequestration proceedings. The court was also careful to make this point.

8. The importance of the submission that these were not civil proceedings was that, then, the evidence relied on was hearsay and because these were not civil proceedings, hearsay evidence could not be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

9. It was submitted for Mr Wood that the evidence that was hearsay was so intimately bound with the rest of the evidence, that it would be impossible to unscramble the egg, and that, therefore, none of the evidence before the court could have been relied upon. His failure to raise disputes on each and every document, the argument continued, cannot dilute this proposition, as he was obliged to plead over and the hearsay point had to be considered first and independently of his pleading.

10. It was submitted for the Fund, on the other hand, that the evidence relied on for the Court was not that tainted by the hearsay allegation, and that, in any event, there was no real dispute of fact raised. The requirements for a final sequestration were fulfilled and the court was entitled to make the order it did.

11. The main basis of the hearsay point is that the documents on which the deponent to the founding affidavit relies are not produced by him, and that the people who produced them and who had the knowledge which allowed them to produce them do not attest to the veracity of the documents. Reliance was placed on *LA Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd*,[4] but that reliance was misplaced. There the court was dealing with whether the fact that a document was computer generated meant

[4] 2011 (4) SA 577 (GSJ)

it automatically complied with the principles against hearsay, and found that it did not. In that particular case there was human intervention in the generation of the data which meant that it had to be confirmed by those people. The principle of hearsay was not changed, and there is no new principle to be applied in this matter.

12. The Fund relied on the approval of the SCA of the proposition that first-hand knowledge of all the minutiae is not required, and that records in the company's possession may be relied upon, in *Rees and Another v Investec Bank Limited.*[5] In any event, the Fund pointed out, neither my judgment nor that of Manoim J relied on any evidence which can properly said to be hearsay.

13. Although the judgment in *Rees* dealt with whether a deponent to an affidavit in summary judgment proceedings was in a position to positively swear to the facts, I do not think the difference is material. The complaint that all the source material has not been provided to the court has no weight when there is no real problem with the conclusions articulated, and that alone does not result in hearsay. If there were documents that Mr Wood required to properly defend himself from being sequestrated, which are not before the court, there are tools in the court Rules which can be used. It was his choice not to avail himself of that.

14. Overall, the complaints raised by Mr Wood appear now, as when the matter was being considered the first time, to be technical devices aimed at obscuring what is before the court, with his own brand of smoke and mirrors. Now, as then, I am not convinced.

15. Having looked carefully at Mr Wood's arguments, I am not satisfied that another court may come to a different conclusion

16. For these reasons I make the following order:

    1. The application for leave to appeal is dismissed.

    2. Costs, including costs of two counsel, are costs in the sequestration of the respondent's estate.

[5] 2014 (4) SA 220 (SCA)

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	A E Bham SC and N Luthuli
Instructed by:	ENS Africa
Counsel for the respondent:	E L Theron SC
Instructed by:	Fairbridges Wertheim Becker
Date of hearing:	11 April 2024
Date of judgment:	07 May 2024