

**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3679/2020

**Reportable: YES/NO**

**Of Interest to other Judges: YES/NO**

**Circulate to Magistrates: YES/NO**

**In the matter between:**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**Applicant**

**And**

**SARAH MMATAWANA MLAMLELI**

**Respondent**

**In the matter between:**

**SARAH MMATAWANA MLAMLELI**

**Applicant**

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**1<sup>st</sup> Respondent**

**GERHARD GELDENHUYS N.O**

**2<sup>nd</sup> Respondent**

**In re:**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**Applicant**

**and**

**NTHIMUTSI MOKHESI**

**1<sup>st</sup> Defendant**

**MAHLOMOLA JOHN MATLAKALA**

**2<sup>nd</sup> Defendant**

|                                           |                                  |
|-------------------------------------------|----------------------------------|
| <b>PHEAGANE EDWIN SODI</b>                | <b>3<sup>rd</sup> Defendant</b>  |
| <b>BLACK HEAD CONSULTING(Pty) Ltd</b>     | <b>4<sup>th</sup> Defendant</b>  |
| <b>DIAMOND HILL TRADING 71(Pty) Ltd</b>   | <b>5<sup>th</sup> Defendant</b>  |
| <b>605 CONSULTING SOLUTIONS (Pty) Ltd</b> | <b>6<sup>th</sup> Defendant</b>  |
| <b>SELLO JOSEPH SYDNEY RADEBE</b>         | <b>7<sup>th</sup> Defendant</b>  |
| <b>MASTERTRADE 232 (Pty) Ltd</b>          | <b>8<sup>th</sup> Defendant</b>  |
| <b>ABEL KGOTSO MANYEKI</b>                | <b>9<sup>th</sup> Defendant</b>  |
| <b>ORI GROUP (Pty) Ltd</b>                | <b>10<sup>th</sup> Defendant</b> |
| <b>THABANE WISEMAN ZULU</b>               | <b>11<sup>th</sup> Defendant</b> |
| <b>SARAH MATAWANA MLAMLELI</b>            | <b>12<sup>th</sup> Defendant</b> |
| <b>MAREDI BERNARDINE SUSAN MOKHESI</b>    | <b>1<sup>st</sup> Respondent</b> |
| <b>KHOMBISILE ZULU</b>                    | <b>2<sup>nd</sup> Respondent</b> |
| <b>BASE PROPERTY HOLDINGS (Pty) Ltd</b>   | <b>3<sup>rd</sup> Respondent</b> |
| <b>MASEKO DOROTHY MOBU</b>                | <b>4<sup>th</sup> Respondent</b> |
| <b>LIKEMO FAMILY TRUST</b>                | <b>5<sup>th</sup> Respondent</b> |
| <b>LIATILE MACHOANE MOKHESI</b>           | <b>6<sup>th</sup> Respondent</b> |
| <b>MONAMELA KATLEHO MOKHESI</b>           | <b>7<sup>th</sup> Respondent</b> |

**KEKELETSO REABETSOE MOKHESI**

**8<sup>th</sup> Respondent**

**TLAKS FAMILY TRUST**

**9<sup>th</sup> Respondent**

**DINEO KELEBOGILE MATLAKALA**

**10<sup>th</sup> Respondent**

**KHAUTA AARON MALOKA**

**11<sup>th</sup> Respondent**

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 11:00 on 25 February 2022.

### **RULING ON THE APPLICATION FOR LEAVE TO APPEAL**

**JUDGMENT BY: MOLITSOANE, J**

**DELIVERED ON: 25 FEBRUARY 2022**

[1] The applicant, seeks leave to appeal to the Full Court of this Division, alternatively the Supreme Court of Appeal the whole of the judgment granted by this court on 2 November 2021 in which the application for rescission brought by Ms Mlamleli was granted and the final restraint order was set aside. In the remainder of the order thus granted the provisional order was extended against Ms Mlamleli.

[2] Section 17(1) of the Superior Courts Act 10 of 2013 sets out the test to be applied in an application for leave to appeal. It provides as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

- (a)(i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[3] Section 17(1) clearly sets out that an applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In *Democratic Alliance v President of the Republic of South Africa and Others*<sup>1</sup> the Full Court held as follows:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and Others* 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word ‘would’ as opposed to ‘might’ serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012(1) SACR 567 (SCA) at para 7;

‘More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.”

[4] In this application for leave to appeal it is contended by the NDPP that the rescission was granted in terms of the common law when, in restraint matters made under Prevention of Organised Crime Act 121 of 1998(POCA) are concerned, it is the provisions pertaining to rescission in POCA alone which are applicable.

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<sup>1</sup> (21424/2020) [2020] ZAGPPHC 326(29 July 2020) paras [4] – [5].

[5] Ms Mlamleli brought her application for rescission under the common law and set out in detail in her application why she was entitled for the relief sought. It is so that under POCA, there is a specific section dealing with rescission of judgment, namely section 26(10). In the application for rescission for judgment the NDPP contended that Ms Mlamleli failed to disclose to the court appointed curator bonis the existence of an Absa account in her names in which the sum of R963 393. 78 stood to her credit. It was thus contended that that she did not handle herself in a bona fide manner and her application was thus not bona fide.

[6] In *National Director of Public Prosecutions v Phillips and Others*<sup>2</sup> the court held as follows:

“To sum up, a High Court which grants a restraint order in terms of s26(1) of the Act has no inherent jurisdiction to rescind the order. Subject to one exception its power to do so is circumscribed by the Act and is limited to the grounds set forth in s25(2) and s26(10). The exception is the existence of one or other of the recognised common law grounds for rescission which must have existed when the restraint order was granted.”

[7] In my view the court in Phillips does not say that rescission of judgment cannot be brought under the common law although that should happen under exceptional circumstances. In this regard the court held that those circumstances may be in situations where judgment is founded on fraud, common mistake and the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents). Having regard to the facts of this case, section 26(10) of POCA and the Phillips decision I am of the view that another court may come to different decision to the one granted by this court. I accordingly make the following order:

## **Order**

1. The applicant is granted leave to appeal to the Full Court of this Division;

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<sup>2</sup> [2005] 1 All SA 635 at para 23.

2. The costs of application shall be costs in the appeal.

**P.E. MOLITSOANE, J**

For the Applicant

The State Attorney

BLOEMFONTEIN

(REF: 619/20200863/P16M)

For the Respondent: Matlho Attorneys

Instructed by: BLOEMFONTEIN

(REF: MD MATLHO/MLA14/0001)