

NOT REPORTABLE
HANDED DOWN: 17 APRIL 2009

/BH

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

CASE NO: 20675/2006

IN THE MATTER BETWEEN:

PROCHEM (PTY) LTD

APPLICANT

AND

RUDI SWART

RESPONDENT

JUDGMENT

SITHOLE, AJ

(A) INTRODUCTION

[1] The Applicant is PROCHEM (PTY) LTD, a company with limited liability, duly registered and incorporated in accordance

with the company laws of the Republic of South Africa with its principal place of business situated at 13 Sloane Street, Epsom Lawns, Bryanston. The Applicant is legally represented in the matter by adv. L A Pretorius of Pretoria.

[2] The Respondent is Mr Rudi Swart ("Swart"), an adult male and director of companies who is married out of community of property to Suzanne Marie Swart by virtue of antenuptual contract H8790/1976 and who resides at 3 Elysium, 233 Nixon Street, New Muckleneuk, Pretoria. The respondent is represented in this application by adv. D J Blignaut of Pretoria.

[3] On 29 June 2006, the Applicant filed an application in this court in terms of which he sought the following orders:

3.1 That the estate of the Respondent be sequestrated in the hands of the Master of the High Court;

3.2 That the costs of this application be costs in the sequestration.

[4] The matter has had a somewhat long history in that before I could hear it on 24 May 2007, it had served before several Judges, including my learned brother Shongwe DJP on 7 December 2006, who granted a provisional sequestration order with a

return date 23 January 2007. After hearing it I reserved judgment in order to research the authorities I had been referred to by counsel for the parties during argument.

[5] What seems to be a long time has passed since I reserved judgment. This has occurred on account of circumstances beyond my control, including poor health and pressure of work during my stints as Acting Judge on the Bench at Pretoria and Mafikeng, and any inconvenience which may have been occasioned to any party as a result of such delay is deeply regretted. Suffice it to say that my judgment in this matter follows below:

(B) FACTUAL BACKGROUND

[6] The factual backdrop against which the issues between the parties have to be evaluated is, by and large, common cause. This obviously implies that there are some aspects of it in which the parties hold different points of view. I shall, however, during the narration of the facts, indicate the aspects on which the parties differ.

[7] The Applicant instituted action under case number 8695/2005 in this court against the Respondent. On 1 July 2005 the Court per

the honourable Justice Shongwe DJP granted summary judgment in favour of the Applicant against the Respondent for payment of the sum of R1 255 460,20, plus interest on this amount at the rate of 15,5% per annum as from 20/4/05 to date of payment.

[8] The Respondent subsequently applied for leave to appeal against granting of the summary judgment order. Leave was refused by this Court. The Respondent thereafter launched an application in terms of Rule 6 of the rules of the Supreme Court of Appeal. Leave to appeal was also denied by the Supreme Court of Appeal.

[9] The Applicant, in consequence of the above, caused to be issued a warrant of execution which was served on the Respondent on 15 February 2006. The Sheriff rendered a return of *nulla bona* to the said warrant.

[10] As a result of the circumstances as set out above the Applicant brought an application for sequestration of the estate of the Respondent on the ground that Respondent has committed an act of insolvency as envisaged in terms of Section 8(b) of the Insolvency Act, 24 of 1936.

[11] On 7 December 2006 a provisional order of sequestration was granted (per Shongwe DJP) with return date 23 January 2007.

[12] On 13 December 2006 the Respondent served on Applicant's attorneys of record an application in terms of Section 11(3) of the Insolvency Act, whereby the Respondent gave notice of his intention to anticipate the return date on 14 December 2006. The matter was enrolled on the urgent court roll on 14 December 2006. His Lordship Mr. Justice Motata struck the application in terms of Section 11(3) of the Insolvency Act from the roll on 14 December 2006 as Judge Motata was apparently of the view that the

application should not have been placed on the urgent roll.

[13] In terms of the provisional order of sequestration dated 7 December 2006, the return date was originally stated to be 23 January 2007. However, because the matter is opposed and because 23 January 2007 fell within the recess period, the return date was extended by agreement in court on 23 January 2007 to 14 March 2007.

[14] On 17 January 2007 the Respondent's attorney served on Applicant's attorney of record a notice of application in terms of rule 6(5)(e) in terms whereof the Respondent requests the Honourable Court

to grant him leave to file a further affidavit and that the Respondent be granted leave to supplement the admissions and withdraw certain admissions in his opposing affidavit filed on 6th of September 2006 (the opposing affidavit to the application for sequestration.)

[15] On 14 March 2007 the Rule 6(5)(e) application was argued before His Lordship Justice Rabbie who made an order that leave be granted to the Respondent to file a further affidavit on or before 11 April 2004 and also that leave be granted to the Applicant to answer to the Respondent's further supplementary affidavit on or before 9 May 2007. The return day was

extended to Thursday 24 May 2007 with certain directives given to the Registrar. The Applicant was ordered to pay to the Respondent his costs in respect of the Rule 6(5)(e) application as well as the costs of appearance on 14 March 2007.

[16] In his supplementary opposing affidavit filed on 11 April 2007, the Respondent, *inter alia*, alleges that the summary judgment referred to in paragraph (7) *supra*, was obtained fraudulently and that it is factual that International Source Services (ISS) had no indebtedness to Prochem (Pty) Ltd, Registration No 2003/08551/07 at the time that he

(Respondent) was presented with the Deed of Suretyship to sign.

[17] The foregoing allegations and contentions by Respondent are denied by the Applicant in its opposing affidavit. In support of such denial the Applicant referred the Court to certain invoices attached to the papers as annexures "JM12" and "JM18" and dated from 19 April 2004 to 29 May 2004, which were issued by Applicant to ISS before the Respondent signed the Deed of Suretyship on 31 May 2004. In consequence of the above, the Applicant submits that it is clear that the Respondent is attempting to mislead the Court by clouding the real issues and therefore the

Respondent's credibility should be doubted.

(C) THE ISSUE(S) TO BE DECIDED BY THE COURT

[18] The issue to be decided by the Court is whether, in the light of the foregoing background as well as the defences raised by the Respondent, the Applicant is entitled to a final sequestration order stated otherwise, whether the provisional sequestration order should be confirmed.

(D) THE APPLICANT'S CASE

[19] In the head of argument filed on behalf of the Applicant, it was contended and submitted by counsel that:

(19.1) The respondent does not raise any new facts in his supplementary opposing affidavit. In fact, all the facts raised in that affidavit are either fabricated by the Respondent as clearly indicated in the Applicant's answering affidavit to the supplementary opposing affidavit or were known to the Respondent long before he deposed to that affidavit.

(19.2) The court, when considering whether to allow a party to withdraw admissions made, should require a satisfactory explanation

both of what the circumstances were when the admission was originally made and the reasons why it is now sought to withdraw the admission.

(19.3) The reason for seeking the withdrawals by the Respondent is, with respect, very tactical, does not constitute to be a satisfactory reason and therefore should not be allowed by the above Honourable Court.

(19.4) The Respondent is clearly *mala fide* and is acting in an attempt to delay the sequestration

proceedings and that the Respondent's so-called supplementary opposing affidavit is purely of a tactical nature and does not meet the requirements which would allow this Honourable Court to exercise its discretion in his favour.

(19.5) In regards to the Respondent's allegations of fraud pertaining to the summary judgment that was granted against him it is admitted that the Respondent has been aware of these so-called sufficient facts for some time but does not explain why these were not raised

in summary judgment proceedings. The Respondent has had more than ample opportunity to ventilate the issues surrounding the so-called fraud and that approximately 19 months to raise the issues of the alleged fraud that has not done so (action was instituted in March 2005 already). It is submitted that these allegations pertaining to fraud is (sic) in any event unsubstantiated and devoid of any merit as fully discussed in the Applicant's answering affidavit to the Respondent's supplementary opposing affidavit and Applicant

in any event furthermore relies on the defences of *res judicata*.

(19.6) The Respondent is, with respect, transparently en-devouring to postpone and prolong the sequestration proceedings as much as possible. It is further submitted that these attempts are dishonest, disingenuous and *mala fide* and such conduct should not be tolerated by this Honourable Court.

(19.7) The Respondent has been aware of the identity of the true creditor, the Applicant, as far back as the

time when the summons was issued against Respondent and served on him. It must be remembered that the registration number of the applicant is clearly reflected on the suretyship which forms part of the summons and particulars of claim.

(19.8) It is reiterated that the Respondent has not furnished a satisfactory explanation both of the circumstances where-under he made certain admissions originally and of the reasons why he now seeks to withdraw the admissions.

(19.9) An analysis of defences previously raised by the Respondent indicates that his previous affidavits are depleted (sic) with contradictions. Reference in this regard is made to paragraph 11 of the Applicant's answering affidavit in the application in terms of Rule 6(5)(e) in which the previous defences raised by the Respondent are analysed on p77 to 83 of the paginated papers. There is therefore no merits (sic) in the so-called investigations done by Mr Hough.

(19.10) With regards to the Respondent's financial position is it fully set out in paragraphs 5.1 to 5.9 of the founding affidavit in the application for sequestration on pages 6-8 of the paginated papers. The financial position of the Respondent as set out by the Applicant in his founding affidavit is however denied by the Respondent in his opposing affidavit.

(19.11) The Respondent's wife is the owner of several assets found at the Respondent's premises. It is submitted that, where the

Respondent to be sequestrated, all the Respondent's wife's assets will vest in the Respondent's trustee pursuant to the provisions of Section 21 of the Insolvency Act. The trustee appointed to the Respondent's estate would then be in a position to determine whether the Respondents' wife acquired all her assets by a title separate from the Respondent's creditors.

(19.12) The Respondent's assertions regarding the assets in his opposing affidavit must be regarded with extreme caution. It will certainly be necessary, and

to the advantage of creditors, for the Respondent's estate to be sequestered to enable a trustee to conduct a full investigation into all the assets referred to in the opposing affidavit as well as the assets and income referred to in the financial statements being Annexures "JM6" and "JM7" to the founding affidavit. Additionally, as already stated, the Respondent's wife's assets will vest in the Respondent's trustee in terms of Section 21 of the Insolvency Act and a trustee will be able to determine whether Respondent's wife acquired all her

assets by a title separate from the Respondent's creditors. Applicant in the event of sequestration order being granted fully intend to conduct a thorough and extensive interrogation in terms of Section 152 of the Insolvency Act with a huge return and precisely what has transpired with the Respondent's assets and income.

(19.13) The Respondent in his opposing affidavit also refers to several agreements entered into discussed in paragraph 4.1 of his opposing affidavits on page 26 of the

paginated papers. It is submitted on behalf of the Applicant that the Applicant was not privy to any of these agreements referred to in this paragraph and accordingly submits that this is not relevant to the application for sequestration.

(19.14) The Respondent's opposing of this application for sequestration of his estate is not justified due to the fact that the Respondent in his opposing affidavit does not set out any factual or any basis in law on which he relies.

(19.15) In conclusion, it is submitted that there is no dispute of facts on the papers and that the final order of sequestration should be granted. It is furthermore submitted that the Respondent's supplementary opposing affidavit as already discussed *supra* does not take the matter any further and is in any event devoided (sic) of any truth and merit as is clearly indicated in the Applicant's answering affidavit to the Respondent's supplementary opposing affidavit.

(19.16) It is further submitted that the Applicant has clearly proven on the balance of probabilities that it is entitled to a final order of sequestration in that:

19.16.1 The applicant has established against the Respondent a claim such as is mentioned in 9(1) of the Insolvency Act;

19.16.2 The Respondent committed an act of insolvency;

19.16.3 There is reason to believe that it will be

to the advantage of
creditors of the
Respondent if his estate
is sequestrated.

(19.17) It is accordingly submitted that
the estate of the Respondent
should be finally sequestrated.
This marked the end of Applicant's
contentions and submissions.

(E) THE RESPONDENT'S CASE

In the heads of argument filed on behalf
of the Respondent, the following, *inter
alia*, is stated that:

[20] In support of his opposition to the final sequestration of his estate, the Respondent contends:

(20.1) That the Applicant is not a creditor of his estate as contemplated by Section 9(1) of the said Act and that the Applicant consequently never had *locus standi* to apply for the provisional sequestration of his estate.

(20.2) That he has not committed an act of insolvency, as Section 9(2) of the said Act require (sic);

(20.3) That there is no reason to believe that it will be to the advantage of creditors if his estate is sequestrated.

[21] The Respondent alleges that there is *prima facie* evidence of a fraud having been committed by the Plaintiff under case number 8695/2005 in obtaining the judgment against him that underlies the *nulla bona* return relied on by the Applicant for the sequestration of his estate.

[22] The essence of the defence raised by the Respondent is that there exists strong *prima facie* evidence of fraud having been committed which, if proved in court, may

result in the judgment under case number 8695/2005 being set aside on grounds of fraud under the common law.

[23] The Respondent states that he had at all material times been under the *bona fide* impression in opposing the said action that the Plaintiff was Prochem (Pty) Ltd with Registration No: 2001/003964/07. The Respondent refers the Court to Prochem (Pty) Ltd with Registration No: 2001/003964/07 in his affidavit as Prochem 1, at page 99 paragraph 35.1 of the paginated papers.

[24] On 3 June 2003 Prochem 1 *inter alia* concluded an agreement with Amenable

Investments (Pty) Ltd with Registration
No: 2003/008551/07 to dispose of its
businesses, as going concerns, to
Amenable.

[25] In the circular to creditors regarding the
said transaction and annexed to the papers
as Annexure "RS3", the registration number
of Amenable is stated as 2003/008551/07
and the registration number of Prochem
)Pty) Ltd is stated as 2001/003964/07.

[26] Although Amenable and Prochem¹ were
clearly two separate companies, Amenable
on 18 May 2004 changed its name to Prochem
(Pty) Ltd, which change of name was

affected (sic) under company registration number 2003/008551/07.

[27] The Respondent states that following the investigations on his behalf, it turned out that Prochem1 was in fact not the same Prochem (Pty) Ltd whose registration details are inserted on the suretyship namely Registration No: 2003/008551/07.

[28] The Respondent then states that ISS had no indebtedness to the said Prochem (Pty) Ltd with Registration No: 2003/008551/07 at the time that he was presented with the suretyship to sign.

[29] It has already been stated that the said Prochem (Pty) Ltd with Registration No: 2003/008551/07 again changed its name to Protea Chemicals (Pty) Ltd on 6 June 2005.

[30] Further evidence of the alleged fraud is to be found in Morrison's replying affidavit to the Respondent's further affidavit. Morrison refers to copies of invoices issued by the Applicant to ISS before the Respondent signed the Deed of Suretyship on 31st May 2004 and annexes copies thereof dated April 2004 to 29 May 2004 as Annexures "JM12" to "JM18".

[31] Morrison at p283 par 23.4 of the paginated papers, then states that: "It is very

clear from the invoices that the invoicing creditor is Protea Polymers a division of Prochem (Pty) Ltd, Registration Number 2003/008551/07."

[32] On perusal of the said invoices it appears from each and every one of them that they were issued by Protea Polymers, a division of Protea Chemicals (Pty) Ltd (Reg No 2003/0008551/07). In view of the fact that Amendable only changed its name to Prochem (Pty) Ltd on 18 May 2004 and Prochem (Pty) Ltd changed its name to Protea Chemicals only on the 6th of June 2005, these invoices covering the period 19 April 2004 to 20 May 2004 are clearly a

fabrication as Protea Chemicals (Pty) Ltd did not exist at that time.

[33] It must be taken into account that the degree of proof required before a final order of sequestration will be granted, is higher than when a provisional order is sought in that the matter must be proved on a balance of probabilities. In this regard the Court is referred to the case *Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W) at 718B-C as authority.

[34] The Applicant should therefore prove its case upon a clear balance of probabilities and where the Respondent disputes the

indebtedness, the onus is on the Respondent to prove not that it is not indebted to the Applicant, but that the indebtedness is *bona fide* disputed on reasonable grounds. In this regard the Honourable court is respectfully referred to the following cases:

- *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) at 286A and further;
- *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 264 (W) at 269;

- *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) Sa 346 (T) at 347.

[35] The question is how the court should deal with an opposed application where affidavits reveal fundamental and crucial disputes of fact and where there is not preponderance of probability either way, on the papers. It is submitted that where affidavits do not reveal a balance of probabilities in favour of the Applicant, then clearly no *prima facie* case is established. In this respect the above Honourable Court is hereby referred to the case of *Kalil v Decotex (Pty) Ltd &*

Another 1988 (1) SA 943 (A) at 975 J, 979E and 979I as authority.

[36] In the premises it is submitted that the Rule Nisi should be discharged with costs on an punitive scale. This concluded the Respondent's contentions and submissions.

(F) ANALYSIS AND FINDINGS

[37] In order to cater for a systematic analysis of the issues and contentions raised by the Respondent to the relief claimed by the Applicant, it is necessary to refer to paragraph [20] *supra* as well as to certain allegations in the papers which have been made by the Respondent in

respect of his opposition to the final sequestration of his estate.

[38] In paragraph 20.1 *supra* the Respondent states that the Applicant never had *locus standi* to apply for the provisional sequestration of his estate because the Applicant is not a creditor of his estate as contemplated by section 9(1) of the Insolvency Act no 24 of 1936 ("the Act"). The above statement on the Applicant's *locus standi* sounds contradictory to Respondent's admissions in his first affidavit in which he opposed the application. For example, in such admitted the identity of the Applicant but also that "the Applicant holds no security

for payment of this debt from the Respondent."

[39] Whatever prompted the Respondent to change back by raising the issue of *locus standi* it would appear that this has happened as a result of his discovery of what he calls new facts. As he himself states in paragraph 5 of his Rule 6(5)(e) application:

"In view of the fact that I have become aware of new facts which was (sic) unknown to me at the time of deposing to the Opposing Affidavit I respectfully submit that the admissions therein contained should be

supplemented and I humbly beg leave of this Honourable Court to incorporate such new matter as contained in my affidavit ...” My underlining for emphasis.] In consequence of the above development the Applicant argues in sub-paragraphs 19.2, 19.3 and 19.4 *supra* that the Respondent’s withdrawal of previous admissions is *mala fide*, very unsatisfactory and tactical so as to delay the sequestration proceedings.

[40] To resolve this impasse one has to read the relevant Rule of court *pari passu* with applicable case law. The relevant rule is 36 and unfortunately it gives no

guidance in regard to the tests to be applied. But, as Hiemstra J (as he then was) aptly put it in *President Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H:

“There are two guiding rules to be distilled from various authorities:

1. There must have been a *bona fide* mistake on the party seeking to amend;
2. The amendment must not cause prejudice to the other side which cannot be cured by an appropriate order as to costs. It has been

suggested, especially in view of the decision in *Rishton v Rishton*, 1912 TPD 718, that an amendment involving a withdrawal of an admission is to be put on a different basis. This is not so. The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of *bona fides* thereof, and (ii) it is more likely to prejudice the other party who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason,

have omitted to gather the necessary evidence."

[41] *In casu* the Applicant contends and submits that the Respondent is "clearly *mala fide*, and is acting in an attempt to delay the sequestration proceedings" (*vide* subparagraph 19.4 *supra*.) This means that if the withdrawals of the Respondent are allowed, this would prejudice the Applicant in the sense that the sequestration proceedings would be protracted or might even never come to a close. Besides, such prejudice does not appear to be one that can be cleared by an appropriate order as to costs. It follows that the finding I arrive at is that the

Respondent's withdrawal of his initial admissions cannot be allowed and his defence based on the Applicant's *locus standi* has to fail.

[42] The second defence raised by the Respondent is that he has not committed an act of insolvency, as Section 9.2 of the Insolvency Act requires. (*Vide* subparagraph 20.2 *supra*.) Section 9.2 of the Act states that a liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of section (1)." In other words, this section is irrelevant here. What is

relevant is section 8 of the Act which provides for acts of insolvency.

[43] Section 8(b) of the Act states expressly that:

“A debtor commits an act of insolvency

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(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it

appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

In casu, the Respondent has admitted that:

(i) The Applicant caused to be issued a warrant of execution, which was served on him (Respondent) on 15 February 2006;

(ii) The Sheriff rendered a return of *nulla bona* to the warrant of execution. A

copy of the return of service is attached to the papers as Annexure "JMB3".

(iii) The Applicant accordingly submits that the Respondent has committed an act of insolvency as envisaged in terms of section 8(b) of the Insolvency Act 24 of 1936.

In the light of the above, I find that the contents of the annexed Sheriff's *nulla bona* return is incontestable and that it is on all fours with the provisions of section 8(b) of the Act. I also find that

the Respondent's defence in this respect is misconceived.

[44] The third defence and contention of the Respondent is that there is no reason to believe that it will be to the advantage of creditors if his estate is sequestrated. This contention has been consistently held by the Respondent in the following terms:

"I do not own any movable or immovable assets". (*Vide* page 27 of the papers).

"I deny that to sequester my estate will be of any benefit to creditors as the said assets are the only assets under my control of which the ownership has already been set out above. I further humbly put on record that the liquidators of international Source Services) (Pty) Limited, for which company I also signed surety, has already done a proper investigation into all available assets and has not brought an application to sequester my personal estate." (*Vide* p29 of the papers.)

Later on, the Respondent, *inter alia*, states: "There will be no advantage for

creditors, and I will have no ability to earn income to provide for my family or to pay any debts. I therefore pray that the application by the applicant is (sic) denied with costs". (*Vide* page 30 of the papers.)

[45] The Applicant, on the other hand, maintains and submits that with regards to the advantage to creditors, it is not necessary for an applicant to convince a court that the sequestration would be to the financial advantage of the creditors, but merely that there is a reason to believe that this will in fact be the case.

Furthermore, the Applicant submits that it is not necessary to prove that the debtor has any assets, unless it is prudent that the debtor has either an income in terms whereof a large portion in terms of section 23(5) of the Act will most probably be available to the creditors or that there is a reasonable prospect that a curator, by relying on the machinery of the Act, may retrieve or recover assets which will be to the financial advantage of the creditors.

[46] In terms of section 12(1) read together with sections 8 of the Act, the Court may

grant an order for the sequestration of the estate of a debtor/respondent if it is convinced and satisfied, *inter alia*, that:

(46.1) The Respondent has committed an act of insolvency or is factually insolvent;

(46.2) There is reason to believe that it will be to the advantage of creditors that Respondent's estate is sequestrated. Furthermore, the *onus* is on the Applicant to show advantage to creditors. The law also requires that in an application for an order of sequestration the facts put before

the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. (*Vide Meskin & Co v Friedman* 1948 (2) SA 555 (WLD) at 558 *per* Roper J.)

Having carefully scrutinised the evidence in this application, I am satisfied that there is a prospect which is not too remote that some pecuniary benefit will accrue to creditors. And, on the facts, I am also satisfied that a curator, by relying on the machinery of the

Insolvency Act, may retrieve or recover assets which will be to the financial advantage of creditors. (*Vide BP Southern Africa (Pty) Ltd v Firstenburgh* 1966 SA 717 (O) at 720.)

[47] Lastly, as to the Respondent's allegation that there is *prima facie* evidence of a fraud having been committed by the Plaintiff in obtaining the judgment against him under case number 8695/2005 because of changes undergone by the Applicant's name and identity, as well as the subsequent investigations and revelations of one Hough, my considered opinion is that it is

sufficient to state that the papers indicate that:

(47.1) The Respondent has been aware of these so-called sufficient facts for some time but does not explain why these were not raised in the summary judgment proceedings (if they in fact existed). For example, the Respondent states that: "I had all along been of the view that there was a fraud or (sic) sorts" (*Vide* page 89 of the papers.)

(47.2) Quite a considerable time (almost nineteen months)

passed before the Respondent could raise his reasons for the alleged fraud. No explanation is given by him for the delay.

(47.3) In the papers the Applicant has raised the defence of *res judicata* in respect of Respondent's attack of the summary judgment proceedings.

(47.4) I find no disputes of fact in this matter which could call for the matter to be referred to oral evidence.

[48] Over and above the foregoing four facts, it has to be stated that in our law a judgment procured by the fraud of one of the parties, whether by forgery, perjury or in any other way such as the fraudulent withholding of documents, cannot be allowed to stand. (*Vide R v Schiff* 1913 AD 224; also *Schierhout v Union government* 1927 AD 94 at 98.) Any party seeking to set aside a judgment on the ground of fraudulent evidence must prove the following:

(a) that the evidence was in fact incorrect;

(b) that it was made fraudulently and with an intent to mislead; and

(c) that it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than what it was induced by the incorrect evidence to give. (*Vide Swart v Wessels* 1924 TPD 187 at 189-190.

In casu the Applicant, apart from having attempted twice to appeal the summary

judgment decision against him, does not seem to have made an application to court to have such judgment rescinded or set aside, in particular, on the above basis.

[49] Lastly, fraud, in our law, is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. (*Vide S v Henkes* 1941 AD 143 at 161.) Because it is unlawful it is regarded as a crime punishable at law.

Anyone who has been defrauded is at liberty to lay a criminal charge of *fraud*

against the one who has committed it. *In casu*, it is merely alleged *in vacuo* and there is not a single iota of evidence that the Respondent, as the alleged prejudiced and aggrieved party, has brought such charges against the alleged fraudster. Besides, to accuse another of having committed fraud by means of legal proceedings is not, in my humble opinion, a trivial matter.

[G] CONCLUSION AND ORDER

[50] In the light of the foregoing analysis and findings, I am constrained to arrive at the ineluctable conclusion that this

application has to succeed. In the result
I make the following order:

“Both prayers 1 ands 2 of the relevant
notice of motion are hereby granted.”

MNS SITHOLE

ACTING JUDGE OF THE HIGH COURT