



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D13829/2023**

In the matter between:

THE UNLIMITED GROUP (PTY) LTD

APPLICANT

and

KGOTHSO BARREL MAMOGALE

RESPONDENT

Coram: Mossop J
Heard: 23 April 2025
Delivered: 30 April 2025

ORDER

The following order is granted:

1. The applicant's application for an adjournment is refused with costs, such to be taxed on scale B.
 2. The application is dismissed with costs, such to be taxed on scale B.
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JUDGMENT

MOSSOP J:

Introduction

[1] On 16 September 2024, I delivered a judgment dismissing an application brought by the applicant for the sequestration of the respondent's estate (the sequestration application). A month later, on 18 October 2024, the applicant launched the present application in which the primary relief that it seeks is framed as follows:

'That the judgement and cost orders delivered by the Honourable Mossop J on 16 September 2024 (FA2 to the Founding Affidavit) in the matter of an application for the sequestration of the respondent be and is hereby set aside.'

[2] The applicant builds its application upon two principal foundations. Firstly, it alleges that a fraud was committed by the respondent in his submissions in the sequestration application, and, secondly, that additional documents have been discovered since the judgment was handed down in that application that casts a different light upon the matter.

Events after argument but before judgment

[3] Before considering the merits of the applicant's case, it is unfortunately necessary to mention something that occurred before I delivered my judgment in the sequestration application. I mention it only because it has some relevance to the application before me.

[4] In the afternoon of 9 September 2024, after hearing argument in the sequestration application and having reserved judgment earlier that day, the applicant delivered to my chambers further affidavits, comprised of a document titled 'Applicant's Further Affidavit' and a document titled 'Confirmatory Affidavit,' the latter deposed to by the applicant's attorney. No application for leave to do so appeared to accompany the affidavits and there was nothing obvious to indicate to me that the respondent was aware of what the applicant was attempting to do. I consequently did not accept the affidavits, nor did I read them beyond swiftly satisfying myself that there was no formal application for me to receive the documents.

[5] I take a very dim view of this conduct. It is both disrespectful and unprofessional as it shows a disdain for the legal process and is grossly improper.

Litigants are not entitled to deliver documents as and when they feel the need to do so, even more so after argument has been completed. There is a defined process that all legal practitioners involved in litigation are required to know and respect. Such unrestrained conduct will not be tolerated and it must not be repeated.

[6] The two affidavits and the annexure that the applicant attempted to deliver to my chambers have, however, been put up by the respondent in his answering affidavit in this application and they can accordingly now be considered by me at greater leisure than when I first encountered them.

[7] The deponents to each of those affidavits applied their signature to them before a commissioner of oaths on the same day that the sequestration application was argued, namely 9 September 2024. Attached to the further affidavit was a document entitled 'FNB Law on Call Personal Plan Standard and Plus Terms and Conditions'. It is difficult, ex facie the document, to determine the year to which it applied but I must assume that it applied to the year in question, 2021, otherwise whatever tenuous relevance it has to these proceedings is greatly diminished, if not entirely extinguished.

[8] The suggestion therefore that the policy documents allegedly uncovered by the applicant are recently discovered would appear, at best, to be questionable for the relevant policy was in the hands of the applicant's legal representatives on the very day that the sequestration application was argued.

Application for an adjournment

[9] When the matter was called, Mr Pillay SC, who now appears for the applicant, indicated that a subpoena duces tecum (the subpoena) had been served on First National Bank (FNB) after the rescission application was launched and that further relevant documents had been secured from FNB as a consequence.¹ If I correctly understood Mr Pillay's submission, he wished to argue the matter on the basis that the documents secured by the subpoena were before me. I was further advised that the witness who had produced the documents was not present and had been

¹ I make no comment or finding on whether it is proper for a subpoena duces tecum to be issued in motion proceedings. See in this regard *Steyn v Meyer* [2022] ZAGPPHC 772 para 8.

excused from any further attendance. Mr Pillay submitted further that the documents would apparently confirm that the insurance policy (the policy) held by the respondent with FNB had been in place and had been relied upon by him during the litigation conducted before the labour court.

[10] I pointed out to Mr Pillay that these documents were, in fact, not before me and that Ms Russo, who continues to appear for the respondent, had earlier indicated that the respondent would oppose their late introduction into the matter.

[11] It is trite that exhibits relevant to a dispute cannot simply be handed up from the bar by counsel. In motion proceedings, such as the present, they are introduced by a witness who identifies them and refers to them in his or her affidavit. There was no such affidavit before me relating to the documents secured through the subpoena. Mr Pillay then indicated that the applicant wished to prepare such an affidavit and accordingly applied informally from the bar for an adjournment, proposing that costs be reserved. Ms Russo opposed the application. She submitted that what the applicant was trying to do was to re-argue the sequestration application, which it was not permitted to do. It had brought the application and must stand or fall on the case that it presented. After a moment of reflection, I refused the application with costs.

[12] The matter then proceeded without the documents acquired under the subpoena.

Rescission of judgments

[13] Ordinarily, the rescission of a judgment may be considered in terms of Uniform rule 31, Uniform rule 42 or in terms of the common law. The founding affidavit in the application before me does not specify upon which of these grounds it is based.

[14] Uniform rule 31 permits the rescission of judgments taken without the knowledge of the judgment debtor and Uniform rule 42(1) provides that a court may *mero motu*, or upon application, rescind or vary:

- ‘(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) An order or judgment granted as the result of a mistake common to the parties.’

[15] Uniform rule 31 does not apply to this matter, for the applicant was represented before me when the matter was argued, and none of the grounds adumbrated above in relation to Uniform rule 42 are of any application to the facts of this matter. The only basis that this application can find a footing in law is if reliance is placed by the applicant upon the common law. Mr Pillay confirmed that this was, indeed, the basis upon which this application was conceived of and brought.

The common law

[16] The guiding principle of the common law is that of the certainty of judgments. Legal proceedings must have an end.² Once judgment is given in a matter it is final and unalterable and it may not thereafter be varied or rescinded by the judicial officer who delivered it. The unalterableness of judgments stems from the fact that the judicial officer, once judgment has been handed down, is rendered *functus officio*.³

[17] Thus, as a general proposition, a court lacks the power to set aside or alter its own judgments, although this is subject to certain exceptions.⁴ In *Freedom Stationery (Pty) Ltd and others v Hassam and others*,⁵ the Supreme Court of Appeal confirmed that:

‘There are exceptions to this general rule. The requirements for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional

² This is expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality). See: *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G and 309A.

³ In *Black’s Law Dictionary* 9 ed (2009), *functus officio* is stated to mean ‘having performed his or her office’. It relates to an officer or official body ‘without further authority or legal competence because the duties and functions of the original commission have been fully accomplished’.

⁴ *Kgomo and Another v Standard Bank of South Africa and others* 2016 (2) SA 184 (GP) para 11.

⁵ *Freedom Stationery (Pty) Ltd and others v Hassam and others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 17.

circumstances, on the grounds of justus error or the discovery of new documents. See *Childerley Estate Stores v Standard Bank of South Africa Ltd* and *De Wet and Others v Western Bank Ltd.*' (citations omitted.)

[18] From its papers, and as stated at the commencement of this judgment, it is apparent that the applicant relies on the first and third grounds referred to in the extract mentioned above.

The facts

[19] A brief reference to the facts of the matter may be of assistance. These facts arose from the sequestration application and are referred to in the judgment that I delivered, and so I will only briefly restate them:

- (a) The respondent was previously employed by the applicant and, according to it, was so employed because he falsely misrepresented his academic qualifications;
- (b) Upon discovering the true extent of his qualifications, or the lack thereof, the applicant dismissed the respondent from its employment and commenced litigation in the labour court against him;
- (c) The respondent, however, successfully resisted the applicant's claim in the labour court and secured a costs order against the applicant (the labour court costs order);
- (d) There was further litigation between the parties before the Commission for Conciliation, Mediation and Arbitration and before the high court;
- (e) Having secured a costs order against the respondent in the high court litigation (the high court costs order) that was not paid by him, the applicant then brought its application for the sequestration of the respondent;
- (f) In his answering affidavit, the respondent freely disclosed having the policy with FNB that covered his legal costs;
- (g) The applicant submitted, but only in argument, that the labour court costs order, and the high court costs order could not be set-off against each other as FNB was entitled to be paid the labour court costs order granted against the applicant and there was therefore no mutuality of debts. The respondent resisted this argument, inter alia, by submitting that there was no evidence adduced by the applicant that the policy was in place in 2021; and
- (h) In addition to the high court costs order, the applicant subsequently obtained a further costs order in the high court against the respondent which came to

R74 312.65 after it had been taxed. The respondent paid that amount in full, in two instalments.

The essence of the judgment

[20] In dismissing the sequestration application, I accepted that there was no proof that the policy was in place in 2021 and I found that despite the applicant submitting that it did not 'consent' to the operation of set-off, set-off operated by operation of law and that the respondent was therefore not indebted to the applicant, as the labour court costs order, in the amount of R61 411.65, exceeded the high court costs order, in the amount of R46 802.45. As a consequence, the applicant was no longer a creditor of the respondent and could not therefore seek the sequestration of his estate.⁶

[21] In coming to this conclusion, I found that if the policy existed, it amounted to a *res inter alios acta* and was of no relevance to the facts of this matter and it could not be relied upon by the applicant.

[22] Finally, I concluded that if I was incorrect in coming to that conclusion, I had a discretion when considering a sequestration application and that on the facts of this matter, I would exercise my discretion against the applicant.

[23] I turn now to consider the applicant's submissions in this application.

The applicant's submissions

[24] The order that I granted in the sequestration application had two constituent parts, namely, the dismissal of the sequestration application and the order that the applicant pay the respondent's costs on scale B.

⁶ Section 9(1) of the Insolvency Act 24 of 1936 provides as follows: 'A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the Court for the sequestration of the estate of the debtor.'

[25] The setting aside of my refusal to grant a sequestration order serves no real purpose if viewed in isolation, for it achieves nothing. It does not result in an order of sequestration assuming its place. However, the order dismissing the sequestration of the respondent's estate was linked to the second part of my order, namely the costs order. It is the costs order that is the true focus of this application.

[26] In its founding affidavit in this application, the applicant rehashes its previous oral argument that the labour court costs order:

'... did not fall within the respondent's estate because the respondent had not incurred these costs insofar as the respondent was covered by an FNB Policy for legal assistance and that as such those costs accrued to FNB ...'

That argument held no appeal to me when the sequestration application was argued and still holds no appeal to me. The order of the labour court made it abundantly clear that the respondent was awarded costs and not any other entity.

Fraud

[27] The applicant alleges that a fraud has been perpetrated by both the respondent and, it seems, by his legal representatives, although Mr Pillay did indicate that in making that submission, he did not intend to tar the respondent's counsel with the same brush. The allegation of fraud rests upon a supposition by the applicant of what the respondent and his legal team must have known at the time of the sequestration application.

[28] The argument appears to go that the respondent must have known that he was covered by the policy in 2021 and that he could not in good conscience therefore have permitted it to be argued on his behalf that there was no proof of him not being covered by the policy during that year. It seems that the adjunct to that is that the respondent's legal representatives must have also known what the true factual position was but made, or permitted counsel to make, submissions contrary to what they knew to be true, namely that the policy was in place.

[29] In this regard, Mr Pillay referred me to two articles written by two eminent judges that emphasise the ethical standards that should be maintained by legal

representatives. In particular, I was referred to the article by Rogers J titled 'The Ethics of the Hopeless Case',⁷ where the learned judge stated that:

'... counsel must properly research the law and insist on adequate factual instructions. They must not fill gaps with guesswork or plead denials because their instructions are incomplete.'

[30] Mr Pillay submitted that the conduct cautioned against by Rogers J had occurred during the sequestration application. When pressed on the issue of fraud, Mr Pillay conceded that there was no criminal fraud, but that in his view, the conduct complained of 'was close to commercial fraud'. I am not sure that I appreciate the distinction that counsel attempted to draw here, nor do I find it easy to accept that something that is 'close to commercial fraud' is fraud itself.

Further documents

[31] As further justification for the relief that it claims, the applicant states that it has acquired documentation unavailable to it at the time when the sequestration application was argued. I have already referred to the fact that on the day that the sequestration application was argued, the applicant had the policy document in its possession. The other policy documents for earlier and later years than 2021, attached to the application papers in this application, have no relevance to this matter. And, finally, the even later documents acquired by the applicant through the subpoena were never placed before the court and therefore cannot be considered. On the face of it, the existence of this ground is illusory.

[32] The applicant, however, submits that:

'Only since have these documents come to hand and they present a stark reality that demonstrates that the respondent has allowed a false narrative to be presented before court, in circumstances where the respondent personally and potentially his legal representatives must have been aware that not only was he covered by the insurance policy in 2021 but that he had expressly and unequivocally ceded all rights to any legal costs to FNB. Those legal costs therefore did not fall within the respondent's estate and set-off could not have applied.'

⁷ O Rogers 'The Ethics of the Hopeless Case' (2017) 30 *Advocate* 46 at 50.

[33] The terms and conditions of all the policies put up by the applicant appear to have a common clause dealing with FNB's right to recover legal costs. It accordingly appears in the 2021 policy. It reads as follows:

'We can recover all Legal Costs and pursue a claim in court in your name. To help us do this:

- You agree to transfer all rights to us to claim Legal Costs we have paid, for an insured matter, from the responsible person.
- You will sign all the necessary documents when requested. If we need the Insured Persons consent or signature, it is your responsibility to get this.
- If you compromise our right to recover Legal Costs, then we can claim the non-recovered amount of Legal Costs from you.

Any Legal Costs recovered will be paid directly to us. The recovery of Legal Costs will not adjust the Case Limit and Lifetime Limit.'

[34] The applicant submits that the case that it argued at the sequestration application has been vindicated and fortified by the documents that it has put up.

The respondent's submissions

[35] It will come as no surprise that the respondent dismisses the applicant's submissions.

[36] The respondent submitted in his answering affidavit that there was no evidence before me when the sequestration application was argued to establish that during the labour court proceedings, the policy was utilised. And it is submitted further that, even if it was in place and even it was utilised by the respondent, which was not admitted, that was irrelevant to the issues before me. The respondent states that how he pays his legal fees is of no concern of the applicant.

[37] The respondent acknowledges that his policy documents with FNB covering a span of several years had been put up by the applicant and complains that they are confidential to him. In that he must be correct. How the documents came to be in the applicant's possession must, according to him, be explained. It has not. Associated with this fact is the respondent's denial that either he or his legal representatives are guilty of any fraud that has allegedly been perpetrated on this court.

[38] Perhaps the most telling point made by the respondent is his assertion that the applicant has not, and cannot, assert that the policy was ever utilised by him.

Analysis

[39] Fraud is not easily inferred,⁸ even less so in motion proceedings where versions are advanced by deponents without them being seen, or their demeanour assessed, by a court.⁹ In *Fraai Uitzicht 1798 Farm (Pty) Limited v McCullough and others*,¹⁰ the court considered when a judgment may be rescinded due to fraud and concluded as follows:

‘In spite of being a 1924 decision, *Childerley* remains good authority regarding the circumstances under which a court can grant *restitutio in integrum* against a judgment. Following *Childerley* our courts have repeatedly stated that a judgment induced by fraud to which one of the parties was privy, cannot stand. It was held that in order to succeed on this ground there are three requirements that a plaintiff must prove: (1) the defendant gave incorrect evidence at the initial trial; (2) that the defendant did so fraudulently with the intention to mislead the court; and (3) that such false evidence diverged from the true facts to such an extent that the court, had it been aware thereof, would have given a different judgment.’ (Footnotes omitted.)

[40] When the facts of the sequestration application are more closely considered, none of the three grounds referred to in *Childerley* have been established. The respondent did not give incorrect or false evidence. It was only through his disclosure that the existence of the policy came to be known. The facts reveal that the applicant itself held back information about the labour court costs order awarded against it. No disclosure of this costs order was made by it in its founding affidavit, the respondent being the party who apprised the court of this fact. The applicant, asserting that ethical conduct was required by the respondent and his legal representatives, may thus have been hoisted by its own petard. In addition, the applicant itself made no mention of the policy. Perhaps it could not do so because it lacked knowledge of its existence. The fact that the policy came to assume the

⁸ *Gilbey Distillers & Vintners (Pty) Ltd and others v Morris NO and another* 1990 (2) SA 217 (SE) at 226A.

⁹ *Commissioner for the South African Revenue Service v Sassin and others* [2015] ZAKZDHC 82; [2015] 4 All SA 756 (KZD) para 47.

¹⁰ *Fraai Uitzicht 1798 Farm (Pty) Limited v McCullough and others* [2020] ZASCA 60 para 16.

importance that it ultimately assumed in the eyes of the applicant was solely through the disclosure of its existence by the respondent. Once its disclosure was made known, the applicant did not meaningfully deal with it in its replying affidavit. The disclosure of the policy's existence by the respondent is hardly the conduct of a party intent on deception.

[41] The applicant's case on the policy exists only in its supplementary heads of argument that were submitted before the sequestration application was argued. No case in this regard was made out in its papers.

[42] Having carefully considered the applicant's contentions in this regard, I am simply not able to discern any fraud allegedly committed by the respondent, let alone his legal representatives, and any suggestions that the latter were guilty of such conduct is ill-considered.

[43] While standards of ethical conduct must be always observed, a respondent is not required to make an applicant's case easier for it and it is entitled to resist relief claimed by an applicant within the boundaries of the sanctioned rules. In my view, this is what the respondent has done and no more. When discussing the issue of fraud, I obviously do not refer to, or make any comment on, the merits of the true dispute between the parties regarding the respondent's academic qualifications.

[44] As regards the policies acquired by the applicant before the acquisition of the further documents through the subpoena, when the policies were acquired, and how that occurred, has not been explained by the applicant. It seems from this silence that no explanation can safely be given. That, perhaps, is a true indication of the animosity that exists between the parties: each may be prepared to do anything if it allows them to gain an advantage over the other. I am unconvinced that this ground holds any merit.

[45] The applicant views the 2021 policy as a vehicle for it to overturn the judgment that I previously delivered. It has established that there was a policy in place at the time of the labour court matter but that, in my view, does not improve its position. It is obvious from the extract of the policy that I narrated earlier in this judgment that much more would need to be established before it could be found that

the policy potentially has any relevance to the dispute. Thus, it would have to be established that:

- (a) The respondent had invoked the provisions of the policy. The fact that he had the policy does not automatically mean that he claimed against it;
- (b) FNB had paid the respondent's costs;
- (c) The respondent was represented by attorneys appointed by FNB, for the policy only covered costs associated with specific attorneys selected by FNB; and
- (d) The respondent had concluded a cession agreement between himself and FNB.

[46] The applicant's contention that there is unambiguous evidence of a cession by the respondent is not sustained on the documentation before me. The extract narrated earlier reveals that no cession had yet been concluded, otherwise there would be no need for the clause which required the respondent to sign further documents. At best, there is a spes that a cession could potentially be concluded. All the issues identified above remain unanswered by the applicant and it cannot answer them. The respondent declines to answer them on the grounds of relevancy. But in truth, even if answered, they would not assist the applicant's case for rescission for they remain, in my view, a classic example of *res inter alios acta*.

[47] The applicant has taken a firm line on what the respondent must have known and has criticised him for what he has not disclosed. But that criticism is a dual edged sword: the applicant has at no stage made any disclosure that it has factually been called upon by FNB to pay the costs awarded to the respondent. That would have been evidence of the cession contended for by it, for in claiming such amount, FNB would have to explain its right to do so given the terms of the labour court costs order. Had there been such a demand from FNB, I have no doubt that it would have been drawn to my attention. That I have not been so informed serves to confirm that the cession relied upon by the applicant has not occurred.

[48] In my view, the applicant has failed to properly understand two essential concepts. The first is the true meaning and effect of *res inter alios acta*. This:

‘... is a common-law doctrine which holds that a contract cannot adversely affect the rights of one who is not a party to the contract’.¹¹

Whether the policy held by the respondent was before me or not at the hearing of the sequestration application would not have made the slightest difference to the outcome of the matter, as it was irrelevant to a costs order granted in favour of the respondent (not in favour of FNB) by a competent court of this country. FNB was not a party to the labour court litigation and the costs order awarded was not in its favour, but in the favour of the respondent. The existence of the policy was an issue revealed by the respondent during the sequestration application, and I was aware of, and received, the applicant’s argument in that regard. The absence of the policy document in no way influenced the outcome of the sequestration application. The corollary is that its production is equally insignificant and does not materially alter the decision to which I came.¹²

[49] The second concept that the applicant seems to not acknowledge is that in dismissing the sequestration application, I exercised the discretion that I had. There was a reason that I exercised it against the applicant. The parties are at each other’s throats, rightly or wrongly, and their battle is continuous and ongoing. After one skirmish, one party may have a costs order to its credit. After a further skirmish, the position could be reversed. In my judgment, I found that the insolvency laws are not to be used as an instrument to extract an advantage in a fluid and ever changing scenario where there is an ongoing ebb and flow in the respective financial fortunes of the parties involved in the dispute. In my view, it would not be appropriate to permit one party to attempt to claim victory over the other after a battle when the war rages yet.

[50] In any event, the respondent demonstrated that he had the financial ability to meet, and pay, the substantial second high court costs order granted in favour of the applicant against him. That is not the conduct of a financially ruined man.

[51] If the applicant was firmly of the view that I had erred in the reasoning set out in my judgment delivered on 16 September 2024, it was at liberty to have taken it on

¹¹ *Coughlan NO v Road Accident Fund* [2015] ZACC 9; 2015 (4) SA 1 (CC) footnote 1.

¹² *Fraai Uitzicht 1798 Farm (Pty) Limited v McCullough and others* [2020] ZASCA 60 para 21.

appeal to a higher court. It did not do so. It has not established sufficient grounds for me to upset my earlier ruling. The application must thus fail.

Costs

[52] Because of such failure, the applicant must pay the respondent's costs and, in so ordering, the point that I have just made about the ebb and flow of the parties' financial fortunes is again demonstrated.

Order

[53] I accordingly grant the following order:

1. The applicant's application for an adjournment is refused with costs, such to be taxed on scale B.
2. The application is dismissed with costs, such to be taxed on scale B.

MOSSOP J

APPEARANCES

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