



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 17233/2022

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

DATE: 24 AUGUST 2026



In the matter between: -

SHACKLETON CREDIT MANAGEMENT (PTY) LTD

Applicant

and

DINEO KHOLOFELO MOGODI

Respondent

J U D G M E N T – L E A V E T O A P P E A L

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date

and time for hand-down is deemed to be 14h00 on 24 August 2026.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] On 16 July 2024 I granted an order placing the estate of Ms Dineo Kholofelo Mogodi under final sequestration, and directed that the costs of the application be costs in the insolvent estate. Ms Mogodi now applies for leave to appeal against the whole of that judgment and order. She asks that leave be granted to the Full Court of this Division.
- [2] In the notice of application for leave to appeal, and in the heads of argument delivered on her behalf, Ms Mogodi is cited as the applicant and Shackleton Credit Management (Pty) Ltd as the respondent. To avoid confusion with the citation in the sequestration application, which I retain, I refer to the parties by name throughout this judgment.
- [3] The application is opposed. After argument I reserved judgment and, by directive issued on 9 March 2026, invited the parties to deliver heads of argument. Both parties have done so. I am indebted to Adv Stevenson and to Mr Molele for their assistance.

THE GROUND ADVANCED

- [4] The notice of application for leave to appeal advances a single ground, namely that "*[t]he judgment which gave rise to the judgment debt was the subject of application for leave to appeal at the time the judgment in this matter was delivered*". The particulars given in support of that ground are, in summary, these:-
 - 4.1 On 11 June 2024 Ms Mogodi lodged an application for leave to appeal under case number 2020/22076;
 - 4.2 The operation and execution of the judgment which gave rise to the judgment debt was in consequence suspended when I delivered judgment on 16 July 2024;

4.3 My finding that Ms Mogodi had not discharged the evidentiary burden resting upon her was influenced by the dismissal of the rescission application;

4.4 I erred and misdirected myself in that I ought at least to have enquired whether that judgment was being appealed against; and

4.5 I ought to have deferred the delivery of judgment pending the finalisation of the appeal.

[5] In the heads of argument delivered on her behalf the ground is developed into the propositions that the final order of sequestration constituted the execution of the judgment debt, that it was accordingly granted contrary to an express statutory prohibition, and that it is for that reason a nullity. It is further contended that Shackleton's attorneys ought to have brought the pending application for leave to appeal to my attention, and that this Court should issue a reminder to legal practitioners of their primary duty to the court.

THE COMMON CAUSE CHRONOLOGY

[6] The chronology relevant to this application is not in dispute:-

6.1 On 13 August 2021, and under case number 2020/22076, default judgment was granted against Ms Mogodi in favour of Shackleton for payment of R271 350.49, interest and costs, arising out of an asset-based finance agreement.

6.2 On 24 May 2022 a net amount of R1 256.95 was recovered by the sheriff pursuant to the attachment of a bank account. No further recovery was made.

6.3 On 21 June 2022 a warrant of execution against movable property was served on Ms Mogodi personally, and the sheriff rendered a nulla bona return.

6.4 On 6 February 2023 Mahomed J granted a provisional order of sequestration. Ms Mogodi's application for the rescission of the default judgment was served on the same day.

- 6.5 On 5 February 2024 the return day was argued before me and judgment was reserved.
- 6.6 On 21 May 2024 the rescission application was heard and dismissed with costs, the order having been uploaded to CaseLines on 22 May 2024. Nothing turns on which of the two dates is used.
- 6.7 On 11 June 2024 Ms Mogodi lodged an application for leave to appeal against the order dismissing the rescission application.
- 6.8 On 16 July 2024 I granted the final order of sequestration.
- 6.9 On 16 August 2024 the present application for leave to appeal was delivered.
- 6.10 On 28 February 2025 this Court refused leave to appeal against the dismissal of the rescission application.
- 6.11 On 6 May 2025 the Supreme Court of Appeal refused leave to appeal. (Shackleton's heads give the date as 7 May 2025; nothing turns on the difference.)
- 6.12 On 22 September 2025 the Constitutional Court refused leave to appeal.

[7] One further matter is common cause, and it lies at the heart of this application. The default judgment of 13 August 2021 has not been rescinded, set aside or varied. The application for leave to appeal lodged on 11 June 2024 was directed at the order dismissing the rescission application, and at nothing else. Ms Mogodi's own heads of argument put the matter beyond doubt: the application was lodged "*against the order of the dismissal of her application for rescission of judgment*".

THE TEST FOR LEAVE TO APPEAL

[8] Section 17(1)(a) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that:-

*"(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."*

- [9] The threshold is a stringent one. Leave to appeal must not be granted unless there truly is a reasonable prospect of success; an applicant must convince the court on proper grounds that there is a realistic chance of succeeding, and prospects which are remote will not suffice.¹ Whether the legislature's use of the word "*would*" in section 17(1)(a)(i) has raised the threshold above that which obtained under the repealed Supreme Court Act 59 of 1959 has been debated at High Court level, a debate to which the Supreme Court of Appeal has adverted without resolving it.² Nothing turns on the point in this matter. On any formulation of the test the result is the same.
- [10] In *Ramakatsa and Others v African National Congress and Another*,³ the Supreme Court of Appeal held that the test postulates a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court; that the prospects must not be remote but must amount to a reasonable chance of succeeding; and that a sound, rational basis for the conclusion that there are prospects of success must be shown to exist. That decision also confirms that a court which is unpersuaded that prospects of success exist must nevertheless enquire whether there is some other compelling reason why the appeal should be heard. I have approached the matter on that footing.
- [11] The issues which arise are these. First, whether section 18(1) of the Superior Courts Act suspended the default judgment of 13 August 2021.

1 MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016) paras 16–17.

2 Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021) para 10.

3 Ramakatsa above n 2 para 10.

Second, whether the final order of sequestration constituted the execution of that judgment. Third, whether the order is a nullity. Fourth, whether I misdirected myself in failing to enquire into, or to have regard to, the pending application for leave to appeal. Fifth, whether the proposed appeal would in any event have any practical effect or result.

WHETHER THE DEFAULT JUDGMENT WAS SUSPENDED

[12] Section 18(1) of the Superior Courts Act provides:

“Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”

[13] The suspension for which the section provides attaches to *"a decision which is the subject of an application for leave to appeal or of an appeal"*. The enquiry is therefore a narrow and a factual one: which decision was the subject of the application for leave to appeal lodged on 11 June 2024?

[14] On Ms Mogodi's own papers the answer is that it was the order dismissing her rescission application. It was not the default judgment. The default judgment was not the subject of that application, nor of any other application for leave to appeal, nor of any appeal. Section 18(1), on its plain terms, therefore never operated upon it.

[15] It is asserted in the heads delivered on Ms Mogodi's behalf that it is *"common cause"* that the operation and execution of both the default judgment and the order dismissing the rescission application was suspended, and that it is common cause that the suspension of both was still in place on 16 July 2024. That is not so. The proposition is not a fact but a conclusion of law, and it is squarely disputed by Shackleton. A contested question of statutory interpretation does not become common cause because one party asserts that it is.

[16] The argument advanced requires this Court to read into section 18(1) words which the legislature did not use, namely that the suspension of a decision also suspends every anterior decision which the impugned decision left

undisturbed. No authority was cited for that proposition, and I am aware of none.

[17] Section 18(1) deliberately confines the statutory suspension to a decision which is the subject of an application for leave to appeal or of an appeal. Applications for rescission were pointedly not included.

[18] That was the reasoning of Meyer J in *Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another*,⁴ where the learned judge held:

“Contextually read, I am of the view that had it been the intention of the legislature for the operation and execution of a decision which is the subject of an application for rescission also to be automatically suspended, then such decision would have been expressly included in section 18(1).”

[19] If the launching of a rescission application does not suspend the judgment sought to be rescinded, it is difficult to see upon what principle an application for leave to appeal against the *refusal* of that rescission could do so. The refusal of rescission leaves the underlying judgment precisely where it stood before the rescission application was brought. It confirms, rather than disturbs, that judgment.

[20] There is a further difficulty, and it is a practical one. Suspension of the “*operation and execution*” of an order dismissing an application has little content. Such an order is in substance a negative one. Apart from the costs order which accompanies it, there is nothing in it which operates, and nothing in it which can be executed. Its suspension does not revive the rescission application, and it certainly does not place in abeyance a judgment which was never appealed against.

4 *Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another* (17119/15) [2015] ZAGPJHC 233; 2016 (6) SA 466 (GJ) para 18.

[21] For these reasons I am not persuaded that another court would reasonably conclude that the default judgment of 13 August 2021 was suspended on 16 July 2024. On the contrary, it appears to me to be plain that it was not.

WHETHER THE SEQUESTRATION ORDER CONSTITUTED EXECUTION

[22] Were I wrong in the conclusion set out above, Ms Mogodi faces a second and independent difficulty.

[23] I accept, as I was urged to do, that "*execution*" bears a wide meaning. In *Minister of Finance v Sakeliga NPC* 5 the Constitutional Court held that execution of a judgment means giving effect to the judgment, whatever its nature, and that the concept is not confined to execution under a writ.

[24] The question, however, is not what execution means. It is whether the order which I granted on 16 July 2024 gave effect to the default judgment. In my view it did not. It gave effect to the Insolvency Act 24 of 1936.

[25] A sequestration order is not a mechanism by which a money judgment is enforced. It is a discrete statutory remedy with its own requirements. A sequestrating creditor must establish a liquidated claim of not less than R100,6 an act of insolvency or actual insolvency, and reason to believe that sequestration will be to the advantage of creditors.⁷ On the return day the burden lay upon Ms Mogodi to show why the provisional order should not be made final. That enquiry was an independent judicial enquiry into the requirements of the Insolvency Act, not the enforcement of a judgment.

[26] The act of insolvency relied upon was that contemplated in section 8(b) of the Insolvency Act, arising from the nulla bona return rendered on 21 June 2022. That act of insolvency was complete some two years before the

5 Minister of Finance v Sakeliga NPC (previously known as Afribusines NPC) and Others [2022] ZACC 17; 2022 (4) SA 401 (CC) para 13.

6 Section 9(1) of the Insolvency Act 24 of 1936.

7 Section 12(1) of the Insolvency Act.

rescission application was dismissed and before the application for leave to appeal was lodged. An act of insolvency, once committed, is not undone by subsequent events. It was also common cause on the joint practice note that Ms Mogodi serviced her home loan while the judgment debt remained unpaid.

- [27] The default judgment served, in these proceedings, as evidence of the indebtedness. It was not the order to which effect was given. As Adv Stevenson correctly submitted, a judgment is not a jurisdictional requirement for sequestration at all; it is prima facie proof of a liquidated claim, no more.
- [28] There is a further consideration which points in the same direction. A sequestration order is not granted for the benefit of the sequestrating creditor. It brings about a concursus creditorum, the effect of which is that the rights of the general body of creditors are fixed and individual creditors may no longer proceed by way of execution.⁸ Far from executing the default judgment, the order which I granted had the effect of precluding Shackleton from executing it.
- [29] Accordingly, even on the assumption that the default judgment stood suspended on 16 July 2024, I am not persuaded that another court would reasonably hold that the granting of a final order of sequestration constituted the execution of, or gave effect to, that judgment.

WHETHER THE ORDER IS A NULLITY

- [30] The nullity argument rests upon three decisions. In *Master of the High Court, Northern Gauteng High Court, Pretoria v Motala NO and Others*⁹ the Supreme Court of Appeal held that a judge who appointed liquidators had "*usurped for himself a power that he did not have*", that power having been conferred by statute upon the Master, and that his order was consequently

8 Walker v Syfret NO 1911 AD 141 at 166.

9 Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others (172/11) [2011] ZASCA 238; 2012 (3) SA 325 (SCA) para 14.

a nullity. In *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others*¹⁰ the judge who purported to amend an order was functus officio and therefore lacked the power to do so. In *Knoop and Another NNO v Gupta (Tayob Intervening)*¹¹ the order was granted contrary to the express prohibition contained in section 18(4) of the Superior Courts Act.

- [31] The thread which runs through all three is that the court concerned purported to exercise a power which it did not possess, or acted in the face of an express statutory prohibition upon the making of the order in question.
- [32] This Court unquestionably has the power to place the estate of a debtor under final sequestration. That power is conferred by the Insolvency Act. No provision of the Insolvency Act, of the Superior Courts Act or of any other enactment prohibited the making of the order of 16 July 2024. Section 18(1) does not prohibit a court from adjudicating a matter or from delivering judgment. It suspends the operation and execution of a decision. It is not addressed to the jurisdiction or competence of a court at all.
- [33] The complaint, properly analysed, is not that I lacked the power to make the order. It is that I made it without knowledge of a fact which was never placed before me, and (it is said) upon a mistaken view of the law. A complaint of that nature, if well founded, gives rise to an appealable error, and may in an appropriate case found relief under Uniform Rule 42(1)(a). It does not render the resulting order void *ab initio*. Not every order which is wrong is a nullity, and the distinction is an important one.

10 *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others; Mathibane and Others v Normandien Farms (Pty) Ltd and Others* (512/2016 and 370/2017) [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA) para 53.

11 *Knoop and Another NNO v Gupta (Tayob Intervening)* (115/2020) [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA).

[34] There is, moreover, a tension within the argument itself. *Motala* holds that a nullity requires no pronouncement to that effect and need not first be set aside. Ms Mogodi relies upon that passage, yet she seeks leave to appeal so that a Full Court may set the order aside. The heads delivered on her behalf address this under the heading "*Declarator versus appeal*", and contend that nullity is simply the ground of appeal and does not alter the remedy. I need not decide that question, because the premise upon which the argument rests — that the order was granted contrary to a statutory prohibition — fails for the reasons already given.

[35] The applicant has therefore not established a reasonable prospect that another court would find the final order of sequestration to be a nullity.

THE FAILURE TO ENQUIRE, AND THE CONDUCT OF THE ATTORNEYS

[36] The sequestration application was argued on 5 February 2024 and judgment was reserved. The application for leave to appeal upon which Ms Mogodi relies was lodged more than four months later, on 11 June 2024.

[37] A court which has reserved judgment does not embark upon its own enquiries into the state of other proceedings between the parties. A litigant who wishes a court to have regard to a fact which arises after argument must place that fact before the court, whether by an application to lead further evidence, by a supplementary affidavit delivered with leave, or at the least by a request through the registrar for leave to make further submissions. There is a well-established procedure for doing so, and it exists precisely because the alternative — a court seized of a reserved judgment making its own investigations — is neither practicable nor consistent with the adversarial process.

[38] Ms Mogodi took none of those steps. The step upon which she relies was her own step, taken in other proceedings, of which she plainly had knowledge. If she considered it material to the outcome of the sequestration application, the obligation to bring it to my attention rested, first and foremost, upon her. She did not do so, and she has advanced no explanation for that failure.

- [39] I am accordingly unable to find that I misdirected myself by failing to have regard to a fact which was never placed before me. Nor can it be said that I ought to have deferred the delivery of judgment pending the outcome of an application of which I had no knowledge.
- [40] As to the criticism directed at Shackleton’s attorneys, I was referred to *M.R.S v B.S and Others*.¹² That matter concerned a practitioner who enrolled upon the unopposed roll a matter which she knew to be opposed, and who thereby obtained an order which she knew she was not entitled to seek. The conduct there censured bears no resemblance to what occurred here. Shackleton’s attorneys uploaded the order dismissing the rescission application — a document directly responsive to the very issue which stood reserved, and one which Ms Mogodi could scarcely complain of having been placed before me. They were under no corresponding duty to file, on their opponent’s behalf, a process issued by their opponent in separate proceedings which their opponent had elected not to bring to my attention.
- [41] In any event the complaint takes Ms Mogodi nowhere. Given the conclusion which I have reached on the proper construction of section 18(1), the outcome would have been no different had the application for leave to appeal of 11 June 2024 been placed before me the day it was lodged.
- [42] For completeness I record that the heads delivered on Ms Mogodi’s behalf also address whether it was necessary for the warrants of execution to have been set aside. Both warrants had by then been executed and were spent. Nothing turns upon the point, and it does not advance the proposed appeal.

THE PROPOSED APPEAL WOULD HAVE NO PRACTICAL EFFECT

- [43] There is a further and independent reason why leave must be refused.
- [44] Section 16(2)(a)(i) of the Superior Courts Act provides that when, at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone. The principle is not confined to appeals already before

12 *M.R.S v B.S and Others* (D1249/2025) [2026] ZAKZDHC 5 (4 February 2026).

a court of appeal. In *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another*¹³ the Supreme Court of Appeal dismissed an *application for leave to appeal*, with costs, on the footing that supervening events had deprived the proposed appeal of any practical significance and that it was, as that Court put it, stillborn from the outset. It follows that an appeal which would inevitably meet that fate cannot be said to enjoy a reasonable prospect of success within the meaning of section 17(1)(a).

[45] The sole premise of the proposed appeal is that, on 16 July 2024, an application for leave to appeal was pending. That application has since been finally and comprehensively disposed of. Leave to appeal was refused by this Court on 28 February 2025, by the Supreme Court of Appeal on 6 May 2025, and by the Constitutional Court on 22 September 2025. The rescission application failed at every level at which it was pursued. The default judgment stands today, unrescinded, unappealed and fully operative, and the indebtedness which it records remains unpaid.

[46] Mr Molele's answer is that orders refusing leave to appeal operate prospectively and not retrospectively; that they cannot undo what was done before they came into existence; and that a live controversy therefore remains between the parties. He relies upon *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹⁴ and *Minister of Tourism and Others v AfriForum NPC and Another*.¹⁵ The premise is sound as far as it goes. The conclusion does not follow. The enquiry under section 16(2)(a)(i) is not whether the parties continue to

13 *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* (245/2017) [2018] ZASCA 12; 2018 (4) SA 433 (SCA) (8 March 2018).

14 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

15 *Minister of Tourism and Others v AfriForum NPC and Another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC).

disagree, but whether the decision sought on appeal will have a practical effect or result.

[47] Assume, in Ms Mogodi's favour, that she succeeds on appeal and that the final order of sequestration is set aside. The consequence would be the revival of the provisional order granted by Mahomed J on 6 February 2023, which she has never attacked and which was granted at a time when no application for leave to appeal was pending anywhere. The matter would simply be re-enrolled for a return day. On that occasion the only defence which Ms Mogodi has ever raised — that the debt was disputed on bona fide and reasonable grounds because a rescission application was pending — would be unavailable to her, the rescission having by then failed as far as the Constitutional Court. The evidential burden which she failed to discharge in February 2024 would be incapable of discharge now. A final order of sequestration in identical terms would be the inevitable result.

[48] The proposed appeal would therefore achieve nothing beyond delay and a duplication of costs which the insolvent estate and its creditors can ill afford. The decision sought would have no practical effect or result. On this ground alone the application falls to be dismissed.

WHETHER THERE IS SOME OTHER COMPELLING REASON

[49] Not being persuaded that the appeal would have a reasonable prospect of success, I am obliged to consider whether there is nevertheless some other compelling reason why the appeal should be heard. It was submitted that the appeal raises an important question of law which will affect future disputes, and that it is in the interests of justice that it be heard.

[50] I do not agree. The question which the proposed appeal raises is answered by the plain language of section 18(1) and by *Erstwhile Tenants*. No conflicting judgments were placed before me, and I am aware of none. A contention which is not arguable does not become a compelling reason for an appeal because it is described as important. Nor do the interests of justice favour the hearing of an appeal which, for the reasons already given, could produce no practical result.

COSTS

[51] There is no reason why costs should not follow the result. The costs of the sequestration application were made costs in the insolvent estate. This application, by contrast, was a wholly unsuccessful attempt by Ms Mogodi, in her own interest, to overturn that order, and it has put Shackleton to the expense of opposing it and of delivering heads of argument. She must bear those costs.

[52] Uniform Rule 67A(3) requires me to indicate the scale upon which party and party costs are to be taxed. Having regard to the nature of the matter, the volume of the papers and the complexity of the issues raised, scale B is appropriate.

ORDER

[53] In the result the following order is made:

1. The application for leave to appeal is dismissed, with costs, such costs to be taxed on scale B.

APPEARANCES:

On behalf of applicant:

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