IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 10604/2020

In the matter between:

RICHARD EDEN Applicant

and

STEVEN ELLIS First Respondent

NEIL GORE N.O. Second Respondent

AND

Case number: 11636/2023

In the matter between:

STEVEN ELLIS Applicant

and

RICHARD EDEN First Respondent

MARISE EDEN (born ROSSOUW) Second Respondent

Coram: Acting Justice P Farlam

Heard: 13 August 2024

Delivered electronically: 28 November 2024

JUDGMENT

FARLAM AJ

INTRODUCTION

[1] In the previous High Court litigation between the parties, the judgment of Rogers J (as he then was)[1] commenced with the following paragraph:

> *'There are two applications before me. In the first, the applicant is Mr Steven Ellis and the respondent Mr Richard Eden. In that application, which I shall call the enforcement application, Mr Ellis seeks judgment against Mr Eden in the sum of R971,132.28, being the amount reflected as owing by Mr Eden to Mr Ellis in a liquidation and distribution account prepared by a receiver pursuant to an order of this Court dissolving an alleged partnership between the parties. In the second application, Mr Eden is the applicant and the respondents are Mr Ellis and the receiver, Mr Neil Gore, who abides. By way of the second application, Mr Eden seeks the rescission of the order dissolving the alleged partnership. It is common ground that the success or failure of the enforcement application hinges solely on the success or failure of the rescission application.'*

[2] The present case evokes a sense of déjà vu. For again, there are two applications: one by Mr Ellis, brought in response to a debt owing by Mr Eden;

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[1] Reported as *Ellis v Eden* 2023 (1) SA 544 (WCC) (and referred to below as *Ellis v Eden (1)*).

and the second by Mr Eden, who seeks to rescind the order on which the first application is premised. And again, the success or failure of the first application is entirely dependent on the fate of the rescission application.

[3] As in the previous case, I consider that the rescission application should fail, with the result that Mr Ellis should obtain the order that he seeks in his application (the provisional sequestration of the estate of Mr Eden). My reasons for that conclusion follow.

RELEVANT FACTUAL BACKGROUND

[4] The judgment of Rogers J referred to in paragraph 1 above summarises facts germane to the parties' relationship between mid-2017 and mid-2022, which do not require repetition. In part as a result thereof, the factual background relevant to this judgment can be set out briefly. It is convenient to do so by referring to relevant events in chronological order.

[5] Between *mid-2017 and December 2019*, Mr Eden and Mr Ellis conducted a partnership, under the name and style of Extruct Exhibitions (Pty) Ltd (**Extruct**).

[6] On *6 August 2020*, Mr Ellis brought an action for the dissolution of the partnership and the appointment of a receiver (the **dissolution action**), as well as a damages action.

[7] The dissolution action was not opposed. Mr Ellis accordingly brought an application for default judgment in respect of the dissolution action on *8 October 2020*, which was granted by this Court on *12 January 2021*.

Pursuant thereto, Mr Neil Gore was appointed as the receiver, responsible for the preparation of a liquidation and distribution account (**L&D account**) to facilitate the equal distribution of the partnership assets.

[8] The second L&D account prepared by Mr Gore reflected the amount of R971 132.28 as owing by Mr Eden to Mr Ellis. Mr Eden did not object to the second L&D account; but he nevertheless failed to pay that amount, as requested.

[9] On *3 November* 2021, Mr Ellis consequently instituted the proceedings referred to by Rogers J as the *'enforcement application'*, in which he sought payment of the amount of R971,132.28 (plus interest and costs).

[10] Mr Eden did not immediately oppose the enforcement application. A notice of opposition was only filed on *25 January 2022*. On *15 March 2022*, Mr Eden delivered answering papers in the enforcement application. At the same time, he applied to rescind the default judgment order. That application was, as indicated in the quote in paragraph 1 above, the sole response to the enforcement application.

[11] On *6 June 2022*, this Court (*per* Rogers J) dismissed the rescission application and consequently, too, granted the enforcement application. The Court accordingly ordered Mr Eden to pay Mr Ellis the amount of R971,132.28, plus

interest thereon at the prescribed rate from 19 October 2021 to date of payment.[2]

[12] Mr Eden unsuccessfully applied for leave to appeal against the order of Rogers J,[3] with his application for leave to appeal to the Supreme Court of Appeal (**SCA**) being dismissed with costs on *12 October 2022*.

[13] Writs of execution followed: on *28 November 2022*, in respect of the enforcement application amount of R971,132.28 plus interest and costs; and on *16 April 2023*, in respect of the taxed costs of Mr Eden's unsuccessful application to the SCA for leave to appeal, being R25,952.14.

[14] As Mr Eden has acknowledged, the total amount which he owes to Mr Ellis as a result of Rogers J's order and his unsuccessful attempt to appeal it, is *R997 084.92*, plus interest and High Court costs.

[15] The sheriff unsuccessfully attempted to execute the writs in respect of the Rogers J order and the SCA order on *17 February 2023* and *31 May 2023*, respectively. Being unable to attach anything to satisfy the writs, he issued *nulla bona* returns.

[16] As is undisputed, a *nulla bona* return is an act of insolvency, in terms of section 8(b) of the Insolvency Act, 24 of 1936, thereby entitling the creditor to bring

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2 This was under case number 10604/2020.

3 Rogers J dismissed Mr Eden's application for leave to appeal in the High Court on 28 July 2022.

sequestration proceedings. On *17 July 2023*, Mr Ellis duly instituted an application to sequestrate Mr Eden, which was served on *21 July 2023*.

[17] Mr Eden filed a notice of intention to oppose the application on *29 July 2023*. No answering affidavit was however forthcoming from Mr Eden within the prescribed time period, or in the months that followed. Accordingly, on *29 November 2023*, Mr Ellis brought a chamber book application to compel an answering affidavit in the sequestration application, failing which the application could proceed on an unopposed basis.

[18] On *8 April 2024*, Mr Eden brought an application, under case no. 10604/2020, to rescind paragraph 2 of Rogers J's order of 6 June 2022.[4] That application is based on an alleged fraud by Mr Ellis, which is said to have resulted in the liquidation and distribution account (**L&D account**) in respect of the dissolved partnership incorrectly reflecting the amount of R971,132.28 as owing by Mr Eden to Mr Ellis. It cites as a second respondent Mr Gore, the receiver who prepared the second L&D account in respect of the dissolved partnership.

[19] On *17 April 2024*, Mr Eden applied for leave to deliver, out of time, an answering affidavit in the sequestration application (case no. 11636/2023). That answering affidavit indicated that the rescission application constituted his defence to Mr Ellis's sequestration application, as if it were to succeed, the

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[4] There has been no application to rescind the SCA order which dismissed the application for leave to appeal against Rogers J's order. Such a challenge was not however necessary, as the SCA order merely rejected an application seeking to appeal that order, and thus neither replaced nor amended the order of Rogers J.

basis for the sequestration application (the unfulfilled liquidated claim enjoyed by Mr Ellis) would fall away.

[20] The delivery the late sequestration answering affidavit, as well as the rescission application of a few days before, resulted in the sequestration application being postponed on *19 April 2024*, for hearing simultaneously with the rescission application on the semi-urgent roll.

[21] The matters were again postponed on *21 May 2024*, this time for hearing on the semi-urgent roll on 13 August 2024. On both occasions, wasted costs stood over for later determination.

THE RESCISSION APPLICATION

[22] Mr Eden's rescission application has been brought under the common law. As mentioned, it is based on an alleged fraud by Mr Ellis, who, Mr Eden claims, fraudulently misrepresented to Mr Gore the true amount of his own personal expenses run through the bank account of the partnership. Had Mr Gore been aware of the alleged fraud when dissolving the partnership, Mr Eden submits, the L&D account would have looked different; while had the Court been aware of it when considering the enforcement application, the Court would not, according to Mr Eden, have granted the order which it did.

Relevant legal principles

[23] The general principles applicable to common-law applications for rescission based on fraud were set out by the SCA in *Moraitis Investments v Montic Dairy*,[5] where the Court *inter alia* stated (at para [12]):[6]

> *'The issue [concerning the grounds on which an order of court can be set aside] is far more nuanced than the arguments [in the parties' heads] suggest. The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(*b*) or rule 42 of the Uniform Rules, or under the common law on good cause shown.[7] In contested proceedings the test is more stringent.[8] A judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party.[9] As the cases show, it is only where the fraud – usually in the form of perjured evidence or concealed documents – can be brought home to the successful party that* restitutio in integrum *is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that once a judgment has been given it is not lightly set aside, and De Villiers JA said as much in* Schierhout.[10]'

[24] As the SCA has also confirmed, a plaintiff or applicant seeking to obtain the rescission of a judgment and order on the grounds of fraud, must, in particular,

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5 *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* 2017 (5) SA 508 (SCA); [2017] 3 All SA 485 (SCA).

6 The footnotes in the original have been retained.

7 *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A).

8 Ibid at 1041B-E.

9 *Makings v Makings* 1958 (1) SA 338 (A); *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166G-J.

10 *Schierhout v Minister of Justice* 1927 AD 94 at 98.

prove: (i) that the defendant / respondent gave incorrect evidence during the initial proceedings, (ii) that [s]he did so fraudulently with the intention to mislead the court and (iii) that this false evidence diverged from the truth to such an extent that the court would have given a different judgment had it been aware of the true position.[11]

[25] As observed by Zulman J (as he then was) in *Nedperm v Verbri*,[12] *'fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established'*.[13] It is particularly difficult to prove fraud in motion proceedings, not least because the version of the respondent must, save where inadequately justified or plainly implausible, be accepted.[14] In *Nelson v Nelson*,[15] Govindjee J even remarked,[16] when considering an application to rescind a court order under Rule 42(1)(*c*), alternatively the common law, that *'It has been suggested that it is, as a general rule, practically impossible to establish fraud using motion proceedings'*.[17]

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[11] *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough and Others* [2020] ZASCA 60 at paras [16]-[17], confirming *Childerley Estate Stores v Standard Bank of SA Ltd* 1934 OPD 163 at 169.

[12] *Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 (W) at 220B.

[13] See, too, Cilliers *et al Herbstein & Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed. Vol. 1 at p 940, where it was stated that: "*charges of fraud are in their nature of the greatest gravity and should not lightly be made, and when made should not only be made expressly but should be formulated with the precision and fullness demanded in a criminal case.*" See, too, *Schierhout* fn.10 above at 98; and *Nelson v Nelson* 2283/2021) [2022] ZAECGHC 9 (17 May 2022), where it was stated (at para [32]) that "Courts have set an exceedingly high threshold before countenancing an allegation of fraud".

[14] *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[15] Footnote 13 above.

[16] At para [31], with reference to *Shomang v Moamogoe and Others* [2021] ZAGPJHC 772 at para [1],

[17] In similar vein, Baker AJ (as he then was) stated in *Deary v Deary* 1971 (1) SA 227 (C) at 230B-C that:

[26] As held in *Schierhout*, and endorsed in *Moraitis*, a party seeking rescission in any event faces a difficult task, as a judgment of a court, even if incorrect, will not easily be set aside. That was recently reaffirmed by the Constitutional Court in *City of Ekurhuleni*,[18] where the Court held (in relation to an application under the common law to rescind an order granted by consent):[19]

> *'In assessing whether a case has been made out for rescission, it is important to bear in mind that a consent order "brings finality to the* lis *between the parties; the* lis *becomes* res judicata *(literally, a 'matter judged')". The fact that an order may be incorrect or in conflict with the Constitution is not, on its own, a reason for its rescission. Indeed, this Court has made it clear that it will not, in a constitutional dispensation where court orders are sacrosanct, readily allow a widening of the grounds for rescission. The City must be able to demonstrate a sound and recognised legal basis for rescission.'*

[27] As was also noted in *City of Ekurhuleni*,[20] one of the requirements for rescission under the common law is whether the rescission application has

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'Had the applicant continued to rely upon a fraudulent misrepresentation which induced the Court to grant summary judgment against him in the first instance, he would have had to proceed by way of action to have that judgment set aside. (See Herbstein and van Winsen, Civil Practice of the Superior Courts, 2nd ed. p. 427, and the authorities referred to in note 44). That being so, had he relied upon a fraudulent non-disclosure, the Court would have been obliged to dismiss the present application on the ground that the remedy was misconceived.'

'The correctness of the judgment in Deary, which was also supported by inter alia Bristow v Hill *1975 (2) SA 505 (N), was questioned by Eloff J in* Santos Erec v Cheque Discounting Co. (Pty) Ltd *1986 (4) SA 752 (W), where it was held that it was competent to bring a rescission application under the common law either by way of motion proceedings or by way of action. I agree with Eloff J that it is not necessarily required of a party seeking rescission under the common law to proceed by way of action. However, a party seeking rescission by way of application, rather than action, faces the risk of the Court finding that the choice of procedure was inappropriate in the light of foreseeable disputes of fact.'*

[18] *City of Ekurhuleni Metropolitan Municipality; In re: Unlawful Occupiers: 1 Argyl Street and others v Rohlandt Holdings CC and Others* (CCT 228/22) [2024] ZACC 10 (31 May 2024).

[19] Ibid at para [87] (footnotes omitted).

[20] Ibid at paras [86] and [88].

been brought timeously (i.e., within a reasonable time). The Court added in this regard that:

> *'What is reasonable will depend on the circumstances of the particular case. A starting point in determining what is reasonable is the 20-day time period referred to in rule 31(2)(b) of the Uniform Rules of Court. Where there has been delay, the applicant must show that there is a reasonable explanation for the delay.'*[21]

As observed by this Court in *Williams v Shackleton Credit Management*,[22] an inordinate delay in instituting an application to rescind a default judgment may count against the rescission applicant and result in rescission being refused.[23] That was also pointed out by Rogers J in *Ellis v Eden (1)* – where the rescission application had been brought in terms of Uniform Rule 42(1) – in which the learned judge *inter alia* stated, with reference to his earlier judgment in *Nkata*:[24]

> *'It has been said that the purpose of rule 42(1) is "to correct expeditiously an obviously wrong judgment or order", that the interests of finality dictate that the Court should be approached within a reasonable time, and that it would be a proper exercise of the discretionary power to refuse rescission in the case of unreasonable delay.'*

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[21] As authority for the proposition in the final sentence of the quote (that an application for rescission must provide a reasonable explanation for any delay), the Court cited *Roopnarain v Kamalapathy* 1971 (3) SA 387 (D) at 390F-391D; *Nkata v Firstrand Bank Ltd* 2014 (2) SA 412 (WCC) at paras [26]-[29] and *NW Civil Contractors CC v Anton Romaano Inc* [2019] ZASCA 143; 2020 (3) SA 241 (SCA) at para [21].

[22] *Williams v Shackleton Credit Management (Pty) Ltd* 2024 (3) SA 234 (WCC) at para [23].

[23] See, too, *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 703E-G.

[24] Ibid at para [63].

[28] A further issue in any rescission application under the common law, as also noted in *City of Ekurhuleni*,[25] *is 'whether the court should exercise the ultimate discretion it enjoys to refuse rescission, even where the formal requirements are established'*. According to the Court, a court considering an application under the common law *'enjoys a wide discretion. It may refuse rescission if justice and equity demand it, notwithstanding that an applicant had shown formal compliance with the requirements for granting rescission.'*[26]

The rescission sought in the present case

[29] As mentioned, Mr Eden alleges that Mr Ellis was guilty of fraudulent misrepresentations to Mr Gore, when the latter was preparing the second L&D account, thereby resulting in that account reflecting an amount owing by Mr Eden which was not in fact owed by him to Mr Ellis. That in turn, so Mr Eden claims, resulted in the High Court being brought under a mistaken impression in the enforcement application, with the result (so Mr Eden claims) that he is entitled to set aside the order of Rogers J[27] which directed Mr Eden to pay Mr Ellis the amount of R971,132.28, together with interest at the prescribed rate from 19 October 2021 to date of payment, and the costs of the enforcement application (including the costs reserved on 3 February 2022).

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[25] Ibid at para [86]; see, too, para [100].

[26] Ibid at para [100].

[27] Paragraphs 2(a) and (b) of the order in *Ellis v Eden (1)*.

The delay in bringing the rescission application

[30] A threshold problem faced by Mr Eden is that his rescission application relates to an order which was handed down on *6 June 2022*, and confirmed by the SCA on *12 October 2022*, and yet was only brought on *8 April 2024* (some twenty-two (22) months after the order was delivered). The rescission application was moreover brought some eight-and-a-half (8½) months after the sequestration application was served on Mr Eden (on *21 July 2023*). There is an ineluctable inference that, but for the sequestration application, the rescission application would not have been brought, and Mr Eden would have simply continued to ignore the Court's order in the enforcement application. But, even if one were to assume that it was legitimate for the rescission application to be a response to the sequestration application, it was a dilatory response, which prevented the timeous hearing of the sequestration application. What is more, Mr Eden had already been warned by the High Court in *Ellis v Eden (1)* about the consequences of an unreasonable delay in bringing a rescission application, and been told by Rogers, in the penultimate paragraph in the body of his judgment (para [66]), that *'assuming the dissolution order was erroneously granted, I would exercise my discretion against granting rescission, having regard to the gross delay and the unsatisfactory nature of Mr Eden's explanations'*.

[31] The delay in the bringing of the (second) rescission application was, to use the terminology of Rogers J, "gross". As the Constitutional Court noted in *City of Ekurhuleni*, a starting point for assessing the reasonableness of the timing of a rescission application is the 20-day time period referred to in Rule

31(2)(*b*).[28] That period pales into insignificance when reckoned against the time that passed between the handing down of Rogers J's judgment in the enforcement application and the institution of the rescission application – some 22 months, and over 300 days.

[32] The explanation for the unreasonable delay is also inadequate. In summary, Mr Eden's attempted justification of the timing is as follows:

32.1. Mr Eden did not call for Extruct's bank statements to check the accuracy of Mr Gore's L&D accounts, and more particularly the second L&D account sent to the parties on 28 September 2021 because, after engaging Mr Stefan van der Meer as his attorney in or about January 2022, Mr Van der Meer apparently advised him that it was unnecessary to do so, as the enforcement application was supposedly doomed to failure because the first rescission application (directed at the order of 12 January 2021 dissolving the partnership and appointing the receiver) was purportedly unanswerable on a legal point. After Rogers J held the opposite, on 6 June 2022, he applied for leave to appeal against Rogers J's orders, first to the High Court and then to the SCA (both times unsuccessfully, the latter application being dismissed with costs on 12 October 2022.

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[28] The relevance of that period as a guide to what constitutes a reasonable period in a common-law rescission application was also endorsed in *Nkata v FirstRand Bank Ltd* 2014 (2) SA 412 (WCC) at para [27].

32.2. After the institution of the sequestration application on 17 July 2023, Mr Eden appointed new attorneys, who briefed senior counsel. A consultation was then held on 23 August 2023, at which Mr Eden was apparently advised that it was imperative for his defence in the sequestration application for him to obtain copies of Extruct's bank statements in order to prove that Mr Ellis had allegedly defrauded him by not disclosing the full extent of his use of Extruct's bank account for his personal expenses.

32.3. Subpoenas, apparently dated 26 October 2023, were thereafter served upon ABSA calling on them to produce copies of Extruct's various bank statements.

32.4. ABSA delivered the bank statements (covering the period 1 August 2017 to 13 December 2019) on 14 December 2023. Mr Eden then analysed them and forwarded his analysis to senior counsel on 7 January 2024. A consultation was held on 11 January 2024, at which a range of other documents were requested.

32.5. Some of the documents considered necessary were requested from Mr Ellis's attorneys, who emailed the last of these documents to Mr Eden's attorneys on 23 February 2024, whereafter a further consultation was held on 24 February 2024. Other consultations followed on 29 February and 1 March 2024.

32.6. Senior counsel prepared a draft of the rescission application by 12 March 2024. A consultation was then held on 13 March 2024,

whereafter Mr Eden sent an updated analysis of the bank statements to his attorneys on 15 March 2024.

32.7. Largely as a result of unavailability of legal representatives, the rescission application was thereafter issued on 8 April 2024.

[33] There are at least two problems with that explanation.

33.1. First, and importantly, if Mr Eden believed that the second L&D account was attributable to fraud which would be revealed by Extruct's bank statements, he should have sought the bank statements back in 2021 or 2022, or at least after the rescission application was dismissed by the High Court and further rejected by the SCA and thus in the last quarter of 2022 and the first half of 2023. Even if one were to accept Mr Eden's justification for not having requested the bank statements while the rescission application was pending (and to accept his version that he did not have the bank statements), there is no explanation at all for why Mr Eden did not request them between June 2022, or at least October 2022 when the SCA dismissed his application for leave to appeal against Rogers J's order, and July / August 2023. By that time, the advice on which he states he relied in 2021 and early 2022 – and thus the basis for his not having requested the bank statements during that period – had been shown to be wrong. Had Mr Eden genuinely been desirous of disputing the second L&D account, he should therefore have requested the bank statements then, insofar as he still needed them.

33.2. Second, despite having been apprised by the Court in *Ellis v Eden (1)* of the need for rescission applications to be brought within a reasonable time, he (and his legal team) delayed even after the consultation of 23 August 2023 (which was itself unduly late given the service of the sequestration application on 21 July 2023), with the subpoenas to ABSA only being issued more than two months, and over 60 days, later, on 26 October 2023. That delay – which is three times the length of the period envisaged for Rule 31(2)(*b*) rescission applications – is moreover entirely unexplained. In addition, despite knowing of the time constraints inherent in the institution of rescission applications, Mr Eden only brought his rescission application almost four (4) months after receiving the bank statements on 14 December 2023. Even taking into account the year-end vacation and the extent of the information in the bank statements, that appears to be unreasonably long (all the more so given the need for expedition in the light of the previous delays), while the explanation is also patchy and not entirely satisfactory.

[34] Mr Eden is effectively seeking to put the parties back in the position that they were in back in September 2021, prior to the second L&D account being sent to the parties. I agree with the analogous remarks of Rogers J in paragraph [52] of *Ellis v Eden (1)* about the undesirable effects of such an order and how it undermines the interests of finality, as recently affirmed by the Constitutional Court in *City of Ekurhuleni*.

[35] As in *Ellis v Eden (1)*, I am accordingly of the view that there was a gross delay which has not been satisfactorily explained, and which it would not be in the

interests of justice to overlook or condone. For this reason alone, the rescission application should, in the exercise of my discretion, be dismissed.[29]

Failure to show fraud on the papers

[36] I am in event not persuaded that a finding of fraud against Mr Ellis can be made on the papers, or thus that Mr Eden has shown that Mr Ellis fraudulently misrepresented the financial position to Mr Gore, resulting in the second L&D account substantially overstating Mr Eden's liability to Mr Ellis.

[37] Mr Eden attempted to prove fraud by Mr Ellis by annexing to his founding affidavit in the rescission application various schedules which he had prepared (annexures "FA5" to "FA20"), which referred to entries in the Extruct's bank statements which were alleged to relate to personal expenses of Mr Ellis (rather than partnership expenses), which had not been treated as such by Mr Gore, because (so Mr Eden alleged) Mr Ellis had fraudulently misrepresented the position to Mr Gore. According to Mr Eden's founding affidavit in the rescission application, Mr Ellis owed him R1 006 140.69 as a result of that alleged fraud, which exceeded Mr Ellis' claim against him (of R997 084.92) by R9 055.71.

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[29] I do not agree with Mr Eden's counsel that the parties' consent to the late filing of Mr Eden's answering affidavit and Mr Ellis's replying affidavit, as recorded in order of Goliath AJP of 21 May 2024, somehow precludes Mr Ellis from complaining about Mr Eden's delay in seeking rescission of paragraph 2 of Rogers J's order in the rescission application. The parties were merely agreeing that condonation applications concerning the failure to comply with the time periods in the Uniform Rules were unnecessary. That agreement cannot impact on how the Court should evaluate the factors relevant to the granting or refusal of the rescission application (substantive issues ventilated in the affidavits).

[38] Mr Ellis vehemently disputed the allegations of fraud. He also denied that the schedules were accurate. Mr Ellis pointed out that some of the entries undeniably related to partnership expenses. Mr Eden conceded this to be so in the case of at least some of the schedules and some entries on other schedules. Mr Eden was thus constrained to acknowledge by the time of the hearing that his alleged claim against Mr Ellis was less than the amount that he owed Mr Ellis pursuant to the orders of Rogers J and the SCA (and thus the amount of the writs against Mr Eden which had gone unsatisfied). Mr Eden's counsel nevertheless contended that Mr Eden was entitled to a partial rescission of the order in the enforcement application.[30]

[39] It is not possible for me to conclude on the affidavits whether the second L&D account had, as alleged by Mr Eden, incorrectly reflected personal expenses of Mr Ellis as partnership expenses, to the detriment of Mr Eden. Mr Ellis has in numerous instances cast doubt on Mr Eden's assertions in his schedules, read with his affidavits. Where he has not addressed particular entries, I also cannot conclude, in the light of his explanations and his numerous credible rebuttals of Mr Eden's version, that those entries were personal expenses which were wrongly recorded by Mr Gore.

[40] But, in any event, even if one assumes that personal expenses of Mr Ellis were inaccurately represented as partnership expenses in the second L&D account, Mr Eden has not come close to showing that any such inaccuracies were

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[30] The circumstances in which a judgment can be rescinded in part were helpfully discussed in *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants* CC 2015 (4) SA 103 (GJ).

attributable to fraudulent misrepresentations by Mr Ellis to Mr Gore, or that, as alleged by Mr Eden, *'Mr Ellis perpetrated a fraud on Mr Gore and* [him]'. Any such errors could, on the papers, have been attributable to a variety of reasons: for example, Mr Gore could have failed to interrogate the expenses sufficiently with the partnership's accountant, Mr Penderis, or Mr Ellis, or have made incorrect assumptions; or Mr Ellis could have made statements to Mr Gore in good faith, on the basis of assurances, express or tacit, from Mr Penderis, and fortified by what he perceived Mr Eden to accept; or Mr Ellis could simply have held a different view as to what could legitimately be debited to the partnership to the one that Mr Eden has now adopted.[31] Mr Eden essentially relies for his allegations of fraud on inferences, based on his assessment (sometimes speculative, and on occasions demonstrably wrong) of entries in the bank statements; but not only are such inferences not justified, but his allegations do not meet the strict standard for pleading fraud, and they are also incapable of being accepted in motion proceedings in the face of Mr Ellis's unequivocal denials.

[41] For this reason, too, Mr Eden's rescission application must fail.

Res judicata (issue estoppel) / Abuse of process?

[42] Mr Ellis also objected in argument to the rescission application on the basis that Mr Eden could have objected to the second L&D account when opposing

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[31] Mr Ellis alleges that he and Mr Eden agreed that some personal expenses could be paid using the partnership's funds, as Mr Eden's own practice (confirmed by bank statement entries) shows; and that Mr Eden has been disingenuous in now contending otherwise.

the enforcement application and that it would therefore not be appropriate to permit him to attempt to do so now, as that would offend the principle of *res judicata* / issue estoppel and also be an abuse of process.

[43] Mr Ellis' counsel relied in this regard on the Full Bench decision of this Court in *Basson*[32] (another matter in which the fate of a sequestration application depended on the fact of a rescission application), in which the Court (again *per* Rogers J) stated the following (under the heading "*Res judicata*"):

> *'[49] The Basson sureties did not in their first rescission application assert that the cession agreement was a sham. It was raised for the first time in argument during the hearing of the application for leave to appeal. I disagree with the submission advanced on behalf of OPPL that the decisions of Traverso DJP and the SCA dismissing the applications for leave to appeal can be regarded as determining the fraud defence on its merits. The issue is thus not res judicata in the usual sense.*
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> *[50] However* ***the policy which underlies the principle of res judicata is that nobody should be permitted to harass another with second litigation on the same subject. Such litigation can be viewed as an abuse of process. The same policy prevents a litigant from advancing, by way of second proceedings, something which he could and should have raised in the earlier proceedings, provided that in all the circumstances his conduct in so doing can be regarded as an abuse of process*** *(*Janse van Rensburg & Others NNO v Steenkamp & Another; Janse Van Rensburg & Others NNO v Myburgh & Others *2010 (1) SA 649 (SCA) paras [27]-[30]).*
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> *[51] OPPL contended in the court [a] quo, and Traverso DJP accepted, that the second application was an abuse of process in the above sense. It*

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[32] *Basson NO and Another v Orcrest Properties (Pty) Ltd and two related matters* [2016] 4 All SA 368 (WCC).

> *will be apparent from what I have already said regarding the Basson sureties' delay in bringing the second application that I agree.'*
>
> [emphasis added]

[44] It was clearly open to Mr Eden to have sought to resist the enforcement application on the basis that the second L&D account was inaccurate, whether as a result of deliberate misrepresentations by Mr Ellis or otherwise. As Mr Ellis's counsel pointed out, Rogers J in fact made a comment to that effect in paragraph [62] of *Ellis v Eden (1)*, where he stated that *'... even if the dissolution order had not been timeously impeached, it was open to Mr Eden to object to the accounts prepared by Mr Gore on the basis that particular assets or liabilities had been wrongly excluded or included. ... However, Mr Eden chose not to challenge the accounts. Even in the present proceedings, there has been no attempt to attack the accounts on their merits'.*

[45] Mr Eden's counsel understandably did not seek to dispute this. His argument was instead that a defence along those lines must be expressly pleaded by a party, and cannot be raised for the first time in argument; and that Mr Ellis had not pertinently pleaded reliance on that rule or thus laid a foundation in fact which would enable Mr Eden to deal with such reliance, and he could therefore not rely on it in argument.

[46] In support of that contention, Mr Eden's counsel referred to a passage from the SCA judgment in *Janse van Rensburg*,[33] in which Heher JA, writing for the court, summarised the position as follows [bold emphasis added]:

> *'[29] In* Arnold v National Westminster Bank plc *[1991] 3 All ER 41 (HL) at 48j Lord Keith pointed out that, although Henderson's was a case of action estoppel, the statement of the law has been held to be applicable also to issue estoppel. The learned law lord had earlier referred (at 48e) to* Brisbane City Council v A-G for Queensland *[1978] 3 All ER 30 (PC) at 35-36; [1979] AC 411 at 425, where Lord Wilberforce said*
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> "The second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 and its existence has been reaffirmed by this Board in *Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56. A recent application of it is to be found in the decision of the Board in *Yat Tung Co v Dao Heng Bank* [1975] AC 581. It was, in the judgment of the Board, there described in these words (at 590): ". . . there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." This reference to "abuse of process" had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."
>
> *[30] I respectfully agree. The identification with abuse of the process accords with the policy expressed in the* maxim nemo debet bis vexari pro una et eadem causa *which underlies the principle of res judicata. As was said in the* National Sorghum *case (at 241D-E) the abuse arises when the same cause*

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[33] *Janse van Rensburg NO and Others v Steenkamp and Another; Janse van Rensburg NO and Others v Myburgh and Others* 2010 (1) SA 649 (SCA); [2009] 1 All SA 539 (SCA).

> *of action is raised against a defendant a second time.* ***But what is to be noted from both the*** **Henderson and Brisbane City Council** ***cases is the additional emphasis on the facts of each matter, for how else should a court determine whether the conduct of a party has reached the level of being an abuse? That being so it is for the party who relies on the application of the rule pertinently to plead such reliance and lay a foundation in fact which would enable the opposing parties to deal with such reliance****. In the context of the present appeal that required that the respondent had to lay a basis for barring the liquidators from carrying out what was prima facie their right and duty to employ the remedy created by s 29 of the Act. But I find no such evidence in the record of either appeal."*

[47] It is readily understandable why an argument based on issue estoppel would require a proper factual foundation. If, for example, it were not reasonably possible for an issue to be raised at an earlier stage, it would seem inequitable to preclude a party from subsequently raising it. It is however difficult to understand what more needed to be set out in the affidavits in order for the point to be taken in argument in this case. It was after all Mr Eden's own version that he could have queried the accuracy of the second L&D account in opposition to the enforcement application, and in fact seemingly wanted to do so; but was persuaded by his then attorney that he should put all his eggs in a 'legal argument' basket.[34] Mr Eden's own case is thus that he consciously did not advance an argument that he has now sought to raise in the context of the rescission application. Mr Ellis also repeatedly averred in his answering affidavit that Mr Eden was relying for his rescission on information previously available to him. This therefore seems precisely the sort of case where the res

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[34] Whether that was actually a legal argument, or a mixed argument of law and fact, is of no moment.

judicata / issue estoppel principle would find application. Even if the principle cannot be directly invoked in this case, it would moreover factor into the interests of justice consideration which informs the general discretion that the court has in such circumstances. Had I not already concluded that the rescission application should be dismissed, I would therefore have been minded to reject the application for this reason as well.

CONCLUSION AND COSTS

[48] In the result, the rescission application by Mr Eden (the second application) must fail. As the rescission application was the only answer to the sequestration application by Mr Ellis (the first application), the relief sought in that application (provisional sequestration and a rule *nisi*) must, as a result, also be granted. No return day for the rule *nisi* was proposed, in the event that I were to grant such an order. In the light of the time of year, it would however seem appropriate to set a return date for the rule *nisi* which is three months from the date of this judgment, subject to confirmation with the registrar; alternatively such (other) return date as the registrar allocates.

[49] Given the nature and complexity of the issues, this is not a case where counsel's costs should be on the default scale envisaged by Uniform Rule 67A(3), read with rule 69: i.e., Scale A. But equally, I do not think that the highest scale (Scale C) would be applicable. I shall accordingly order that counsel's costs be taxed on the intermediate scale (scale B).

[50] Mr Eden should also pay the wasted costs of 19 April 2024 and 21 May 2024, which were ultimately attributable to his delays in bringing his rescission application and responding to the sequestration application.[35]

ORDER

[51] I accordingly make the following order:

1. In regard to the rescission application (case no. 10604/2020):

    a. The application is dismissed.

    b. The applicant, Mr Eden, is directed to pay the costs of the respondent, Mr Ellis, with the costs of Mr Ellis's counsel being taxed on Scale B.

2. In regard to the sequestration application (case no. 11636/2023):

    a. The estate of Mr Eden is hereby placed under provisional sequestration.

    b. A rule *nisi* is issued calling upon the first and/or second respondents (Mr Eden and his wife) and any interested parties to show cause, if any, on **27 February 2025** (subject to confirmation with the registrar; alternatively such return date as the registrar allocates), as to why:

        i. Mr Eden's estate should not be placed under final sequestration;

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[35] Insofar as it may be necessary formally to do so, I should also record that, as indicated at the hearing, the further affidavits of Mr Ellis and Mr Eden in the rescission application (deposed to on 13 July 2024 and 6 August 2024, respectively) are admitted into evidence.

ii. The costs of this application should not be costs in the sequestration of Mr Eden's estate.

c. This Order is to be served on:

i. Mr and Mrs Eden at [redacted] Close, [redacted] Estate, George, Western Cape;

ii. The South African Revenue Service (SARS), at 22 Hans Strijdom Avenue, Cape Town, Western Cape;

iii. Any and all employees of Mr Eden and any registered trade union(s) that may represent such employee(s).

3. In relation to both applications Mr Eden is to pay the costs reserved on 19 April 2024 and 21 May 2024 (including the costs of counsel on Scale B).

[redacted]

ACTING JUDGE P FARLAM

For applicant in case no. 10604/2020 and respondents in case no. 11636/2023:

Adv Guy **Elliott SC**

Instructed by: Alta Roos Inc. (George) c/o Bailey Haynes Inc.

For first respondent in case no. 10604/2020 and applicant in case no. 11636/2023:

Adv Bronwynne **Brown**

Instructed by: B Lubbe & Associates (Blouberg) c/o Francis Thompson & Aspden