

SOUTH AFRICA / JUDGMENT

Singh v Body Corporate of St Tropez (386/2023) [2024]

ZASCA 142 (21 October 2024)

[2024] ZASCA 142

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Mokgohloa, Keightley, Hendricks, Naidoo

CASE / FILE NUMBER

386/2023

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FLYNOTES:

PROFESSION – Judge –
Recusal –
Sequestration application by body
corporate against appellant – Judge had been chairperson at
another body corporate
which proceeded against appellant –
Judicial Conduct Committee report after complaint by appellant –
Conflict
of interest – Finding that complaint was
well-founded – Judge ought not to have heard the application
–
Case for her recusal properly established –
Provisional sequestration order set aside.
THE SUPREME COURT OF
APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 386/2023

In the matter between:

LUNESH SINGH

APPELLANT

and

THE BODY CORPORATE OF ST TROPEZ

RESPONDENT

Neutral citation: Singh v The Body Corporate of St Tropez (Case no 386/2023) [2024] ZASCA 142 (21 October 2024)

Coram: PONNAN, MOKGOHLOA and KEIGHTLEY JJA and HENDRICKS and NAIDOO AJJA

Heard: 4 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on the 21 October 2024.

Summary: Provisional order of sequestration – conflict of interest on part of judicial officer raised ex post facto as ground of appeal – Judicial Conduct Committee upholding complaint and finding judicial officer ought mero motu to have recused herself – appeal upheld – provisional sequestration order set aside – application remitted to high court.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokose J, sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court dated 22 November 2021 provisionally sequestering the estate of the appellant, Mr Lunesh Singh, is set aside.

3 The application for the sequestration of the estate of the appellant, Mr Lunesh Singh, is remitted to the high court for consideration by a differently constituted court.

4 The costs of the appeal are reserved for determination by the high court.

Keightley JA (Ponnan and Mokgohloa JJA and Hendricks and Naidoo AJJA concurring)

[1] On 22 November 2021, Mokose J in the Gauteng Division of the High Court, Pretoria (the high court) granted an order, on the application of the respondent, the Body Corporate of St Tropez (the body corporate), provisionally sequestering the estate of the appellant, Lunesh Singh (Mr Singh).

[2] The question in the appeal, with leave of this Court, is whether, on the facts, Mokose J was disqualified from presiding in the matter, because of a conflict of interest, and if so, whether she should mero motu have recused herself. In that event, the provisional order that issued must, without more, be set aside.

- [3] The body corporate applied for Mr Singh's sequestration in the high court. As the owner of four units in the St Tropez sectional title scheme, Mr Singh was liable to pay levies to the body corporate. As a result of his persistent failure to pay levies, the body corporate had obtained several judgments against him in the magistrates' courts. It averred that all attempts at execution to satisfy the judgment debts had resulted in nulla bona returns. Based on these alleged acts of insolvency, and on the additional averment that Mr Singh was factually insolvent, the body corporate instituted the sequestration application.
- [4] Although Mr Singh entered an appearance to oppose the sequestration application, he failed to file an answering affidavit timeously. Consequently, the application was enrolled on the unopposed motion court roll for hearing on 22 November 2021. On 29 October 2021, Mr Singh filed a notice (the rule 30 notice) in terms of rule 30 and/or 30A of the Uniform Rules of Court (the rules). The rule 30 notice was signed by Mr Singh personally. It listed fourteen complaints, ranging from an alleged failure to comply with rule 6(5), to a complaint about the body corporate's lawyer's alleged lack of experience. The body corporate did not respond to the rule 30 notice. On 18 November 2021, Mr Singh instituted an application in terms of rule 30 to set aside the sequestration application as an irregular step. The body corporate opposed the application and filed an answering affidavit in which, among other things, it averred that the rule 30 notice, and hence Mr Singh's application, did not comply with the rules.
- [5] This was how matters stood when the sequestration application was enrolled for hearing before Mokose J on 22 November 2021 on the unopposed motion court roll. Mr Singh appeared in person at the hearing. Although there is no judgment recording what transpired in the hearing, it appears to be common cause that Mr Singh made submissions in an effort to persuade the court that the matter should not proceed on an unopposed basis. Unpersuaded, Mokose J granted the provisional sequestration order on the strength of the unopposed averments in the body corporate's founding affidavit.
- [6] The averments in the founding affidavit relevant to this appeal are those dealing with Mr Singh's assets and the alleged advantage to creditors in the event of his estate being sequestrated. The body corporate averred that Mr Singh owned a total of eight immovable properties. The details of these properties were not contained in the founding affidavit. However, reference was made to valuation reports, which were annexed, for each of the eight properties. One of the annexures was a valuation report in respect of Unit 17 in a sectional title scheme registered as Upper Houghton 169 (the Upper Houghton property). The valuation report reflected that the full name of the owner of the property was 'Rajamooni Lunesh', with identity number 7604085134080. This is Mr Singh's identity number.

- [7] The founding affidavit listed eight judgments against Mr Singh, identified in an attached TransUnion Consumer Profile, totalling some R3,9 million. Reference was also made to the amounts owing to the bondholders in respect of his eight immovable properties, totalling R2,2 million. As proof of the outstanding bonds, printouts from the office of the Registrar of Deeds were annexed to the founding affidavit. Included in them was the deeds record relating to the Upper Houghton property, reflecting once more that the owner of the property was Rajamooni Lunesh. Ownership was registered in 2005, with an endorsement in favour of Standard Bank of South Africa Ltd for R112 000.
- [8] The body corporate averred in the founding affidavit that the sequestration of his estate would be to the advantage of Mr Singh's creditors in that, given the value of his immovable properties, the sale would generate sufficient proceeds to pay the administration and sequestration costs, as well as his creditors, a not insignificant percentage in the Rand. In addition, Mr Singh had received substantial rental income from letting out his properties for many years and a trustee would be able to investigate the whereabouts of, and recover, the rental proceeds. It was further averred that as Mr Singh had other creditors whom he was unable to pay, the concursus creditorum established on sequestration would be to their common advantage.
- [9] Based on these and the remaining averments in the founding papers, the high court was satisfied that the body corporate had met the requirements for the grant of a provisional order of sequestration. On 10 December 2021, Mr Singh filed an application for leave to appeal against the order. He listed several grounds of appeal. This Court is only concerned with one, this being an averment, for the first time, that Mokose J had failed to disclose that she had a conflict of interest in the matter and to recuse herself from the application for his sequestration. The application for leave to appeal was heard by Mokose J on 4 October 2022 and dismissed. Again, there is no judgment setting out the reasons for refusing the application.
- [10] The facts giving rise to the conflict of interest alleged by Mr Singh are largely common cause. The first key fact is his ownership of the Upper Houghton property, albeit that that property is registered to him under a different name. The second key fact is that the Serai Family Trust (the Trust) is the owner of two other units in the same Upper Houghton sectional title scheme. Critically, Mokose J is a trustee of the Trust. Moreover, between 2008 and 2016, Mokose J was the Chairperson of the Upper Houghton Body Corporate. In her role as Chairperson, Mokose J, deposed to a replying affidavit in high court proceedings in 2016 in which the Upper Houghton Body Corporate instituted an application against Mr Singh. In those proceedings he was cited by the name Rajamooni Lunesh.
- [11] The final key fact is that after the hearing of the sequestration application Mr Singh lodged a complaint against Mokose J under s 14(3) of the Judicial Services Act 9 of 1994 (the JSC Act). The basis of the complaint was the same conflict of interest allegation relied on by Mr Singh in this appeal. In terms of s 17(1)(b) of the JSC Act, Victor J was designated to inquire into the merits of the complaint and to make an appropriate order. Shortly before the appeal was

heard and, after this Court had made inquiries with the Judicial Conduct Committee, a copy of the report by Victor J (the JCC report) was made available to the Court and to the parties. It records a finding that Mr Singh's complaint was well-founded and that a reprimand of Mokose J by the Chair of the Judicial Conduct Committee is justified.

- [12] The question for decision in this appeal is whether, on these facts, Mokose J ought mero motu to have recused herself. The duty to recuse in a case where a judicial officer has a conflict of interest falls within the realm of the constitutional imperative to avoid a reasonable apprehension of bias in the dispensing of justice. A reasonable apprehension of bias may arise when the judicial officer has some attachment to the case which suggests that she has an interest in the outcome of the litigation.[1] This will depend on the particular facts of the case, and the nature and extent of the interest.[2] If an interest is established on the facts, the test is whether, in the mind of a reasonable litigant in possession of all the relevant facts, the judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.[3]
- [13] Mokose J did not have an obvious, personal, and direct interest in the case before her or in either of the litigants. She had no link with the body corporate that applied for Mr Singh's sequestration. In the Upper Houghton litigation against Mr Singh, she had signed the replying affidavit in her representative capacity as the chairperson of that body corporate.
- [14] That said, a notable feature of this case is the nature of the relief sought in the application that served before her. The body corporate applied for Mr Singh's sequestration, which required Mokose J to consider whether this would be to the advantage of creditors. Mokose J is a trustee of the Trust that, like Mr Singh, owns property in the Upper Houghton sectional title scheme. The Trust is a member of the Upper Houghton body corporate, an entity that previously litigated against Mr Singh. On these facts, the Upper Houghton body corporate potentially falls into the class of creditors that could possibly benefit from Mr Singh's sequestration. Consequently, and considered objectively, it might be said that Mokose J had an interest, albeit not a direct or personal interest, in the outcome of the sequestration application.
- [15] Unfortunately, one of the difficulties of this case, is that the alleged conflict of interest and recusal application were not dealt with when the matter first came before Mokose J. We also do not have Mokose J's reasons for refusing leave to appeal when the alleged conflict of interest was raised before her for the first time. However, it is significant that the JCC upheld Mr Singh's complaint. It found that:

'The entire conspectus of facts which served before Judge Mokose at the provisional sequestration hearing should have raised an alarm for Judge Mokose when reading the papers and in the court hearing itself. Albeit it that Mr Singh did not seek her recusal at the hearing, she should mero motu have recused herself.'

- [16] It must be emphasised that the correctness of the findings in the JCC report is not an issue that is before this Court. Those findings, which I understand have not been challenged to date, remain valid until set aside by a court. [4] As the Constitutional Court put it in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*, ‘official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside’.[5] In other words, this Court must accept that the statutory body constitutionally responsible for dealing with complaints about judicial officers has found that Mokose J should have recused herself. We cannot simply ignore this finding. Moreover, to do so would be to undermine the constitutional imperative of ensuring that public confidence in our judicial system is maintained.
- [17] The JCC report, taken together with the other considerations alluded to, is sufficient, in my view, to tip the scales in favour of a finding that Mokose J ought not to have heard the application. When all of the facts are viewed cumulatively it must be concluded that the reasonable person, with knowledge of them would reasonably apprehend that Mokose J might not have approached the sequestration application with an open mind. A case for her recusal is properly established.
- [18] This conclusion serves to advance public confidence in the judicial system. At the same time, it does not result in undue prejudice to the body corporate. This is an important consideration because the body corporate bears no responsibility for the events that led to the appeal. Where it is found that a judicial officer ought to have recused herself, the proceedings before her must be regarded as a nullity.[6] Consequently, the order granted by Mokose J provisionally sequestering Mr Singh’s estate falls to be set aside. It follows that the application by the body corporate for the sequestration of his estate must be remitted for consideration afresh by a different judge.
- [19] As far as the issue of costs is concerned, Mr Singh has represented himself in the proceedings to date. His success on appeal was not based on the substantive merits of the sequestration order. The sequestration application is pending and is yet to be adjudicated afresh on its merits. In any event, the costs, such as they are, will in all likelihood be costs in the sequestration. That being so, it would be best for the costs of the appeal to be reserved for determination by the high court.

[20] I make the following order:

R M KEIGHTLEY

JUDGE OF APPEAL

Appearances

For appellant: Appellant representing himself Instructed by: No attorneys appointed
For respondent: J Vorster SC with N G Louw Instructed by: Beyers Incorporated Attorneys, Pretoria
Phatshoane Henney Attorneys, Bloemfontein.

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- [1] Bernert v Absa Bank Ltd [2010] ZACC 28; 2011 (4) BCLR 329 (CC); 2011 (3) SA 92 (CC) (Benert) para 45.
- [2] Benert fn 1 above para 57.
- [3] Benert fn 1 above para 29, citing President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) paras 36-39 (SARFU II).
- [4] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004
- (6) SA 222 (SCA).
- [5] MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 103.
- [6] Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996
- (3) SA 1 (A) 9B-G.
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