




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

**CASE NO: 2021/7954
2019/31650**

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>26/10/2022</u>	

In the matter between:

AES CONSULTING CC

First Applicant

LMD ENGINEERING CC

Second Applicant

KALARZ HOSPITALITY CC

Third Applicant

and

BERNICE MALABA (NEE SWARTS)

Respondent

And the matter between:

TOMBERRY TRADING ENTERPRISE CC

First Applicant

BERNICE SWARTS

Second Applicant

and

AES CONSULTING CC

First Respondent

LMD ENGINEERING CC

Second Respondent

KALARZ HOSPITALITY CC

Third Respondent

In re:

AES CONSULTING CC

First Applicant

LMD ENGINEERING CC

Second Applicant

KALARZ HOSPITALITY CC

Third Applicant

and

TOMBERRY TRADING ENTERPRISE CC

First Respondent

BERNICE SWARTS

Second Respondent

JUDGMENT

YACOOB J:

1. The applicants in case 2021/7954 seek to sequestrate the respondent in that case ("Ms Malaba"). The applicants in case 2019/31650, Tomberry Trading Enterprise CC ("Tomberry") and Ms Malaba seek a rescission of an order granted against them in favour of the applicants in case 2021/7954.
2. For convenience I shall refer to the applicants seeking the sequestration as "the applicants" when dealing with both matters. I shall refer to Ms Malaba and Tomberry in those terms.
3. It is common cause that, if the rescission application succeeds, I do not need to deal with the sequestration. This is because the sequestration is intended to satisfy the debt which is the subject of the order sought to be rescinded. I therefore deal first with the rescission application. Before I do so, I set out the facts from which these applications emanate, as they emerge from the papers. The versions of the two parties have almost nothing in common.

FACTUAL BACKGROUND

4. Ms Malaba is a member of Parliament. She is the sole member of Tomberry. Before she became a member of Parliament, which was in 2019, she held a position as “Stakeholder Relations” at the City of Johannesburg Metropolitan Municipality.
5. The applicant companies all have in common a member, Mr Leonard Machanzi. He is the deponent to the affidavits filed on the applicants’ behalf in these applications.
6. According to Ms Malaba, she has never done business with any of the three applicants, and in fact had not heard of the second and third applicants until she signed an acknowledgment of debt, more of which later. She knew of the first applicant through Mr Machanzi, whom she knew when she was employed as “Stakeholder Relations” at the City of Johannesburg.
7. Ms Malaba alleges that Mr Machanzi informed her he is a strong supporter of the African National Congress (“ANC”), and that he was willing to support ANC events and initiatives. She gave him her banking details and telephone numbers, so that she could “inform and update him” about these. She alleges that neither she nor the Tomberry has received money or goods for their own benefit from any of the respondents.
8. According to Ms Malaba, she informed Mr Machanzi about ANC events when they arose and he sent her money to support them. She does not explain in what capacity she acted in receiving money for these events, and why the money was deposited into her own account rather than an ANC account.
9. Ms Malaba alleges that Mr Machanzi’s companies benefitted from doing business with the City of Johannesburg and the Gauteng Provincial Government in return for the “social responsibility programs that they sponsored” via her.

10. She goes on to allege that when she became a member of Parliament, in 2019 (it is not clear when in 2019), she was not longer available or accessible to people she had previously “worked” with, such as Mr Machanzi. Mr Machanzi was not happy with this and he began threatening to ruin her political career.
11. Mr Machanzi allegedly threatened to ruin her career if Ms Malaba did not comply with his demands and instructions. Ms Malaba does not specify what these demands and instructions were.
12. Ms Malaba then received an email from a journalist asking if she had received money from the second applicant, and suggesting that she had received money in return for tenders. On the same day Mr Machanzi called her again to threaten her. She was then frightened into agreeing to sign an acknowledgement of debt for R10 million on behalf of Tomberry, and standing surety for the amount in her personal capacity. The acknowledgment of debt is dated 24 February 2019.
13. The applicants obtained judgment against her on the basis of this acknowledgment of debt, and that is the judgment she seeks to have rescinded, and which also forms the basis of the sequestration application. The judgment was obtained on 30 October 2019.
14. Mr Machanzi, on the other hand, contends that the acknowledgment of debt was signed without duress. He suggests that payments would never have been made by the applicants in the manner suggested by Ms Malaba, because they would then not be able to explain to SARS.
15. According to Mr Machanza, the monies were advanced to Ms Malaba to “assist her to secure various business and expansion opportunities” for Tomberry, because Ms Malaba told him she needed working capital. Mr Machanzi does not allege that there were any written agreements in terms of which these loans were made, nor

that there was any particular relationship between himself and Ms Malaba which led to the loan of such a large amount of money apparently on trust. This raises the question how the applicants would then have explained this to SARS, as much as Mr Machanza suggests Ms Malaba's version would.

THE RESCISSION APPLICATION

16. Ms Malaba contends that she never received the application. It was served on an address that she had left. She alleges that after she took up a seat in Parliament, her life was nomadic and she was unsettled. She only became aware of the order after the provisional sequestration had been granted, and that she found out from a third party. at some time in August 2021. She contends that her default was not deliberate, and that she was absent from court because she did not know about the proceedings. She submits that she has a *bona fide* defence, that is, that she signed the acknowledgment of debt under duress.
17. The applicants submit that Ms Malaba's version about not knowing about the order until August 2021 is untrue. Mr Machanzi alleges that he met Ms Malaba in January 2020 at a hotel, and that he mentioned the issue to her, and she then sent an email confirming that she would meet with his lawyers. He annexes that email. The applicants submit that no case is made out for condonation.
18. The email from Ms Malaba simply confirms that she would meet with his lawyers. It says nothing about a court order. The applicants do not annex any proof that the court order sought to be rescinded was sent to her or given to her, or that Mr Machanza and Ms Malaba discussed it when they met.
19. In addition, both the original application and the sequestration application were served on a number of addresses, including an address purporting to be Ms

Malaba's place of residence. However neither was served on the *domicilium citandi et executandi* set out in the acknowledgment of debt. In the annexure to the acknowledgment of debt Ms Malaba sets out her home address. This is almost identical to the *domicilium*. However no service was effected there.

20. As far as service by email to Parliament is concerned, which the applicants also rely on, there are 400 parliamentarians. Service on an employee of Parliament cannot, in my view, lead to an inference that the documents reached the right person.

21. Ms Malaba alleges also that she did not receive the email service sent to her nominated email address. Taking into account the amount of money at stake, and the seriousness of the consequences for her personally, I am satisfied that the benefit of the doubt ought to be given as far as the email is concerned.

22. Ms Malaba's prospects of success in the rescission application are also relevant to condonation. I am satisfied that Ms Malaba has demonstrated that her default was not deliberate, especially as there was no attempt to serve on the nominated physical *domicilium*. Where the applicants have made no attempt to even do that, it is not open to them to allege that she is attempting to evade court process.

23. I am satisfied too that Ms Malaba's defence may well be *bona fide*. It is submitted for the applicants that her version is so fantastic that it can be discarded. In my view the applicants' version is as unbelievable or more so than that of Ms Malaba. It may be that neither party is telling the truth. But that is something that can only be determined at trial.

24. For these reasons I am satisfied that a case has been made out both for condonation and for rescission under the common law.

CONCLUSION

25. In view of my conclusion regarding the rescission, it follows that the basis on which sequestration was sought has fallen away, and the provisional sequestration order is discharged.

26. I make the following order:

- (a) The order of this court in case number 2019/31650, granted by Bhoola AJ on 30 October 2019, is set aside.
- (b) The provisional sequestration order granted on 04 May 2021 in case number 2021/7954 is discharged.
- (c) The applicants in case number 2021/7954 are to pay the costs of both the sequestration application and the rescission application, jointly and severally, the one paying the other to be absolved.



S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicants: K.A. Slabbert
Instructed by: DMO Attorneys

Counsel for the Respondent: K. Van Heerden
Instructed by: Mdhluli, Pearce, Mdzikwa and Associates Inc

Date of hearing: 11 April 2022, 20 April 2022 (further submissions)
Date of judgment: 26 October 2022