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

Case 10604/2020

In the matter between:

STEVEN ELLIS	**Applicant**
And	
RICHARD EDEN	**Respondent**

and in the matter between

RICHARD EDEN	**Applicant**
And	
STEVEN ELLIS	**First Respondent**
NEIL GORE N.O.	**Second Respondent**

Coram: Rogers J

Heard on: 25 July 2022

Delivered: 28 July 2022 (by email at 09h30)

JUDGMENT

ROGERS J:

[1] Mr Eden seeks leave to appeal to a full court against my judgment delivered on 6 June 2022. The application for leave was argued on a virtual platform. I do not repeat the full citation of cases mentioned in my previous judgment.

[2] Mr Eden's attorney developed three main points in support of the application for leave to appeal. Firstly, the statement in paragraph 44 of my judgment, that Mr Eden's factual defence in the main action "would face formidable challenges" but was not "hopeless" at least left open the possibility that a court hearing the merits might find in Mr Eden's favour. It was submitted, furthermore, that in the main action it was not Mr Eden but Mr Ellis who would face formidable challenges. The burden of proof would rest on him to prove the alleged partnership. He would have to overcome Mr Gore's statement, in his letter of 25 March 2021, that the partnership "seemed to have been set up and run in a very strange way, in that the partnership ran its business through a company". Mr Eden's attorney also reminded me of Mr Ellis' letter of 9 October 2018 to the attorney who had been instructed to draft a shareholders agreement. In that letter Mr Ellis stated that the draft agreement had not worked for the parties but that the attorney should let Mr Ellis know "the further process on this". This was inconsistent, so it was argued, with a partnership agreement allegedly concluded in mid-2017.

[3] Second, as to the legal defence and the question of excipiability, paragraphs 45 and 51 of my judgment recognised that the matter was not straightforward and that there was an absence of authority on the subject. Mr Eden's attorney submitted, however, that to say (as I did) that the legal defence was "not unarguable" but would "probably fail" did not do Mr

Eden's legal defence justice. My judgment, so it was argued, disregarded the trite distinction between a company and a partnership.

[4] Third, on the question of delay, Mr Eden's attorney referred again to *Colyn*, where the Court said that rule 42(1)(a) was confined to its wording, the crisp question being whether the judgment was "erroneously granted". He also repeated his reference to High Court decisions to the effect that rescission should follow "without further ado" or "without further inquiry" once it was found that judgment had been erroneously granted in the absence of a litigant.

The first point

[5] Regarding the first point, my dismissal of Mr Eden's rescission application was not based on a conclusion that he had failed to put up facts to establish a bona fide defence. If Mr Eden had brought a timeous rescission application in terms of rule 31(2)(b) or the common law, his application would not have failed on the basis that he had not put up an arguable case in opposition to the main action. The only relevance of my assessment of the strength of the factual defence was in relation to the exercise of the discretion which the court has in terms of rule 31(2)(b) and the common law. The fact that the defence might be more compelling than I assessed to be would not, in the circumstances of this case, have been sufficient to overcome the obstacles which delay and the absence of frank disclosure presented to Mr Eden's rescission application.

[6] I accept that in the main action Mr Ellis would have the burden of proving the existence of the partnership. However, in the main action Mr Ellis would have, apart from his own evidence, the express admissions made by Mr Eden in the damages action and certain other aspects of Mr Eden's conduct inconsistent with an intention to dispute the existence of the partnership. It is for that reason that I stated that Mr Eden's defence, viz the denial of the partnership, would face formidable challenges. But as I have said, the outcome of the rescission application would not have been different if I had formulated the proposition less forcefully.

The second point

[7] As to the second point, the legal defence was relevant, in the first place, to the bona fide defence Mr Eden was required to demonstrate in an application based on rule 31(2)(b) and the common law. Once again, Mr Ellis' application for rescission based on rule 31(2)(b) and the common law did not fail because of a rejection of his legal defence. What I have said regarding the factual defence applies here *mutatis mutandis*.

[8] The legal defence was relevant, in the second place, to the contention that the default judgment was "erroneously granted" within the meaning of rule 42(1)(a) because the particulars of claim were excipiable. I set out, in paragraph 60 of my judgment, what I regarded as the most natural meaning of the particulars of claim. As counsel for Mr Ellis pointed out, her client's allegation in the particulars of claim was not that the partnership had been run "through a company" (the formulation used in argument by Mr Eden's attorney) but "under the name and style of" the company.

[9] Mr Eden's attorney said that I could not ignore what Mr Gore said in his letter of 25 March 2021. He also submitted that the factual material supplied by Mr Ellis in response to Wille J's query did not address precisely how the partnership traded and merely made "generic" partnership assertions. In the context of rule 42(1)(a), however, the default judgment was said to have been "erroneously granted" on the sole basis that the particulars of claims were excipiable. Extraneous evidence is not relevant or admissible in answering that question, which is concerned solely with whether, on every reasonable reading of the particulars of claim, no cause of action was disclosed. I do not think that there is a reasonable prospect of another court so finding. That is quite different from whether, in the event, the evidence is consistent with the reasonable reading which saves the particulars of claim from excipiability.

The third point

[10] In any event, a finding in Mr Eden's favour on the excipiability point would not ensure him of success in the appeal, because he would still need to overcome my finding that his application based on rule 42(1)(a) should fail because of delay. That takes me to the third point. I did not find, as the argument for Mr Eden suggested, that a showing of "good cause" was a requirement in terms of rule 42(1)(a). What I found was that, once it has been shown that a judgment was erroneously granted in the absence of a litigant, the court has a discretion to rescind the judgment. This conclusion does not take one outside the wording of rule 42(1)(a), since rule 42(1) states that a court "may", not "must", rescind or vary a judgment in any of the listed circumstances.

[11] The existence of a discretion is established by binding authority. In paragraph 63, I cited the decisions of the Appellate Division, Supreme Court of Appeal and Constitutional Court to this effect, one of which was the *Colyn* case. I also pointed out, in footnote 30 of my judgment, that *Buys*, on which the attorney for Mr Eden placed considerable reliance, recognised that the Court has a discretion.

[12] In supporting the application for leave to appeal, Mr Eden's attorney did not deal with these authorities or with the nature of the discretion. In paragraph 65 of my judgment, I assumed in Mr Eden's favour that the exercise of the discretion should not be affected by my assessment of the merits of the main case. I stated, however, that at very least unreasonable delay would influence the exercise of the discretion. I cannot see how it could be otherwise, since then there would be nothing left at all on which to found the exercise of the discretion. On the argument advanced for Mr Eden, litigants could bring rescission applications in terms of 42(1)(a) ten or twenty years after learning of the default judgment and would have to succeed provided only that they establish that the default judgment was "erroneously granted". There would be no discretion to dismiss the application on grounds of delay. I cannot accept that this is the law. The decisions of Courts which are binding on me say that there is a discretion.

Accordingly, it is not for me, as a Judge of the High Court, to grant leave to appeal so that higher court may decide whether to reassess the existence of a discretion in terms of rule 42(1).

[13] Mr Eden's attorney referred to the injustice of his client now being held liable for the debts of a company. That is not accurate. Following judicial procedures, he is being held liable as one partner to another. If in truth (that is, because of facts which have not been fully ventilated) he is being held liable for the debts of a company, he has only himself to blame for failing to defend the dissolution action, for failing to engage with the receiver as the latter went about preparing the liquidation and distribution accounts, and for failing timeously to seek the rescission of the default judgment. There comes a time when a court cannot relieve people of the consequences of their litigation choices.

[14] The following order is made:

The application for leave to appeal is dismissed with costs.

O L ROGERS
Judge of the High Court

For the Applicant in the first application and for the First Respondent in the second application: B Brown instructed by B Lubbe and Associates

For the Respondent in the first application and for the Applicant in the second application: S van der Meer (attorney) of Van der Meer and Partners Inc.