THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No.: 1121/17

In the matter between:

HENDRIK PETRUS HOUGH	**Applicant**
and	
MZUBANZI SISILANA (ASSISTANT MASTER,WCDHC)	**First Respondent**
SEARDEL INVESTMENT CORPORATION LIMITED (renamed: E MEDIA HOLDINGS LIMITED)	**Second Respondent**
JOINT EXECUTORS: ESTATE LATE AARON SEARLL (Master's ref 6360/2010) [LAUREN SEARLL NO, ELLIOT OSRIN NO, JEFFREY FLAX NO, DAVID FRIEDLAND NO, QUINTIN HONEY NO]	**Third Respondent**
EDWARD NATHAN SONNENBERGS INC.	**Fourth Respondent**
EUGENE NEL NO (Master's ref C337/2015)	**Fifth Respondent**

Neutral citation: *Hendrik Petrus Hough v Mzubanzi Sisilana and others* (1121/2017) [2018] ZASCA 04 (2 February 2018)

Coram: Maya P

Heard: In Chambers

Delivered: 2 February 2018

Summary: Procedure – s 17(2)(*f*) of the Superior Courts Act 10 of 2013 – exceptional circumstances warranting an order for the reconsideration and variation of the dismissal of the application for leave to appeal not established – application dismissed.

ORDER

On application in terms of s 17(2)(*f*): Supreme Court of Appeal (Ponnan JA and Schippers AJA):

1 Condonation as applied for is granted. The applicant is to pay the costs of the application.

2 The application in terms of s 17(2)(f) of the Supreme Court Act 10 of 2013 is dismissed with costs for the reason that no exceptional circumstances warranting reconsideration or variation of the decision refusing the application for leave to appeal have been established.

REASONS

Maya P:

[1] The applicant brought an application in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Act). He sought (a) condonation for his failure to bring the proceedings within the prescribed time limits; (b) reconsideration and variation of the order of this Court dated 22 August 2017 which dismissed his application for leave to appeal against the judgment of the Western Cape High Court (Engers AJ); (c) an order granting him such leave and (d) costs. I dismissed the application, without furnishing substantive reasons therefor, on the basis that no exceptional circumstances warranting the reconsideration or variation of the decision refusing the application for leave to appeal had been established. The following are my reasons for the decision.

[2] I mention at the outset that the applicant's prayer to be granted leave to appeal against the judgment of the high court was incompetent. In terms of s 17(2)(*f*) of the Act '[t]he decision of the majority of judges considering an application referred to in paragraph (*b*), or the decision of the court, as the case may be, to grant or refuse the application [for leave to appeal] shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of … her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.' Subsection (2)(*b*) mentioned above refers to an application for leave to appeal to the Supreme Court of Appeal made pursuant to the refusal of leave to appeal by the court against whose decision an appeal is sought. It is readily apparent from the ordinary wording of these provisions that the relief provided in s 17(2)(*f*) relates only to the dismissal of an application for leave to appeal by the Supreme Court of Appeal. Thus the President of this Court may only direct the appeal judges who considered the application to revisit their decision and no more.

[3] The facts of the case and the parties' contentions are comprehensively set out in the two judgments of the high court and need not be rehashed in any great detail for present purposes. As I understand it, the applicant's estate was finally sequestrated by the high court at the instance of the second respondent, Seardel Investment Corporation Ltd (Seardel), on the basis of several taxed and allocated bills of costs in the latter's favour against the applicant. These proceedings arise from the applicant's challenge, inter alia, to the admission to prove certain claims, including ENS' taxed bill of costs, against his estate by the first respondent, the Assistant Master of the Western Cape High Court, pursuant to a meeting of the creditors convened under the provisions of s 40(1) of the Insolvency Act 24 of 1936. One of the applicant's grounds for the review proceedings he brought in terms of s 151 of the Insolvency Act (upon which he solely relies in this application) was that Seardel had

no locus standi to sequestrate his estate as it was not his creditor. This was so, he contended, because the taxed costs were incurred by Seardel's attorneys, Edward Nathan Sonnenbergs Inc (ENS), a personal liability company which had no Fidelity Fund certificate in its own name. Even though ENS' directors all have the certificates in their personal names, the lack of its own certificate was in breach of the law as it is a 'practitioner' as defined in s 1 read with s 23 of the Attorneys Act 53 of 1979 and was thus obliged under s 41(1) and (2) of this Act to have the certificate in its name to lawfully practise and earn fees and disbursements. The second to fourth respondent's disavowed the inclusion of a company or any other juristic person in the Act's definition of a 'practitioner'. For that reason, so they argued, s 41 of the Act does not apply to ENS and it is not required to have the certificate. The high court dismissed the review application with costs. The applicant's subsequent applications for leave to appeal to appeal against this decision both in the high court and in this Court failed, hence this application.

[4] It appears that the applicant previously challenged ENS' authority to represent Seardel in the sequestration proceedings on the same ground that ENS could not lawfully do so without the certificate. This argument found no favour in the high court. It was rejected by this Court too. A further application to the Constitutional Court, which was premised solely on the argument, was unsuccessful. The applicant's persistence with the argument is bolstered by Engers AJ's comments in his main judgment and in the judgment on application for leave to appeal that he found the applicant's objection 'to be at best, arguable' and that '[a]t best for the applicant, he has shown that his interpretation of the Act may be a tenable one'. However, the acting judge made clear that he was nonetheless not convinced that the argument was correct but found it unnecessary to decide the issue in light of the nature of the applicant's onus which he failed to discharge. In the applicant's opinion, these

throwaway comments (as I view them) also constitute exceptional circumstances which warrant the reconsideration and variation of the SCA's earlier order.

[5] Section 1 of the Attorneys' Act defines 'practitioner' as 'any attorney or a notary or conveyancer'. An attorney means 'any person duly admitted to practice as an attorney in any part of the Republic'. In terms of s 23 a juristic person may also conduct a practice subject to the conditions set out in ss (1) which requires that (a) the private company must be a personal liability company; (b) only natural persons who are practitioners and who are in possession of current fidelity fund certificates are members or shareholders of the company or persons having any interest in the shares of the company; (c) the name of the company consists solely of the name or names of present or past members of the company who practised for their own account or in the predecessor of the company provided that the words 'and associates' or 'and company' may be included in the name of the company. Section 23(9) stipulates that '[a]ny reference in this Act or in any other law to a practitioner or to a partner or partnership in relation to practitioners, shall be deemed to include a reference to a company under this section or to a member of such a company, as the case may be, unless the context indicates otherwise'. And s 23(2) provides that '[e]very shareholder of the company shall be a director of the company, and only a shareholder of the company shall be a director thereof'. Sections 41 and 42 respectively require practitioners practising for their own account or in partnership (and, by necessary implication in terms of s 23(9), practitioners who practise in personal liability companies) to be holders of the certificate and make provision for the application procedure. Nothing in the wording of these provisions suggests that the requirement to hold the certificate extends beyond the individual practitioner who practices for her own account or in a partnership with other practitioners or in a personal liability company. And such a reading does not detract from the objective underlying the need for the certificate ie the protection of the public against the

misappropriation of their money entrusted to attorneys (see *Law Society of the* Northern *Province v le Roux* [2015] ZASCA 168 paras 3 and 5). To my mind, the public remains adequately protected if all the directors of the company which, in any event, acts through their agency, have the certificate. It is also instructive that, as a matter of practice the law societies require only the directors of the company and not the company itself, to have the certificate. It is difficult to accept the applicant's interpretation of these provisions in the circumstances.

[6] It is against this background that I considered whether the applicant established the exceptional circumstances envisaged in s 17(2)(*f*). Furthermore, it is well to bear that a court may review a Master's decision in the present context only where the Master has, in granting her approval, erred or misdirected herself on the factual material placed before her (see, for example, *Al-Kharafi & Sons v Pema & Others NNO* 2010 (2) SA 360 (WLD) at 396). She does not adjudicate the claim as would a court of law. She is required simply to satisfy herself that there is prima facie evidence that the creditor has a valid claim (see *Sechaba Medical Solutions (Pty) Ltd & others v Sekete & others* (216/2014) [2015] ZASCA 8). Thus, the first respondent merely had to be satisfied that the claims based on ENS' taxed bill of costs had been prima facie established when deciding whether to admit them to proof. In light of this test the high court's passing views on the weight of the argument could not assist the applicant's case as the court itself acknowledged. . They do not tilt the prospects of success on appeal in his favour. Another contention advanced by the applicant as 'a compelling reason for the appeal to be heard' was 'the potential impact on the entire legal profession if his interpretation of the Act were to prevail' and the reason underlying the need for practitioners to have the certificate ie to protect the public. It is however common cause that this argument was advanced and failed to hold sway in the application for leave to appeal against the sequestration to the Constitutional Court. And the applicant's further contention that his success in the appeal would be

dispositive of the entire sequestration proceedings against his estate as the basis therefor would be invalid is obviously inaccurate. Only some and not all claims against his insolvent estate would be set aside and he would remain in sequestration.

[7] For all these reasons I was satisfied that the application for leave to appeal was rightly dismissed and that no basis for the reconsideration thereof had been established.

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MML MAYA

PRESIDENT OF THE SUPREME COURT OF APPEAL

APPEARANCES:

APPELLANT:	Horn & Van Rensburg, Bloemfontein
	State Attorney, Bloemfontein
RESPONDENT:	Edward Nathan Sonnenbergs Inc., Cape Town
	Matsepes Inc., Bloemfontein