LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) NO. 91/2022
CIV/APN/0336/2022

In the matter between:

NALA CAPITAL ADVISORS PTY(LTD) **FIRST APPELLANT**
RESTEPILE JOSEPH KHENQOA ELIAS **SECOND APPELLANT**

AND

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**
THE ATTORNEY GENERAL **RESPONDENT**

CORAM: K. E. MOSITO P
P. MUSONDA AJA
P. BANYANE AJA

HEARD: 10 OCTOBER 2023

DELIVERED: 17 NOVEMBER 2023

Summary

Practice - Judgments and orders - Rescission of — Rescission — Application for in terms of Rule 45(1)(a) of the High Court Rules 1980 —Whether judgment 'erroneously granted' as intended in Rule 45(1)(a).

Practice - orders - Rescission in terms of Rule 45(1)(a) of the High Court Rules 1980 –— Locus standi —Appellants had locus standi to bring the rescission application. Distinction between authority to institute proceedings and locus standi.- The decision of the court a quo that the first Appellant had no locus standi and the second Appellant could not represent the first Appellant is set aside - The holding in CRI/A/002/2018 that a prima facie case exists against the appellants is expunged - The Registrar of this Court is hereby directed to remove the publication in LESLII of the judgment in CRI/A/002/2018.

JUDGMENT

K. E. MOSITO P

Background

[1] On 11 December 2018, the High Court (Mokhesi AJ) heard an appeal against a decision of the Magistrate Court to discharge the present appellants in a criminal case at the close of the Crown's case. In CRI/T/MSU/0382/2017, the first accused was Nala Capital Advisors Pty (Ltd), and the second accused was Retŝepile Joseph Khenqoa Elias, its director. The two accused had faced an array of charges – thirty-four in total – which were at the commencement of the trial whittled down to seven charges. The learned Magistrate had discharged the accused on two bases, viz, that, firstly, the Lesotho Revenue Authority (LRA) does not have the power to investigate, charge, and prosecute offenders for infractions of the provisions of the Money Laundering Act (count 26), the Prevention of Corruption and Economic Offences Act (1st alternative to count 26) and the Penal Code Act (second alternative to count 26). Secondly, regarding counts 25, 29, 30 and 31, the learned Magistrate had ruled that the Crown did not adduce *prima facie* evidence of the commission of these offences by the accused.

[2] On 21 March 2019, the learned judge handed down his judgment. He ordered that:

> (1) The order of the court a quo granting an application for discharge of the two respondents (Nala Capital Advisors (PTY) Ltd and Retŝepile Joseph Khengoa Elias) at the end of the crown case and returning a verdict of not guilty in respect of counts 25, and 29 is set aside and replaced by the following order:
> "The application for the discharge of the accused is refused."
> (2) The appeal against the discharge of the respondents in respect of counts 30 and 31 is dismissed.
> (3) The matter is remitted to the court a quo with the following directives:
> [a] The court a quo should make a determination whether a *prima facie* evidence of commission of offences under counts 26, 27 and 28 has been made out by the Crown.
> (b) Having made a determination in respect of paragraph 3 (a) above of this order, the trial to proceed in the ordinary way.

[3] On 12 March 2021, the parties entered into a settlement agreement in which the appellants were to pay M63,250. 00 (sixty-three thousand, two hundred and fifty Maloti), being income tax for the 2013/2014 financial year. The appellants undertook to pay the above Income Tax on or before 31 March 2021. The LRA was to withdraw all the criminal charges against the appellants upon full and final payment of the above Income Tax. The LRA agreed not to impose any penalties on the liability in terms of the Income Tax Act. It was also agreed that the appellants would not prosecute/institute a civil suit against the LRA after signing the agreement. The agreement provided further that it would serve as the final settlement of Rex v Nala Capital Advisors Pty (Ltd) & One in CRI/T/MSU/0382/2017.

[4] On 24 October 2022, the present appellants filed an application in the High Court of Lesotho for substantive relief in the following

terms: (a) Judgment in CRI/A/002/2018 be rescinded and set aside; (b) the Registrar be directed to remove the publication in LESLII of the Judgment CRI/A/002/2018'(c), costs of suit only if the Respondent opposes this application; (d), further and or alternative relief.

[5] Some interim reliefs were sought by the appellants, which are unnecessary to outline in this judgment. The matter came before the High Court (Ralebese J). On 27 October 2022, the learned judge made a ruling in respect of the application in the following terms:

> *'This application is dismissed on the following grounds: -*
>
> *(a) It is not urgent as grounds of urgency have not been established.*
> *(b) It has been erroneously brought as a new matter, yet it is a rescission of a matter already existing before this court. It should have been brought in the same file of the order being sought to be rescinded.*
> *(c) There are no prospects of success, or the balance of convenience does not favour the applicants as they have failed to establish grounds for rescission of the order of the High Court.*
> *(d) The locus standi of the first applicant has not been established. The second applicant had indicated that he is the former director of the first applicant, and he has failed to prove that he has the authority to represent it.'*

[6] On 6 October 2023, the LRA (now Revenue Services Lesotho (RSL) wrote a letter to the Registrar of the Court of Appeal. The letter is on the letterhead of the RSL. It reads in part as follows:

> "Date 06th/October/2023
>
> The Registrar Court of Appeal
>
> Palace of Justice
>
> Maseru 100
>
> Dear Sir
>
> Re: NALA CAPITAL ADVISORS v DPP C OF A 91/22
>
> Reference is borne by the above-mentioned matter.

I am a Senior Litigation Officer at Revenue Services Lesotho (RSL) and Legal Practitioner of this Honourable Court. I wish to inform you that RSL in its capacity as Tax Administration, is delegated by the DPP to prosecute Revenue related cases and any other crimes related thereto.

I was seized with this matter in CRI/MSU/0382/2017 and CRI/A/0002/2017 criminal matter in Magistrate and appeal in High Court of Lesotho. Subsequent to the decision of the High Court to remit the matter for determination to the Magistrate Court, Appellants herein entered into a settlement herein attached. This was in full final settlement to the matter.

However, few months later Appellant wanted the High Court to remove the publication of the judgement in CRI/A/0002/2017 from Leslii platform as they claimed prejudice. We advised ourselves that it is of no interest to RSL and decided not to oppose the matter. It is in this spirit that I wish to inform this Honourable Court that we are also not opposing the appeal herein.

I hope you will find this explanation satisfactory and in order.

Yours faithfully

NTEMA R (ADV)

Senior Litigation Officer

Legal Department"

[7] Against the preceding background and dissatisfied with the above decision by Ralebese J, the appellants approached this court on appeal, complaining that the learned judge a quo erred in deciding that the application did not meet the rescission requirements and thereby dismissed the application. At the hearing of this appeal, the appellants applied for the inclusion of a second ground of appeal that the learned judge erred in holding that the *locus standi* of the first applicant had not been established in as much as the second applicant had indicated that he is the former director of the first applicant. He has failed to prove that he has the authority to

represent it. In essence, the appellants complained that the learned judge ought to have found that the second Appellant had locus standi as an individual and a co-accused in the criminal prosecution to bring the application.

[8] The application giving rise to this appeal was not opposed in the High Court. Similarly, there was no opposition to the present appeal before us. It is apposite at this stage to briefly turn to the facts that gave rise to the present appeal.

The facts

[9] The matter did not proceed in the Magistrate Court partly because of a directive by the Lesotho Revenue Authority (LRA) that all criminal proceedings instituted at the instance of the LRA be stayed. After the withdrawal of the Magistrate Court case in CRI/T/MSU/0382/2017, the appellants requested the LRA in its capacity as a representative of the Director of Public Prosecutions (DPP), to abandon the judgment in CRI/A/002/2018, specifically the part in which it was alleged Mokhesi AJ had ruled that there is a *prima facie* case against certain charges and that the appellants had a case to answer given its potential prejudice to Appellant taking account of the fact that the criminal trial would never proceed.

[10] As can be seen from the judgment of Mokhesi AJ, the learned judge did, as a fact, hold that there is a *prima facie* case against certain charges and that the appellants had a case to answer. He also referred the matter to the Magistrate Court to determine whether a prima facie case existed.

[11] After initial objection and following a protracted discussion, the LRA did not abandon the judgment but merely undertook not to object to whatever relief the appellants sought in the court of law.

Issues for determination

[12] The following issues fall for determination in this appeal. First, whether the application filed by the appellants in the court below did not meet the requirements for rescission, suppose it is found that the application did not meet the requirements for rescission. In that case, the issue may be extended to whether regard was given to the prayer for further and/or alternative relief. This Court should consider granting such a further and/or alternative relief. Second, whether the first Appellant did not have *locus standi* to bring the application before the court a *quo,* and/or whether the second Appellant has failed to prove that he has the authority to represent the first Appellant.

The law

[13] This judgment raises issues of how the law structures companies' responsibility for their managers' and other employees' crimes and delicts. Under criminal and civil law, a company is directly and vicariously liable for wrongs committed by its agents (managers and other employees) within the scope of their employment. The wide-ranging liability of companies for the crimes and delicts of their agents raises two related questions: first, how does the law allocate liability for corporate misconduct between the

cooperate body and its agents, and second, how does the law structure the liability of the corporate body?

[14] The scholarly literature to date has focused chiefly on the first of these questions by exploring the rationales for holding both cooperate bodies and culpable employees liable for corporate misconduct.[1] Here, commentators broadly agree that corporate liability usefully enlists the companies or other corporate bodies in interdicting or deterring its wayward agents and assures that it fully internalizes the costs arising from its activities.

[15] Why must a company director be cited as a co-accused where the company is prosecuted? Section 59(6) of the *Companies Act,2011*[2] provides that a company, its directors and shareholders shall ensure that there are adequate procedures and safeguards in place, which include adequate transparency concerning the beneficial ownership and control of their company, to prevent the unlawful use of the company concerning severe criminal activities as defined under the ***Money Laundering and Proceeds of Crime Act 2008*** or any other

[1] For legal scholarship applying agency cost analysis to the issue of corporate versus individual liability, see generally Cal. L. Rev. 1679 (1996); Stephen P. Croley, Vicarious Liability in Tort On the Sources and Limits of Employee Reasonableness, 69 S. Cal. L Rev. 1705 (1996); Lewis Kornhauser, An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents, 70 Cal. L Rev. 1345 (1982); Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857 (1984); Jonathan R. Macey, Agency Theory and the Criminal Liability of Organizations, 71 B.U. L. Rev. 315 (1991); A. Mitchell Polinsky & Steven Shavell, Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?, 13 Int'l Rev. L. & Econ. 239 (1993); Gary T. Schwartz, The Hidden and Fundamental Issue of Employer Vicarious Liability, 69 S. Cal. L. Rev. 1739 (1996); Kathleen Segerson & Tom Tietenberg, The Structure of Penalties in Environmental Enforcement: An Economic Analysis, 23 J. Envtl. Econ. & Mgmt. 179 (1992); Alan 0. Sykes, 'The Economics of Vicarious Liability, 93 Yale L.J. 1231 (1984).

[2] Companies Act 18 of 2011.

law. Prosecution in Lesotho is based on the ***Penal Code Act 2010***.[3] Section 28 of the Act provides as follows:

> 28. (1) Where a person acting on behalf of a company or body corporate commits an offence, the company or body corporate may be charged with the offence if –
>
> (a) that offence is one created by statute with an express or implicit intention of creating liability on the part of a company for the acts of its employees or officers or
>
> (b) the person who commits the act is a person charged with the direction of the affairs of that company or body corporate.
>
> (2) Where a body corporate commits an offence under subsection
>
> (1) the punishment shall be a fine or imprisonment as may be provided under the relevant statute.

[16] Analytically, if the law explicitly or implicitly imposes responsibility on the company for the actions of its agents (employees or officers), the company can be charged. Subsection (1) (b) states that a company can also be charged if the person who committed the offence is in charge of directing the affairs of the company. This implies that if a high-ranking company official commits an offence on behalf of the company, the company can be held liable.

[17] Subsection (2) deals with the punishment for a body corporate (company) that is found guilty of committing an offence under subsection (1). This law concerns the circumstances under which a company can be held criminally liable for offences committed by individuals acting on its behalf. It also outlines the potential penalties (fine or imprisonment) that the company may face if found guilty of

[3] Penal Code Act N0 2010

such offences, with the exact penalties being determined by the relevant laws or statutes related to the specific offence in question.

[18] Section 28 establishes that a company or body corporate can be charged with a criminal offence when a person acting on its behalf commits an offence. This means that the company can be held criminally responsible for the actions of its employees or officers under certain conditions, as outlined in the section. The section specifies that one of the conditions under which a company can be charged is when the person who commits the act is charged with the direction of the affairs of that company or body corporate. Thus, if a company director or a high-ranking company official is involved in committing the offence, the company can be charged. This implies that not only can the company be held liable, but its directors or officers may also be subject to criminal prosecution, depending on the circumstances and the specific laws.

[19] The section also mentions that the punishment for a company found guilty of committing an offence will be determined by the relevant statute or law associated with that offence. This indicates that the specific penalties, whether fines or imprisonment, will be based on the legal framework governing the offence. If a company director or officer is implicated in a criminal offence committed on the company's behalf, the company and the individual could potentially face criminal charges.

[20] In my view, there are several important reasons for citing or identifying the director of a company when criminally prosecuting a

company. First, holding individuals, including directors and executives, accountable for their actions within a company is a fundamental principle of justice. Individuals can be held personally responsible for their involvement in criminal activities conducted by the company. By citing the director, the legal system ensures that those responsible for making critical decisions within the company are held accountable for any criminal wrongdoing. As was held in ***Tesco Supermarkets Ltd. v Nattrass***[4], the basis of the doctrine of *alter ego* is that a living person has a mind which can have knowledge or intention or be negligent and has hands to carry out his intentions.

[21] Second, publicly identifying directors or executives criminally responsible for a company's actions can deter corporate misconduct. Knowing that they can be personally prosecuted may discourage individuals from engaging in or condoning illegal activities within the company.

[22] Third, citing the director ensures that justice is served by targeting the individuals involved in or aware of criminal activities within the company. It helps distinguish between those who actively participated in wrongdoing and those who may not have been aware or complicit in the illegal actions. Fourth, sometimes, citing a director may be part of a broader prosecutorial strategy. It can encourage cooperation and plea bargaining, providing more information about the company's illegal activities or other individuals involved. Fifth, establishing the legal precedent for holding directors personally liable

[4] Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127 (HL).

for corporate misconduct can help clarify corporate leaders' responsibilities and set corporate governance standards. This can influence the behaviour of directors in other companies, promoting ethical conduct and compliance with the law.

[23] When a court declares that a company director and the company itself have a case to answer in a criminal prosecution, it signifies that the court believes there is enough evidence and legal basis to proceed with a trial.

[24] It is important to note that even though a case to answer may have been declared, the company and the director are presumed innocent until proven guilty. The public perception and reputation of the company and the director can be significantly damaged by being charged and going through a criminal trial. This can impact business relationships and personal credibility.

Application of the law to the facts

[26] The first complaint by the second Appellant relates to the finding by the Court *a quo* that the *locus standi* of the first Appellant has not been established. *Locus standi in judicio* (*locus standi* or standing) governs whether an individual or group may bring an action in court concerning a specific issue. It depends on the relationship between the applicant seeking redress and the right that has been violated.[5] Under our common law on standing, an applicant must show a 'direct

[5] Cheryl Loots, 'Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation', 104 SALJ 131 (1987) at p.132.

and substantial interest' in the subject matter and the outcome of the application.

[27] In paragraph 2(a) of the founding affidavit, the second Appellant avers that the first Appellant is Nala Capital Advisors Pty (Ltd), a company duly incorporated in terms of the laws of Lesotho with principal business at 1145 Fairview Avenue. As a co-accused, the first Appellant had a direct and substantial interest in the outcome of the rescission application. The Court a quo held that the second Appellant had indicated that he is the former director of the first Appellant, and he has failed to prove that he has the authority to represent it. In my opinion, that could not justify a dismissal of the application for rescission in as much as any party personally affected by the court's order may seek a rescission of that order. As an affected party, Mr Elias had a direct and substantial interest in the order sought to be rescinded, irrespective of whether he had no authority to represent the first Appellant. He had *locus standi* to approach the Court *a quo* for rescission in his own right. However, having *locus standi* is not the end of the story.

[28] These sorts of proceedings have little to do with an applicant's right to seek rescission and everything to do with whether that applicant can discharge the *onus* of proving that the requirements for rescission are met. A litigant may seek the rescission of an order of court where specific grounds have been met.

[29] In the present case, the applicant did not establish grounds for a recession in his founding affidavit. In the light of the finding that

the Appellant's explanation is unsatisfactory and unacceptable, it is, therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the Appellant's prospects of success. As an alternative to rule 45, Mr Elias pleads rescission based on the common law, in which an applicant must prove that there is 'sufficient' or 'good cause' to warrant rescission.[6] With this putting an end to the joint law enquiry, I now consider whether Mr Elias has advanced any other grounds on which this Court can and should reconsider its order. The court *a quo* dismissed the rescission application because it does not meet the legal requirements for rescission and fundamentally lacks prospects of success. When a rescission application is brought, a litigant must meet the jurisdictional requirements for rescission, set out in rule 45(1)(a) of the High Court Rules or the common law, before a court can exercise its discretion to rescind an order. None of these requirements was foreshadowed in the affidavits filed by the appellants in support of their application for rescission of the judgment. Even if the specific prerequisites are met, it must still be in the interests of justice for a court to exercise its discretion to entertain the matter. Once an applicant has met the requirements for rescission, a court is merely endowed with the discretion to rescind its order. This discretion must be exercised judicially.[7]

[6] De Wet v Western Bank Ltd 1979 (2) SA 1031 (A) (De Wet) at at 1033C and 1042G.
[7] De Wet v Western Bank Ltd 1979 (2) SA 1031 (A) (De Wet) at 1034F and Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at para 5d.

[30] Advocate Metlae invited this Court to extend the ambit of the common law power to rescind judgments. He termed it the need to develop the common law. The position Advocate Metlae advocates necessarily involves broadening the grounds for rescission. I am not persuaded that we should accede to this invitation. De Villiers CJ in ***Childerley Estate Stores v Standard Bank of South Africa Ltd***[8] and reiterated by Trengove AJA in ***De Wet v Western Bank Ltd***[9] stated that he knew of no further, or extended, ground of rescission than that which exists at the common law. In ***Chetty v Law Society, Transvaal***, the court held that:

> "a distinction is drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not after evidence had been adduced on the merits of the dispute. In the case of a default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission . . . . In the case of a final and definitive judgment, whether by default or not, granted after evidence had been adduced, the Court was regarded as *functus officio*."[10]

[31] Many decisions that I have had regard to suggest we must do the exact opposite. I can do no better than repeat what was held in De Wet:

> 'Since the common law defines the circumstances in which judgments may be set aside and since the Rules of Court make specific provision for such contingencies, it would be anomalous if Courts had the inherent power to grant relief merely because of sympathy for litigants in default. Logic or common sense might suggest that a litigant should be afforded relief. Logic and common sense, however, are no basis for general discretion or power, particularly when it has been deemed

[8] Childerley Estate Stores v Standard Bank of South Africa Ltd 1924 OPD 163 (Childerley) at 168-9.
[9] De Wet v Western Bank Ltd 1979 (2) SA 1031 (A).
[10] Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 761G-I.

> necessary to make Rules specifically dealing with the position. It would be equivalent to legislating if the Courts . . . went beyond the common law. The power must be found in the Rules and in the common law because the ordinary principle is that when judgment has been pronounced the Court is thereupon functus officio.'[11]

[32] I consequently hold that the appellants have failed to establish the requirements for rescission of the judgment handed down by Mokhesi AJ. Therefore, I cannot find fault with the judgment by Ralebese J on this aspect.

[33] But is that the end of the story? I do not think so. Advocate Metlae argued that, based on the further and/or alternative relief, the settlement agreement between the appellants and the LRA constituted a compromise to discharge the appellants' obligations and not only a part of it. I agree that upon a proper examination of the settlement agreement as well as the entire depositions by the second Appellant, there was no want of intention on the part of the parties to deal with everything by the settlement agreement. In my opinion, the words "full and final payment" mean the full and final payment of the obligation to pay income tax. The words make clear that the claim settled was regarding all income tax. Advocate Metlae argued that from the record and despite the settlement, the second Appellant is at risk of suffering reputational damage because the Registrar was not directed to remove the publication in LESLII of the Judgment CRI/A/002/2018.

[34] In paragraph 16 of the judgment, the learned judge remarked that:

[11] De Wet above n 19 at 1034H-1035A.

> Count 25 – Contravention of section 188 (1) (a) or (b) of the Income Tax Act 1993 read with section 188 (2) of the Income Tax Act 1993.
>
> Based on the facts discussed above, which are primarily common cause, viz, the submission by the second Respondent of a tax return showing an income of M825,815.00, while the amount deposited into the first Respondent's bank account amounted to M5,271,021.00, taken together with an amount claimed based on withholding tax certificate confirming that the Respondent generated an income much more substantial than what was recorded in the tax returns filed with the Lesotho Revenue Authority. All these facts create a *prima facie* evidence of contravention of section 188 (1) (a) or (b) and section 188 (2) of the Income Tax Act 1993. I deliberately refrain from delving into an analytical exercise of these facts lest I be interpreted to be preempting the outcome of the decision by the court a *quo*.

[35] In relation to Count 29 – failure to keep proper accounts, the court held that '[i]t also emerged that Nala Capital had invoiced the Ministry of Home Affairs for work done, while on the other hand when Nala Capital's accountant prepared a financial statement, made a contrary declaration that Nala Capital did not invoice the Ministry of Home Affairs. All these factors point to a *prima facie* evidence of failure to keep proper accounts.' (c), Costs of the suit only if the Respondent opposes this application the finding of the High Court that there is a *prima facie* case against certain charges and that the appellants had a case to answer has a potential prejudice to the second appellant regard being had to the fact that the criminal trial would never proceed. It is worth stating that probity litigation is crucial for upholding ethical standards and maintaining public trust. It plays a significant role in identifying and addressing misconduct involving public officials, private companies, or government contracts. The parties have since settled the matter, and the criminal case has been withdrawn.

[36] A probity check is not typically a part of commercial law itself, but it can be related to various aspects of commercial activities. Probity checks are often associated with ensuring fairness, integrity, and transparency in government procurement processes. Probity checks involve examining the honesty, integrity, and ethical behaviour of individuals or organizations involved in procurement or commercial activities, especially in the context of government contracts. These checks prevent corruption, fraud, and conflicts of interest.

[37] While probity checks are not a direct component of commercial law, they are closely linked to legal and regulatory frameworks that govern public procurement, government contracts, and commercial transactions. Commercial law encompasses a wide range of legal principles and regulations related to business transactions, contracts, sales, and other commercial activities. In summary, probity checks ensure these processes' fairness and integrity.

[38] At first blush, Advocate Metlae's argument that this Court should consider intervening to protect the appellants against the grave negative rigours of potential probity checks in the peculiar circumstances of this case sounded like wind rattling in the reeds. However, on mature later reflection, I opined that there is force in his submission. When a higher court has found a *prima facie* case against an accused, and the prosecution subsequently withdraws the case in return for a settlement, the accused may still face several probity challenges and consequences despite the withdrawal of the

criminal charges. Probity challenges refer to issues related to a person's integrity, ethics, or reputation. Here are some potential probity challenges an accused may face in such a situation: First, even though the criminal case has been withdrawn, the fact that there was enough evidence to establish a *prima facie* case at the higher court level may lead to negative public perception and damage to the accused's reputation. Second, the accused may face difficulties in their current employment or seeking new job opportunities. Employers may question the individual's integrity and suitability for certain roles, especially if the allegations relate to professional misconduct. Third, the allegations and the subsequent withdrawal of charges may strain or affect the accused's relationships with friends, family, and acquaintances. People in the accused's social circle may have questions or doubts about their character. Fourth, a record of the *prima facie* case and the subsequent withdrawal of charges may still appear on background checks, which could influence other situations involving character assessment. Fifth, withdrawing criminal charges does not necessarily prevent further legal actions if new evidence emerges or the settlement terms are not adhered to.

[39] The appellants faced tax and money laundering charges. Tax and money laundering charges are often associated with financial impropriety or illegal financial activities. Even if the charges are withdrawn, the accused's financial reputation may be tarnished, affecting their ability to engage in financial transactions, obtain loans, or open bank accounts. Accused individuals who hold professional licenses or work in finance-related industries (such as

banking, accounting, or financial advising) may face significant probity challenges. A withdrawal of charges does not necessarily negate concerns about their professional ethics and integrity and could impact their career prospects in these fields.

[40] Regulatory bodies may sometimes scrutinize the accused's financial activities, even after criminal charges are withdrawn. This could result in audits, investigations, or compliance checks that can be time-consuming and costly. The alleged victims or government agencies may pursue civil litigation to recover financial damages related to the alleged tax evasion or money laundering. Settlements in criminal cases do not necessarily prevent such civil actions. The public perception of individuals accused of financial crimes can be unfavourable, even if the charges are withdrawn. Media coverage and public awareness of the initial allegations can affect the accused's reputation. Even after a settlement, the accused may be subject to ongoing monitoring or compliance requirements, mainly if the settlement includes terms related to restitution, fines, or compliance measures. Accused individuals involved in business ventures may encounter challenges in securing investments, partnerships, or contracts due to concerns about their probity.

[41] It is important to note that a negative probity check's specific dangers and consequences can vary widely based on the individual's circumstances, the industry or organization involved, and the nature of the misconduct or issues uncovered. Additionally, it is essential to maintain transparency and honesty when undergoing probity

checks, as providing false information can exacerbate the consequences.

[42] Individuals with a history of negative probity may find it challenging to secure loans, housing, or other opportunities that demonstrate good character or financial responsibility. Sometimes, a negative probity check may be related to financial misconduct, such as fraud or embezzlement. The process of undergoing a probity check and dealing with its consequences can be emotionally stressful and mentally taxing. It may also strain personal relationships and cause anxiety or depression.

[43] Furthermore, an accused is entitled to due process of law, which includes the right to a fair trial.[12] Withdrawing charges arbitrarily or for improper reasons can potentially violate this right. In section 19 of the Constitution[13], every person is entitled to equality before the law and equal protection of the law. If charges are dropped against an accused based on other protected characteristics, it could raise equal protection concerns. Even if charges are dropped, the accused may face social stigma and damage to their reputation. The mere fact that they were accused of serious financial crimes can have lasting repercussions on their personal and professional lives.

[44] In my opinion, the present case is one of those rare cases in which the Court should administer justice through the invocation of the further and/or alternative relief prayer. Such a prayer can be

[12] Section 12 of the Constitution of Lesotho, 1993.
[13] Section 19 of the Constitution of Lesotho, 1993.

invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given).[14] Relief under this prayer cannot be granted which is substantially different to that specifically claimed unless the basis therefor has been thoroughly canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of 'further and/or alternative relief'.[15] As Van Zyl J correctly cautioned in ***Mgoqi v City of Cape Town[16]***, this relief should not be pushed through the heads of argument while the same is not in the notice of motion or the founding affidavit. It is trite that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in a replying affidavit.[17]

[45] The importance of including further and/or alternative relief prayers in probity check matters and other legal cases lies in their ability to enhance legal protection, adapt to changing circumstances, and increase the chances of obtaining a favourable outcome. It is a

[14] Port Nolloth Municipality v Xhalisa1991 (3) SA 98 (C) at 112D.
[15] See Erasmus et al. Superior Court Practice at B1 - 130A.
[16] 2006 (4) SA 355 (C) at 362F-363B. See Queensland Insurance Co. Ltd v Banque Commerciale Africaine, 1946 AD 272 at p. 286 and Hirchowitz v Hirchowitz 1965 (3) SA 407 (W).
[17] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at paragraph [29].

valuable strategy to address legal proceedings' complexities and uncertainties effectively.

[46] In the present appeal, the second Appellant seeks to have the judgment of the High Court expunged to the extent that it holds that there is a prima facie case against them. The reason for this is that, although the dispute between the parties has been resolved by way of settlement, the Respondent has refused either to have the finding of a prima facie case expunged or to prevent its publication to protect his probity. However, the Respondent has written to say it does not oppose the litigation and the appeal. Expungement can often help individuals maintain their privacy and reduce the negative impact on their ability to secure employment or other opportunities.

[47] Expunging a finding of the existence of a *prima facie* case typically means that the information related to the case is removed from an individual's criminal record. This may result in the case being treated as if it never occurred. After expungement, the individual may not be required to disclose the case on job applications or other forms where they are asked about their criminal history. In cases where charges are merely withdrawn in exchange for a settlement, the specific details of the settlement agreement will also play a role in determining the effects of expungement. With the foregoing considerations in mind, it would meet the justice of this appeal to order the expungement of the existence of a prima facie case as handed by Mokhesi J. I am convinced that nobody will suffer prejudice because of this kind of decision in this case.

Disposition

[48] By way of disposal, I hold that both appellants had *locus standi* to institute proceedings for rescission in CIV/APN/0336/2022 because they were the co-accused in the criminal case, which was both settled and withdrawn. The High Court (Ralebese J) correctly found that on the papers before her, the appellants had not established the requirements for rescission. However, by invoking the head of a 'further and/or alternative relief', it would serve the justice of this case to order the expungement of the finding of the existence of a *prima facie case* against the appellants.

Order

[49] In the result, the following order is made:

(a) The court's decision a quo that the first Appellant had no *locus standi* and the second Appellant could not represent the first Appellant is set aside.

(b) The holding in CRI/A/002/2018 that a *prima facie* case exists against the appellants is expunged.

(c) The Registrar of this Court is hereby directed to remove the publication in LESLII of the judgment in CRI/A/002/2018.

K. E. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:

P. MUSONDA

ACTING JUSTICE OF APPEAL

I agree:

P. BANYANE

ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV. D. METLAE

FOR THE RESPONDENT: NO APPEARANCE