THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 483/2023

In the matter between:

EAMONN COURTNEY	**APPELLANT**
and	
IZAK JOHANNES BOSHOFF NO	**FIRST RESPONDENT**
WINNIE GLADNESS GUMEDE NO	**SECOND RESPONDENT**
ABSA BANK LTD	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT, JOHANNESBURG	**FOURTH RESPONDENT**

Neutral citation: *Eamonn Courtney v Izak Johannes Boshoff NO & Others* (483/2023) [2024] ZASCA 104 (21 June 2024)

Coram: PONNAN, MOCUMIE, NICHOLLS and MATOJANE JJA and TOLMAY AJA

Heard: 21 May 2024

Delivered: 21 June 2024

Summary: Insolvency law — order of final sequestration not preceded by provisional order — order not a nullity — valid until set aside by a court of law — no proper case for rescission.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wanless AJ, sitting as a court of first instance);

1 The appeal against paragraphs 1, 2 and 3 of the order of the high court is dismissed with costs, including the costs of two counsel.

2 Paragraphs 4 to 8 of the order of the high court are set aside.

JUDGMENT

Nicholls JA (Ponnan, Mocumie and Matojane JJA and Tolmay AJA concurring):

[1] This appeal has its genesis in the grant of an order placing the estate of the appellant, Mr Eamonn Courtney (Mr Courtney), under final sequestration. The order was granted by Moultrie AJ, on an unopposed basis, in the Gauteng Division of the High Court, Johannesburg (the high court) on 4 May 2020, in terms of the Insolvency Act 24 of 1936 (the Act). The final order was not preceded by the grant of an order in terms of s 10 of the Act, sequestrating the estate of Mr Courtney provisionally. Nor, did the court issue a rule *nisi* under s 11(1) of the Act, calling upon him to appear on a day mentioned in the rule to show cause why his estate should not be finally sequestrated. Pursuant to the final order, the first and second respondents, Mr Izak Boshoff NO and Ms Winnie Gumede NO (the trustees), were appointed the Trustees of the insolvent estate of Mr Courtney by the fourth respondent, the Master of the High Court, Johannesburg (the Master), who took no part in the proceedings either in this Court or the one below. The third respondent is Absa Bank Ltd (Absa),

the sequestrating creditor, to whom Mr Courtney was indebted in excess of R54 million.

[2] Almost 2 years later, on 29 April 2022, Mr Courtney launched an urgent application in the high court. Relief was sought in two parts. Under Part A, Mr Courtney essentially sought an order that, pending determination of Part B, the trustees be interdicted from taking any further steps in relation to the administration of his insolvent estate. Under Part B, Mr Courtney sought an order in the following terms:

'1. An order declaring the final order of sequestration of the applicant's estate under case number 41681/20 dated 4 May 2020 a nullity and void *ab initio*, alternatively setting it aside.

2. An order declaring the appointment of the first and second respondents as trustees of the applicant's insolvent estate under Master's reference number G506/2020 to be a nullity and void *ab initio*, alternatively setting it aside.

3. An order declaring all steps taken by the first and second respondents following on the final order of sequestration under case number 41681/2020 dated 4 May 2020 and the first and second respondents' appointment under Master's reference number G506/2020 to be of no force or effect and setting same aside.

4. An order that the first and second respondents within a period to be determined by this court render to this court a full account of their administration of the applicant's insolvent estate under Master's reference number G506/2020 estate inclusive [of] the realisation of assets, receipts of proceeds, the distribution of proceeds, and expenditure incurred (inclusive legal fees) and all fees levied.'

[3] The application was opposed by the trustees and Absa. In addition, on 14 May 2022, the latter gave notice of its intention to conditionally cross apply for an order in the following terms:

'1. The order of Moultrie AJ dated 4 May 2020 is varied to read as follows:

1. The estate of Eamonn Courtney ("the Respondent") is placed under provisional sequestration in the hands of the Master of the High Court.
2. The respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate on the . . . day of . . . at 10:00 or as soon thereafter as the matter may be heard.
3. A copy of this order must forthwith be served -
   3.1 on the Respondent by way of service on his attorneys of record Gothe Attorneys Incorporated situated at 225 Muller Street, Queenswood, Pretoria;
   3.2 on all the employees of the Respondent, if any;
   3.3 on all trade unions of which the employees of the Respondent are members, if any;
   3.4 on the Master; and
   3.5 on the South African Revenue Services.'

[4] The matter was heard by Wanless AJ in the high court on 10 August 2022. On 20 December 2022, the learned acting judge delivered a written judgment, in which he issued the following order:

'3. The application instituted by the Applicant is dismissed and the Court specifically declines to grant the relief sought by the Applicant in paragraphs 1, 3 and 4 of the Applicant's Notice of Amendment dated the 10th of August 2022.

4. The Applicant; First Respondent; Second Respondent and Third Respondent are to pay their own costs in respect of the application referred to in paragraph 3 hereof.

5. In respect of the costs payable by the First and Second Respondents in terms of paragraph 4 hereof, these costs are to be paid by the First and Second Respondents in their personal capacities and are not to be paid from the administration of the Applicants' insolvent estate.

6. The order of Moultrie AJ dated 4 May 2020 under case number 41681/2019 is varied to read as follows:

"1. The estate of Eamonn Courtney ("the Respondent") is placed under provisional sequestration in the hands of the Master of the High Court.

2. The respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate o[n] the 27th day of February 2023 at 10:00 or as soon thereafter as the matter may be heard.

3. A copy of this order forthwith be served-

3.1 on the Respondents by way of service on his attorneys of record Gothe Attorneys Incorporated situated at 225 Muller Street, Queenwood, and Pretoria;

3.2 on the employees of the Respondent, if any;

3.3 on all trade unions of which the employees of the Respondent are members; if any;

3.4 on the Master;

3.5 on the South African Revenue Services."

4. The costs of this application are to be costs in the administration of the Respondent's estate."

7. The provisional sequestration order granted in terms of paragraph 6 hereof will be deemed effective as from 4 May 2022.

8. The Applicant is to pay the Third Respondent the costs of the Third Respondent's conditional counter-application, such to include the costs of two (2) Counsel.'

[5] The high court granted leave to: (a) Mr Courtney to appeal in respect of the whole of its judgment and order; (b) the trustees to cross-appeal against paragraph 5 of the order that they pay the costs occasioned by the application in their personal capacities; and, (c) Absa to conditionally cross-appeal, in the event that Mr Courtney is successful in his appeal, that it be entitled to move for an order in terms of its conditional counter-application.

[6] The background facts leading up to this appeal are as follows. Mr Courtney, a citizen of the United Kingdom, who was resident in South Africa at the time, set up two companies, Salt House Investments (Pty) Ltd (SHI) and Allied Mobile Communications (Pty) Ltd (AMC). He and his wife, Mrs Cole-Courtney, were the

sole directors of the two companies. AMC was the Courtney's primary income-producing company and provided, inter alia, cellular devices to mobile network operators, retailers and wholesalers across Africa. It formed a network of international companies ultimately owned and controlled by the Courtneys. SHI was a property holding company which owned several luxury properties, including the home in which the Courtneys resided at 733 Nick's Place, Eagle Canyon Golf Estate, Roodepoort.

[7] On 21 November 2014, Mr Courtney irrevocably and unconditionally guaranteed payment on behalf of SHI of its liabilities to Absa, as and when they became due, limited to the amount of R27 million. On 17 May 2018, he did the same in respect of AMC - this was limited to the amount of R27,5 million. His wife concluded identical guarantees.

[8] By the end of 2018, AMC was under considerable financial pressure. In May and July 2019, Vida Resources PTE Limited and Vodacom (Pty) Ltd, respectively, launched separate liquidation applications against AMC in the high court. The Government Employees Pension Fund then launched an urgent application against AMC and the international companies belonging to the Courtneys in the Gauteng Division of the High Court, Pretoria to perfect its security. This was in respect of monies loaned and advanced by them in the sum of approximately R767,5 million. The order was granted in August 2019. In November 2019, R&R Wholesales & Distributors issued a liquidation application against AMC. Pursuant to this application, AMC was placed in final winding-up on 21 May 2020. By this time, the group of companies and the Courtney's total indebtedness to creditors was in the vicinity of R1 billion.

[9] Both companies defaulted on their obligations to Absa in terms of their respective overdraft facilities. Mr Courtney, in turn, failed to make payment in terms of the guarantees. Meetings were held between Absa and Ms Cole-Courtney, who also represented Mr Courtney. After several promises of payment were not met, Absa proceeded with separate applications for the sequestration of the estate of each of them on 26 November 2019. It is only the sequestration application for the sequestration of Mr Courtney's estate that is relevant to these proceedings.[1] The application was served personally on him at his place of residence at Canyon Golf Estate on 28 November 2019. Less than a week later, on 3 December 2019, Mr Courtney and his wife left South Africa and never returned to their home. There is some dispute as to whether they 'fled' South Africa, abandoning their companies and their creditors. As appears from Mr Courtney's passport, he returned to South Africa on 5 February 2020 and left again on 19 March 2020. Since then, he has not returned and appears to have permanently settled in Scotland.

[10] The hearing of Mr Courtney's sequestration application was set down for 5 February 2020. On 10 December 2019, Crawford and Associates, acting on behalf of Mr Courtney, sought an indulgence until 17 January 2020 to file an answering affidavit. No answering affidavit was filed by that date, or at all, despite Mr Courtney having been placed on terms. A notice of set down for 4 May 2020 was hand delivered to Crawford and Associates on 27 February 2020.

[11] Neither Mr Courtney, nor his attorneys, appeared on 4 May 2020 and the final sequestration order was granted on an unopposed basis. There is no suggestion that

[1] The estate of Mrs Cole-Courtney was placed first under provisional sequestration on 13 October 2021 and then under final sequestration on 24 January 2022.

Absa failed to meet any of the statutory requirements for the grant of a sequestration order.

[12] On 5 May 2020, the day after the final order had been granted, Crawford and Associates withdrew as Mr Courtney's attorneys of record. The address given for Mr Courtney on the Notice of Withdrawal was 733 Nick's Place, Eagle Canyon Gold Estate, Honeydew, the same address at which the application had been served personally on Mr Courtney. When Absa's attorneys attempted to serve the final order of sequestration on Mr Courtney on 4 June 2020, the Sheriff found the premises locked, and the order was affixed to the door. The order was also served by email on Mr Courtney, with a delivery notification that it had been received. Mr Courtney confirmed under oath, in another application,[2] that he learnt of the sequestration order on 8 July 2020 and received a copy thereof on 15 July 2020. Therefore, Mr Courtney was aware that his estate had been placed under a final order of sequestration at the latest in July 2020.

[13] By that stage, Mr Courtney was represented by new attorneys, Banda and Associates, and had been consulting with them regarding contemplated litigation in respect of AMC and SHI. He was aware that the trustees were continuing with the administration of his insolvent estate and when called upon by the trustees to comply with his obligations under the Act, he failed to do so. On 15 July 2020, the trustees despatched an email to Banda and Associates requesting them to bring to Mr Courtney's attention, an attached letter that detailed the various respects in which he was obliged to assist the trustees under the Act. This was ignored. The trustees

[2] Absa launched liquidation proceedings against SHI on 27 February 2020. AMC was placed in final liquidation on 21 May 2020. Pursuant to this various urgent application were launched by the Courtneys. This was the first wherein the Courtneys sought to have access to the digital records relating to the liquidations.

alleged that, by leaving the country, he avoided prosecution for failing to discharge his statutory obligations, thereby contravening various provisions of the Act. He has also allegedly secreted valuable moveable assets, such as artworks and, by remaining outside the country, has shielded himself from the recovery of costs in the litigation.

[14] As things then stood, Mr Courtney and his attorneys, to all intents and purposes, appeared to have accepted the outcome of the sequestration application, to which there had, in any event, been no opposition.

[15] On 9 March 2022, the trustees launched an *ex parte* application in the Court of Sessions in Scotland with a view to obtaining an order from that court in respect of Mr Courtney's assets that were situated in that jurisdiction. On becoming aware of this, Mr Courtney suddenly saw fit, some two years after the event, to challenge the grant of the final sequestration order. He did so on the sole basis that, not having been preceded by a provisional order, the final order of sequestration granted by Moultrie AJ on 4 May 2020 was 'a nullity and void *ab initio'*.

[16] Mr Courtney launched an urgent application in the high court during April 2022. The relief sought in the application underwent several amendments. Even when the matter finally came before Wanless AJ, an amendment was sought during the course of the hearing itself. This amendment replaced the notice of motion in its entirety. The relief finally sought was the following:

'1 It is declared that the order of this court dated 4 May 2020 issued under case number 41681/2019 pursuant whereto the estate of Eamonn Courtney was finally sequestrated is a nullity and set aside.

2 The *ex parte* order of this court dated 8 September 2020 issued under case number 2020/23030 pursuant whereto the powers of the first and second respondents were extended in accordance with Section 18(3) of the Insolvency Act, 1936 is set aside.

3 That first and second respondents shall within a period determined by this court render a full accounting to this court of their administration of the applicant's estate under Master's reference number G506/2020.

4 Upon delivery of the accounting by the first and second respondents as ordered in paragraph 3 above, the applicant is granted leave to approach this court on supplemented papers and notice for such further relief, and to seek such directions thereafter, as may be appropriate.

5 Costs of the application are to be paid by the first to third respondents jointly and severally, the one paying the other to be absolved.

6 The third respondent's conditional-application is dismissed with costs.'

[17] All of the points that were sought to be pursued on appeal need not detain us because the approach adopted by Wanless AJ is confusing and contradictory. The learned judge held:

'In light of, *inter alia*, the considerable delay on behalf of [Mr Courtney] in seeking relief from this Court to have the order of Moultrie AJ granted on 4 May 2020 declared a nullity and set aside, this Court would have declined to have come to the assistance of [Mr Courtney] in terms of Rule 42(1), *alternatively*, the common law. In any event, [Mr Courtney] is not entitled to that relief in that whilst Moultrie JA did not have the authority in terms of the Act to grant a final sequestration order in respect of [Mr Courtney's] estate, he did have the authority to grant a provisional order of sequestration. The fact that he granted a final order instead of a provisional order was a mistake. Following thereon, the order granted by Moultrie AJ was not void *ab initio* but remained in place until it was either set aside or varied by a subsequent order of this Court. In the premises, [Mr Courtney] is not entitled to the relief sought that the order granted by Moultrie AJ on 4 May 2020 should be declared a nullity and set aside.'

[18] That conclusion (the primary conclusion) was dispositive of the matter in its entirety. Having arrived at the conclusion that Mr Courtney was not entitled to the

relief that he sought, namely that the final order of sequestration granted by Moultrie AJ should be set aside, and that consequently the application instituted by him (the main application) fell to be dismissed (para 3 of the order), nothing further remained. The dismissal of Mr Courtney's application meant that the judge did not have to enter into the counter application, which was conditional upon the main application succeeding. To the extent that the judge did so, he misconceived the true nature of the enquiry. In that regard, the costs should obviously have followed the result. There was thus no warrant for ordering the trustees to pay costs in their personal capacities. Thus, unless the primary conclusion (to which I now turn) is susceptible to being overturned on appeal, the cross appeal by Absa, as well as the trustees, need not detain us.

[19] Relying on the decisions of this Court in *The Master of the High Court Northen Gauteng High Court, Pretoria v Motala NO and Others* (*Motala*),[3] and in *Knoop NO and Another v Gupta and Another* (*Knoop*),[4] it was argued on behalf of Mr Courtney that the grant of a final order of sequestration that was not preceded by a provisional order was not competent under the enabling legislation and therefore a nullity from inception. Being a nullity, so the argument proceeded, the order could not be revived and transformed retroactively into a competent order in terms of s 149(2) of the Act.

[20] In *Motala*, this Court found that an order interdicting the Master of the High Court from appointing provisional judicial managers save in terms of a court order,

[3] *The Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (*Motala*).
[4] *Knoop NO and Another v Gupta and Another* [2020] ZASCA 163; [2021] 1 All SA 726 (SCA); 2021 (3) SA 88 (SCA) para 34.

was not a competent order.[5] In so doing, so this Court held, the high court issued an order that it was not empowered to grant in terms of the legislation. The judge therefore usurped a power that had been reserved to the Master. The relevant section of the Act,[6] conferred on the Master, and only the Master the power to appoint provisional judicial managers. It was therefore impermissible for the court to arrogate to itself the power that had been reserved by the legislature for the Master. In such a situation, said this Court, the order of the court was a nullity and it was unnecessary for the order to first be set aside by a court.

[21] *Motala* was confirmed by this Court in *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others*,[7] and *Knoop and Another NNO v Gupta (Tayob Intervening)*.[8]

[22] The reliance on *Motala* and *Knoop* is misplaced. In *Motala*, because the court purported to exercise a power that it did not have in the face of an express statutory provision, the order was a nullity. In *Knoop*, an application for leave to appeal was granted simultaneously with an application for leave to execute, as well as an order that all future appeals did not suspend the operation of the order. This Court held that the order was invalid because it was issued contrary to the provisions of s 18(4) of the Superior Courts Act 10 of 2013, which expressly provides that an appeal against an execution order will be suspended pending an appeal in terms of s 18(4). As in *Motala*, the high court in *Knoop*, had made an order contrary to the express provision of a statute. Thus, like *Motala*, the order in *Knoop* was a nullity.

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[5] *Motala* para 14.
[6] Section 429 of the Insolvency Act.
[7] *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* [2017] ZASCA 177; 2018 (4) SA 71 (SCA).
[8] *Knoop and Another NNO v Gupta (Tayob Intervening)* [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA).

[23] Here, it is only a court that can issue a sequestration order, whether provisional or final. The complaint, in essence boils down to one of timing, namely that it was not competent for the high court to have issued a final order when it did, inasmuch as it was not preceded by a provisional order. The complaint therefore, properly understood, is that although Moultrie AJ was empowered to issue the order that he did, he did so too early. Unlike *Motala* and *Knoop,* Moultrie AJ did not appropriate to himself a power that had been expressly reserved to someone else. It is this that distinguishes this matter from those two cases.

[24] Having chosen not to oppose the application for his sequestration, Mr Courtney was not free to thereafter ignore the order that issued.[9] Even an incorrect judicial order exists in fact and may have legal consequences until a court sets it aside.[10] Therefore, unlike *Motala* and *Knoop,* the final order of sequestration continued to operate and had force and effect. Pursuant to that order, the trustees were appointed and, thereafter, continued to discharge their function.

[25] This being the case, Mr Courtney's only option was to apply for a rescission of the order of final sequestration. A rescission may be granted in terms of rule 42(1)*(a)* of the Uniform Rules of Court on the basis that it was erroneously sought and erroneously granted in the absence of a party, alternatively the common law.

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[9] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 17.

[10] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) para 180; *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3; [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC) paras 23-26.

[26] Rescission does not follow automatically upon proof of a mistake.[11] A court always has a discretion whether to grant an application for rescission which must be judicially exercised.[12] The Constitutional Court, in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*, held that if litigants deliberately elect not to participate in proceedings, they cannot raise their absence as a ground for rescission in terms of rule 42(1)*(a)*.[13] This Court, in *Lodhi 2 Properties v Bondev Developments (Pty) Ltd* (*Lodhi 2 Properties*),[14] held that a court does not grant a default judgment on the basis that the defendant does not have a defence but on the basis that the defendant has been notified of the claim and the plaintiff is entitled to the order sought as per the rules.

[27] Not only did Mr Courtney elect not to participate in the application for his final sequestration, but he also has put up no defence whatsoever. It is not disputed that he is hopelessly insolvent. As this Court pointed out in *Lodhi 2 Properties*, 'a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment'.[15] Clearly Mr Courtney cannot avail himself of rule 42(1)*(a)*, in support of which, in any event, no case was properly advanced on the papers by him.

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[11] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (*Colyn*) para 5.
[12] *De Wet v Western Bank* 1979(2) SA 1031 (A) at 1042F- 1043C; *Colyn* para 5.
[13] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 56.
[14] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) para 27.
[15] Ibid para 17.

[28] It remains to consider a rescission under the common law. To be successful, Mr Courtney has to show that he was not in wilful default and that there is good cause to grant the rescission. He is unable to show either. He has put up no defence and he consciously chose to ignore the order of final sequestration for two years.

[29] The sole objective of the application seems to be to disrupt the administration of his insolvent estate. No doubt, the legal steps taken by the trustees in respect of his property in Scotland appear to have impelled him to act. At the bar, counsel conceded that in persisting with the matter, Mr Courtney hoped to force the respondents to the negotiating table. However, as the relief originally sought under Part B declaring the appointment of the trustees a nullity and seeking to set aside all the steps taken by them in the discharge of the statutory duties, is no longer persisted in, it may well be that what we have been treated to are arguments in sophistry, because it is plain that the clock cannot be turned back.

[30] Accordingly, for the reasons given: (a) the appeal by Mr Courtney must fail; and, (b) paragraphs 4 to 8 of the order of the high court, which cannot stand, must be set aside.

[31] In the result:

1 The appeal against paragraphs 1, 2 and 3 of the order of the high court is dismissed with costs, including the costs of two counsel.
2 Paragraphs 4 to 8 of the order of the high court are set aside.

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C E HEATON NICHOLLS

JUDGE OF APPEAL

Appearances

For the appellant:	J G Smit
Instructed by:	Gothe Attorneys Inc., Pretoria
	Lovius Block Inc., Bloemfontein
For the first and second respondents:	S Symon SC
Instructed by:	Cox Yeats Attorneys, Johannesburg
	Symington De Kok Attorneys, Bloemfontein
For the third respondent:	A Subel SC with A Vorster
Instructed by:	Cox Yeats Attorneys, Johannesburg
	Phatshoane Henney Attorneys,
	Bloemfontein.