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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 9879/2021P

In the matter between:

THE PRUDENTIAL AUTHORITY

APPLICANT

and

JABULANI PHUMASILWE NGUBANE

FIRST RESPONDENT

(Identity No. 7[...])

NELISIWE THULE NGUBANE

SECOND RESPONDENT

(Identity No. 8[...])

(Married to each other in community of property)

ORDER

The following order is granted:

1. The application is dismissed with costs.
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JUDGMENT

PIETERSEN AJ:

[1] This is an application for the rescission of a provisional order of sequestration granted by this court on 21 November 2022 as well as the subsequent final order of sequestration granted by this court on 23 February 2023.¹ It is common cause that both these orders were granted in the absence of the respondents. The respondents are married in community of property and the provisional and final orders of sequestration thus pertained to the joint estate.

[2] On 29 October 2021, the applicant issued an application for the sequestration of the joint estate of the respondents. The application for sequestration was preceded by a directive (the 'directive') in terms of section 83 of the Banks Act 94 of 1990 (the 'Banks Act'), served on the respondents on 16 March 2016. The first respondent, on 12 April 2016, brought an application to review the directive. This review, however, was unsuccessful.

[3] Section 83 of the Banks Act provides for the repayment of money unlawfully obtained. The process is initiated by a directive to any person who has obtained money by carrying on the business of a bank without being registered as a bank or without being authorised to do so. The directive requires the person to repay all such monies obtained by that person, including interest, subject to the provisions of section 84 of the Banks Act and in accordance with such requirements, and within such period, as may be specified in the directive.

[4] The applicant's case for the sequestration of the respondents' estate was premised on monies that were received by the first respondent by carrying on the business of a bank without being registered or authorised to do so. In support of the application for the sequestration of the respondents' joint estate, the applicant relied on the directive, which demanded payment from the first respondent in the sum of R1 125

¹ The parties are referred to as in the main application for sequestration.

323 and which further states that any person who refuses or fails to comply with the directive may for the purposes of any law relating to the sequestration of insolvent estates be deemed not to be able to pay his/her debts or to have committed an act of insolvency. The first respondent did not make payment in accordance with the directive and his subsequent challenge of the directive in review proceedings was unsuccessful. Therefore, in terms of section 83 of the Banks Act, the first respondent was deemed to have committed an act of insolvency.

[5] The application for rescission is brought in terms of section 149(2) of the Insolvency Act 24 of 1936 (the 'Insolvency Act'). However, the application is also brought in terms of the Uniform Rules of Court and the common law, as the first respondent explains at paragraph 44 of his founding affidavit:

'...I bring the application in terms of also the Rules of Court and the common law'.

[6] In this rescission application, the first respondent did not dispute that he obtained monies by carrying on the business of a bank without being registered or authorised to do so. It was also not disputed that the first respondent failed to make payment in accordance with the directive.

[7] In terms of the first respondent's founding affidavit in the rescission application, the first respondent argued that neither the application papers nor the subsequent provisional sequestration order were properly served on him or his wife, the second respondent. The applicant's reliance on the sheriff's returns of service, where personal service is indicated, was further disputed.

[8] The first respondent further takes issue with the applicant's allegations of factual or deemed insolvency on the basis that the draft insolvency report relied on by the applicant is speculative and based on assumptions, and confused the position of the first respondent with that of his brother and an entity known as Mbomvu Consulting CC. The first respondent further disputes the applicant's reliance in the sequestration

application on the amount of R1 125 323.06 and alleges that the only direct evidence of the first respondent receiving deposits are two amounts of R43 200 and R86 400, which means that the total amount of the debt in respect of the first respondent is only R129 600.

[9] The first respondent further takes issue with the allegations of factual insolvency relied on by the applicant and argues that since his true indebtedness is only in the sum of R129 600, it must follow that on the applicant's own version and considering the value of the respondents' unencumbered assets, the respondents' estate is, in fact, solvent. In addition, the first respondent disputes the municipal valuation in respect of the immovable property owned by the respondents and relied on by the applicant as constituting an advantage to creditors. The first respondent points out that the municipal valuation presented to the court hearing the sequestration application stems from 2016 and that the figures relied on by the applicant in proving the respondents' insolvency and advantage to creditors were, therefore, stale.

[10] The applicant opposed the application on the basis that service of the application papers in the sequestration application, as well as the subsequent service of the provisional sequestration order, was proper and the provisional sequestration order was, in fact, served personally on the respondents. It was further stated that the applicant relies on the deemed insolvency of the respondents as a result of the respondents' failure to comply with the directive. It was further pointed out that the first respondent did not deny his involvement in the unlawful scheme conducted through his brother's business, Mbomvu Consulting CC, nor that he took funds from members of the public, despite not being registered as a bank. It was also argued that despite such conduct being unlawful and notwithstanding the directive, the first respondent has not repaid any of the monies acquired by him through the scheme as demanded in terms of the directive.

[11] Section 149(2) of the Insolvency Act provides for the setting aside of a provisional or final order of sequestration. The section does not provide for any specific

grounds to rescind an order and the court must therefore exercise its discretion in light of all the circumstances.² In the absence of express limitations, it has been suggested by the authors of *Insolvency Law and its operation in winding-up*³ that the court should exercise the powers in circumstances it may consider just, including the circumstance that the order was made in error.

[12] In *Storti v Nugent*⁴ the court undertook a comprehensive analysis and historical evaluation of the statutory and common law power of the court to set aside sequestration and liquidation orders. The court identified the following six principles that define this power:⁵

- '(1) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.
- (2) Unusual or special or exceptional circumstances must exist to justify such relief.
- (3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.
- (4) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission.
- (5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.
- (6) A Court will not exercise its discretion in favour of such an application if undesirable consequences would follow.'

[13] It has been suggested by the authors of *Mars: The Law of Insolvency in South Africa*⁶ that the principles relating to the setting aside of a liquidation order may, 'by way of analogy, also be taken into consideration when a sequestration order is sought to be

² *Naidoo and another v Matlala NO and others* 2012 (1) SA 143 (GNP) paras 4 and 5 ('Naidoo').

³ P M Meskin et al *Insolvency Law and its operation in winding-up* (Service issue 61, November 2023) at para 15.1.6.2 ('Meskin').

⁴ *Storti v Nugent and others* 2001 (3) SA 783 (W).

⁵ *Ibid* at 806D-G.

⁶ E Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 10 ed (2019) at 170 ('Mars').

set aside'. In dealing with liquidation orders, the Supreme Court of Appeal held in *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd*⁷ that 'the wording of section 354 of the Companies Act 61 of 1973 was wide enough to allow the setting aside of a liquidation order that should never have been granted, a test that is wider than common-law rescission'.⁸ In *Klass v Contract Interiors CC (in liquidation)*,⁹ the wider test enunciated in *Ward* was applied. It was held that the following principles applied to the rescission of a winding-up order in terms of section 354 of the Companies Act 61 of 1973 ('the 1973 Companies Act'):¹⁰

[65.1] The court's discretion is practically unlimited, although it must take into account surrounding circumstances and the wishes of parties in interest, such as the liquidator, creditors and members.

[65.2] The court should ordinarily not set aside a winding-up where creditors or the liquidators remain unpaid or inadequate provision has been made for the payment of their claims.

[65.3] Where the claims of the liquidator and all creditors have been satisfied, the court should have regard to the wishes of the members, unless those members have bound themselves not to object to the setting-aside order, or the member concerned will receive no less as a result of the order sought than would be the case if the company remained in liquidation.

[65.4] In deciding whether or not to grant a setting-aside order, the court should, where appropriate, have regard to issues of "commercial morality", "the public interest" and whether the continuation of the winding-up proceedings would be a "contrivance" or render the winding-up "the instrument of injustice".

[14] If an application for rescission of judgment is brought in terms of the common law, an applicant must show good cause for rescission. Good cause involves three elements:

(a) A reasonable explanation for the applicant's default;

⁷ *Ward and another v Smit and others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) ('*Ward*').

⁸ *Mars* at 170.

⁹ *Klass v Contract Interiors CC (in liquidation) and others* 2010 (5) SA 40 (W).

¹⁰ *Ibid* para 65.

- (b) The application must be *bona fide* made; and
- (c) The applicant must have a *bona fide* defence which *prima facie* carries some prospects of success.¹¹

[15] Rule 42 of the Uniform Rules of Court provides for the variation and rescission of orders granted in the absence of a party and which were erroneously granted or sought. In *Naidoo*, the court held that '[a] judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment'.¹² In *Zuma v Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others*¹³ it was held that 'where a litigant, given notice of the case against him and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a)'.

[16] The first respondent admits that he received the application papers. He states in his founding affidavit that upon receipt of the papers, he forwarded them to his attorneys of record. The first respondent denies that his wife, the second respondent, received the application papers as indicated in the sheriff's return of service. However, the second respondent failed to present any evidence in this application, not even in the form of a confirmatory affidavit, on this issue.

[17] In terms of the sheriff's returns of service, the application papers were served on the respondents on 12 October 2022. It is common cause that the notice of motion contained an unopposed hearing date of 13 January 2022. The applicant explained that it was unable to obtain service of the application on the respondents for some time and, as a result, a notice of set down accompanied the application papers in terms whereof

¹¹ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11; *Naidoo* para 5.

¹² *Naidoo* para 6.

¹³ *Zuma v 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 61.

the matter was set down for hearing on the unopposed motion roll on 21 November 2022. This is not disputed by the respondents.

[18] The first respondent and the respondents' attorney of record overlooked the notice of set down and the decision was made to wait until the second respondent was served with the application papers before any steps would be taken to oppose the application. The first respondent further explains as follows at paragraph 24 of his founding affidavit:

'...I understood, in any event, that the first stage of the application was simply for the court to order that I be directed, on a day to be allocated, to explain why I should not be sequestered. I was advised that I would get formal notification of that date by the service of a court order.'

[19] This indicates an acceptance by the first respondent that a provisional sequestration order may be granted in his absence and that he would subsequently receive the court order directing him to show cause why a final sequestration order should not be made.

[20] The respondents and their attorney did nothing to oppose the provisional sequestration order, despite being in possession of the application papers. Therefore, on 21 November 2022, the provisional order of sequestration was granted in the absence of the respondents. In the circumstances, I find that the respondents have failed to provide a reasonable explanation of their default when the court granted the provisional sequestration order.

[21] In terms of the sheriff's returns of service, the provisional sequestration order was personally served on the respondents on 9 December 2022 at the first respondent's place of employment. The first respondent disputes such personal service and indicates that the visitors' gate book at his place of employment indicates the arrival of the sheriff on the day to visit the first respondent's personal assistant for purposes of service. In addition, the first respondent presented a copy of his diary for 9 December

2022, which indicates that he had an appointment at a particular school. The first respondent further presented a copy of his vehicle's tracking printout and he draws the conclusion that the printout indicates that he was not present at his place of employment at the time when the court order was served. The first respondent indicates that he was approximately 1km away from his place of employment, although he cannot recall where he was at the time.

[22] The first respondent's evidence to dispute service of the court order is lacking in a number of respects and does not disturb the *prima facie* evidence of personal service placed before the court hearing the application for final sequestration. Again, there is no confirmatory affidavit by the second respondent and it therefore needs to be accepted that the second respondent was personally served with the court order, as indicated by the sheriff's return. There is nothing to suggest on the papers before me that the second respondent's presence at the first respondent's place of employment may have been untrue or even unusual.

[23] The visitors' gate book entry indicating the sheriff's entry to visit the first respondent's personal assistant for purposes of service is also not unusual or indicative of service having taken place on someone other than the first respondent. The sheriff may have been aware or was advised at the gate that the first respondent's personal assistant is one Thobile and that he should liaise with her for purposes of seeing the first respondent. Furthermore, the diary entry for 9 December 2022, indicating the appointment at the school is of no consequence as there is no evidence indicating that the first respondent was in fact present thereat in accordance with his diary entry. To the contrary, the first respondent's vehicle tracker printout seems to suggest that he, or at least the vehicle, was at Albecore Street, St Lucia, which, according to the first respondent, is approximately 1km from his workplace. It is not suggested that this place is in fact the school where the first respondent had the appointment. I find that the tracking printout in respect of the first respondent's vehicle, in the absence of any further evidence, is insufficient to indicate that the first respondent was not present at his office when the provisional sequestration order was served by the sheriff.

[24] The *prima facie* evidence presented by the sheriff indicating personal service of the provisional sequestration order on the respondents therefore stands and was correctly accepted by the court hearing the sequestration application as indicating such personal service. I am therefore also not satisfied that the respondents have provided a reasonable explanation for their default in respect of the hearing for the final sequestration order.

[25] It is not suggested by the respondents that the court granted the provisional and final sequestration orders in error. It therefore needs to be considered whether the respondents have shown that the application is *bona fide* and that they have a *bona fide* defence to the application for sequestration for purposes of rescission in terms of the common law.

[26] The first respondent does not deny having received the directive pertaining to the repayment of funds issued by the Registrar of Banks. In fact, as indicated above, the first respondent, through the assistance of his attorney, invoked the statutory process whereby the directive could be reviewed. The first respondent was unsuccessful in that process.

[27] As such, the respondents had to make payment in terms of the directive and were obliged to cooperate with the applicant and the repayment administrator to provide information in respect of the first respondent's involvement in the unlawful scheme. The respondents failed to make payment in terms of the directive.

[28] Further, the first respondent accepts the report of the repayment administrator as reflecting a liability in the sum of R129 600. This amount exceeds the minimum threshold required for the granting of an order of sequestration.¹⁴ In any event, the amount the first respondent asserts is outstanding is of no consequence in light of the

¹⁴ See section 9 of the Insolvency Act.

fact that his review of the directive was dismissed, and therefore the amount claimed by the applicant is correct.

[29] The repayment administrator indicates in his report that the first respondent unlawfully obtained the sum of R1 125 323 and that he owns an immovable property with the value of R1 380 000, with an encumbrance over the property in the form of a bond in favour of Nedbank in the outstanding sum of approximately R680 000. The conclusion is thus drawn by the applicant that there is sufficient advantage to creditors for the respondents' joint estate to be sequestrated.

[30] It is not disputed by the first respondent that he obtained money by carrying on the business of a bank without being registered or authorised to do so. The first respondent further failed to disclose in his founding papers that he unsuccessfully attempted to review the directive. The first respondent did not make payment in accordance with the directive and, in terms of section 83 of the Bank's Act, the first respondent was, therefore, deemed to have committed an act of insolvency. The applicant thus became entitled to apply for the sequestration of the joint estate of the respondents in terms of section 84 of the Banks Act.

[31] The first respondent's argument that the application is stale is premised on the applicant's reliance on a municipal valuation in respect of the immovable property which stems from 2016. In argument before me, Mr Harrison, who appeared for the respondents, relied on *Air Treatment Engineering and Maintenance CC v Pac-Con Pharmaceuticals*¹⁵ where Masipa J found that the papers which formed the basis for the sequestration application were stale. However, the facts before me can be distinguished from those in *Air Treatment*. Masipa J dealt with a statutory notice in terms of section 345 of the 1973 Companies Act and the liquidation application was three years old. In this matter, the applicant relied on a draft solvency report and municipal valuation from November 2016, with the application for sequestration being heard during 2022 and

¹⁵ *Air Treatment Engineering and Maintenance CC v Pac-Con Pharmaceuticals* [2016] ZAKZDHC 34 ('*Air Treatment*').

2023. I am not satisfied that the applicant's reliance on these documents renders the application stale if one considers the provisions of sections 83 and 84 of the Banks Act, the first respondent's subsequent attempts to review the directive, and the difficulties experienced by the applicant in serving the application.

[32] In the circumstances, I am unable to find that the respondents have shown that they have a *bona fide* defence, which *prima facie* carries some prospects of success in the sequestration application.

[33] Furthermore, as a result of the first respondent's failure to disclose his unsuccessful review of the directive, the respondents' failure to make a full and complete disclosure of their assets, liabilities, income and expenditure¹⁶ and the failure by the second respondent to provide any evidence at all, I conclude that the application is also not *bona fide* made.

[34] The respondents have therefore failed to provide any reason justifying the exercise of the court's discretion in their favour for rescission in terms of section 149(2) of the Insolvency Act and further failed to satisfy the requirements for rescission under the common law. I am further satisfied that the provisional and final orders of sequestration were not granted in error which may have justified rescission in terms of section 149(2) of the Insolvency Act or in terms of Uniform rule 42. The respondents further failed to provide any exceptional circumstances to justify rescission of the final sequestration order.

[35] The application must therefore fail. The applicant sought costs on a punitive scale and it was submitted that the application constitutes an abuse of process. It is a well-known principle that the award of costs is in the court's discretion, which discretion needs to be exercised judicially upon consideration of the facts in each case and 'make such order as to costs as would be fair and just between the parties'.¹⁷ Despite my

¹⁶ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) at 444E.

¹⁷ *Fripp v Gibbon and Co* 1913 AD 354 at 363.

conclusion above that the application is not *bona fide* made, I am unable to find that the application constitutes an abuse of process justifying a mark of this court's disapproval of the respondents' conduct. There are no exceptional circumstances present in this matter that may justify a punitive costs order, having regard to the conduct of the parties throughout the litigation.¹⁸ In the circumstances, the general rule that the successful party is entitled to its costs shall apply.

[36] I make the following order:

1. The application is dismissed with costs.

PIETERSEN AJ

Date of hearing: 15 February 2024
Date of Judgment: 25 September 2024

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¹⁸ *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and another* [2020] ZACC 5; 2020 (4) SA 409 (CC) para 46; *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 220.

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