REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/27101

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES

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SIGNATURE **DATE:** 15 September 2021

First Applicant

Second Applicant

and

ASTRON ENERGY (PTY) LTD First Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED Second Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG Third Respondent

RICHARD KEAY POLLOCK N.O. Fourth Respondent

JUDGMENT

WEINER J

Introduction

[1] There are four applications involving the applicants herein, Dr Mahendran Munsamy (Dr Munsamy), together with his wife, Ms Leegale Adonis (Ms Adonis), which were referred for case management). The applications relate to the following:

(a) The rescission of an order granted by Bhoola J on 16 September 2019, made pursuant to an application brought by Astron Energy (Pty) Ltd ('Astron') and the Standard Bank of South Africa Limited ('Standard Bank') under case number 2019/27101, to appoint the fourth respondent, Mr Pollock (cited herein in his capacity as the provisional / final liquidator of Castle Crest Properties 16 (Pty) Ltd ('Castle Crest'). (the Bhoola J rescission application).

(b) The application brought under case number 2020/16290 for the review and setting aside of the decision by the Master to appoint Mr Pollock, as the final liquidator of Castle Crest (the review application).

(c) The rescission of an order granted under case number 2019/24506 by Judge Mia (at the instance of Mr Pollock and Mr Hasum Yunus Ismail) extending their powers as provisional liquidators to institute proceedings to evict the applicants herein from the property situated at 112A 9th Avenue, Hyde Park (the 'Hyde Park' property), which is owned by Castle Crest. ('the Mia J rescission application').

(d) An application brought by Mr Pollock under case number 2019/13587, seeking the eviction of the applicants from the Hyde Park property ('the eviction application').

[2] The present application, which the parties agreed should be heard first, is the Bhoola J rescission application.

Background and chronology of events

[3] Castle Crest is a property owning company, and does not actively trade. It owns three immovable properties, one of which is the Hyde Park property. On 21 July 2009, Castle Crest concluded a home loan agreement with Standard Bank for

approximately R11 million in respect of this property. On 18 February 2010, a mortgage bond was registered over the property. Castle Crest failed to make payments in respect of the mortgage bond from approximately October 2011. Dr Munsamy and Ms Adonis, the applicants herein, have been in occupation of the property since before the provisional winding-up of Castle Crest and, according Standard Bank and Mr Pollock, have been occupying it without compensation to Castle Crest, and without paying any rental in respect thereof.

[4] On 21 October 2015, Castle Crest was placed under provisional winding-up at the instance of Standard Bank, based upon both the home loan agreement and a suretyship provided by Castle Crest for a company styled Gas2Liquids (Pty) Ltd (Gas2Liquids), which was also secured by a surety mortgage bond of R16 million, as Gas2Liquids was indebted to Standard Bank in terms of both an overdraft and a letter of credit. Gas2Liquids was also placed under provisional winding-up at the same time.

[5] On 16 November 2015, Mr Pollock and Mr Ismail were appointed as provisional liquidators of Castle Crest. All legal proceedings involving the two companies were suspended until the appointment of a final liquidator in terms of s 359 of the Companies Act 61 of 1973 (the 1973 Act).[1] On 2 February 2017, Castle Crest was placed in final liquidation.

[6] The first meeting of creditors was held on 24 November 2017. Standard Bank proved a claim of approximately R49 million for the home loan and the suretyship debt in respect of Gas2Liquids. At the meeting, convened by the Deputy Master of

[1] Section 351 titled 'Legal proceedings suspended and attachments void' provides:
'(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200—
(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.
(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

the High Court (Mr Maphaha), Mr Pollock and Mr Ismail were nominated as the joint liquidators.

[7] On 27 March 2018, Dr Munsamy applied to the third respondent ('the Master') to remove Mr Pollock as the liquidator. In the interim, a s 417 enquiry (in terms of the 1973 Act) was convened into the liquidation of Castle Crest.

[8] The enquiry in terms of s 417 was to be held on 9 April 2018. For various reasons, the applicants contended that the enquiry should not proceed. They referred *inter alia* to the fact that Mr Pollock had been appointed as the joint liquidator of Gas2Liquids, and Midnight Feast Properties 2 (Pty) Ltd, as well as Castle Crest (all companies in which the Dr Munsamy is involved).

[9] The applicants contended that there were disputes between Standard Bank and Astron in regard to debts owing to them. Mr Maphaha was requested to remove Mr Pollock as joint liquidator of Gas2Liquids on the basis of him not having *locus standi,* as he was unable to prove the claims of Standard Bank and Astron. It was accordingly requested that the s 417 enquiry be adjourned and that the duties and powers of the liquidators of the three companies be suspended, pending the Master's decision to remove the liquidators.

[10] On 6 April 2018, the assistant Master, Mr Mpande addressed a letter to the Commissioner of the s 417 enquiry, Bertelsmann J, informing him that he had received an application for the removal of the joint liquidators in all of the above matters, and therefore the Commissioner was directed to stay the enquiry pending the outcome of the removal application.

[11] However, on 25 May 2018, Mr Maphaha wrote to the applicants' attorneys stating that the enquiry proceedings would proceed until the Master received an order issued by the High Court that the enquiry proceedings should be suspended or stayed.

[12] On 11 July 2018, the applicants' attorney laid complaints with the Minister of Justice and Constitutional Development accusing Mr Pollock of various offences.

[13] On 20 February 2019, Astron and Standard Bank instructed their attorney to call upon the Master to either issue certificates of final appointment, alternatively, to decline to accept the nominations. The Master did not respond to the letter.

[14] On 5 April 2019, the Master directed a letter Mr Pollock, requiring a status report and restricting his powers. In response, on 24 April 2019, Mr Pollock set out that Castle Crest owned three immovable properties (one of which is the Hyde Park property). It was also stated that, despite the lapse of 18 months since the first meeting of creditors, the Master had failed, or neglected, to issue a final certificate of appointment.

[15] On 21 June 2019, on application by Mr Pollock and Mr Ismail, Mia J extended the powers of the provisional liquidators to bring an application for the eviction of the applicants. (This order is the one in which rescission is also sought).

[16] On 2 August 2019, Standard Bank and Astron's application to have the liquidators appointed as final liquidators was issued. Such application was not served on the applicants herein. Standard Bank and Astron, contended that it was not necessary to do so. It was served on the Master (apparently on Mr Maphaha) who the applicants herein allege had concealed the file; thus no notice to oppose was filed.

[17] In the application which came before Bhoola J, Astron and Standard Bank sought an order in the following terms:

'1. Directing the first respondent [being the Master] to:

1.1 within five days of this Order appoint the second and third respondents [being Mr Pollock and Mr Ismail] as the final liquidators of Castle Crest Properties 16 (Pty) Ltd (Registration Number: 2006/016587/07) (in liquidation) ("Castle Crest") in terms of Section 369(2)(a) of the Companies Act, 61 of 1973 and, to issue certificates of appointment to second and third respondents in accordance with the provisions of Section 375(1) of the Companies Act 61 of 1973 ("the 1973 Act"); Alternatively

1.2 within five days after this Order, and in the event of the first respondent declining to accept the nomination of second and third respondents as the final liquidators of Castle Crest to give written notice to second and third respondents of that decision in

terms of the 1973 Companies Act that the first respondent so declines to accept the nomination of the second and third respondents; and

1.3 to convene a meeting of creditors and members or contributories of Castle Crest for the purposes of nominating another person for appointment as liquidator, stating in the notice that the first respondent declined to accept the nomination for appointment as liquidators of the second and third respondents, and the reasons therefor.'

[18] Astron and Standard Bank set out the chronology of events referred to above and stated that, that in term of s 359 of the 1973 Act, all legal proceedings, including the arbitration proceedings against Gas2Liquids and Castle Crest, were suspended pending the appointment of a final liquidator. Thus, they had been unable to complete their work in this regard. Astron and Standard Bank contended that the Master was unable to convene a second meeting of creditors and the winding-up of Castle Crest had come to a standstill. The creditors submitted that the intention of the legislature is that the winding-up of an insolvent company should be dealt with expeditiously when regard is had to the provisions of s 391[2] read with s 403 of the 1973 Act.[3]

[19] On 16 September 2019, the order by Bhoola J was granted. It was ordered that:

'The First Respondent is directed within 5 (FIVE) days of this order to appoint the Second and Third Respondents, being the persons nominated by the meeting of creditors and members of 24 November 2017 as the final liquidators of Castle Crest Properties … and,

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[2] Section 391, titled 'General duties' provides:
'A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.'

[3] Section 403, headed 'Liquidator's duty to file liquidation and distribution account' provides:
'(1) (a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their liability.
(b) If the final account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified.
(2) …'

simultaneously to issue certificates of appointment to Second and Third Respondents in accordance with the provisions of Section 375(1) of the Companies Act 61 of 1973.'

[20] On 27 September 2019, the Master apparently unaware of the order that had been granted, drafted a letter to the provisional liquidators, Mr Pollock and Mr Ismail, referring them to the application for their removal, which was dated 27 March 2018. He stated that he was declining to appoint them as final liquidators in terms of s 370 of the 1973 Act.[4] The nominated liquidators had the right to remedy this situation as provided for in terms of s 371 of the Act.[5] As appears below, this letter was apparently not sent.

[21] On 27 September 2019, a letter was sent to Mr Pollock referring to the fact that the Master was withdrawing his certificate of appointment, dated 13 February 2018, as a final liquidator of Gas2Liquids.

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[4] Section 370, titled 'Master may decline to appoint nominated person as liquidator' provides:
'(1) If a person who has been nominated as liquidator by meetings of creditors and members or contributories of a company was not properly nominated or is disqualified from being nominated or appointed as liquidator under section 372 or 373 or has failed to give within a period of seven days as from the date upon which he was notified that the Master had accepted his nomination or within such further period as the Master may allow, the security mentioned in section 375 (1) or, if in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the company concerned, the Master shall give notice in writing to the person so nominated that he declines to accept his nomination or to appoint him as liquidator and shall in that notice state his reason for declining to accept his nomination or to appoint him: Provided that if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as liquidator, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as liquidator of the company concerned.
(2) (a) When the Master has so declined to accept the nomination of any person or to appoint him as liquidator or the Minister has under section 371 (3) set aside the appointment of a liquidator, the Master shall convene meetings of creditors and members or contributories of the company concerned for the purpose of nominating another person for appointment as liquidator in the place of the person whose nomination as liquidator the Master has declined to accept or whom the Master has declined to appoint or whose appointment has been so set aside.
(b) In the notice convening the said meetings the Master shall state that he has declined to accept the nomination for appointment as liquidator of the person previously nominated or to appoint the person so nominated and the reasons therefor, subject to the proviso to subsection (1), or that the appointment of the person previously appointed as liquidator has been set aside by the Minister, as the case may be, and that meetings are convened for the purpose of nominating another person for appointment as liquidator….'

[5] Section 371 'Remedy of aggrieved persons—
(1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister.
(2) The Master shall within seven days of the receipt by him of the request referred to in subsection (1) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.
(3) The Minister may, after consideration of the reasons referred to in subsection (2) and any representations made in writing by the person who made the request referred to in subsection (1) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, direct the Master to accept the nomination of the liquidator concerned and to appoint him as liquidator of the company concerned.'

[22] According to the applicants, it was only in November 2019 that they came to have knowledge of the final appointment of the liquidators of Castle Crest, pursuant to the order of Bhoola J.

[23] In June 2020, a letter from Advocate Netshitahame of the Master's office to Dr Munsamy's attorneys set out the following:

'2. Kindly take note that, it is the duty of the Master to appoint liquidators and that no judge of the High court of South Africa has the authority to effect any appointment of any person as a liquidator.

3. Where the Master received a court order directing him to appoint a particular liquidator, the Master has a duty to obey such a court an order.

4. The decision made by the Master to remove the liquidator in this matter was made after having considered the application for removal of the liquidator and is therefore valid. Such a decision and the court order cannot simply be ignored they remain valid until set aside by the court.

5. When the Master made the decision to remove the liquidators and to issue a certificate to the liquidator without challenging the court order, he became functus officio and can't change his decision.

6. Any person who is aggrieved by any decision of the Master has the right to review the decision of the Master.'

[24] In a letter dated 17 June 2020 to Vathers Attorneys, Mr Mpande pointed out that the letter of removal dated 27 September 2019 was erroneously not sent to the relevant parties. Thus, although he intended to remove the liquidators, he could not effect this by virtue of the court order. On 26 July 2020, this rescission application was issued by the applicants.

[25] It is common cause that the Master failed to make a final appointment in regard to the final liquidator of Castle Crest, and did not appoint Mr Pollock (and Mr Ismail) as its final liquidators until the court order of Bhoola J was served on the Master.

[26] As is evident from the chronology set out above, it appears that this matter has been handled by many different persons in the office of the Master. In addition, it appears that they have expressed contrary views to each other and have issued

conflicting directives. There has been no uniformity in their decision making. At the hearing of this matter, the applicants sought to refer to further reports emanating from the Masters office, which had not been filed previously. These reports are the following:

(a) On 28 July 2021, the Assistant Master (Adv. Netshitahame) filed a report stating the following:

> '2. The notice of motion and annexures was served on the Master and I have carefully considered the court order referred to in the notice of motion together with annexures.
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> 3. The decision to remove the liquidator in this matter was taken by the Master after having considered all the submission made by all the interested parties.
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> 4. The duty to appoint liquidators resides with the Master of the High Court. The appointment of the final liquidator is guided by the provisions of the Insolvency Act and the Companies Act. Section 54 of the insolvency Act requires, among other things that, a person who enjoys number and value must be appointed. The court order does not refer to the insolvency provisions. What it does among other things is to direct the Master to appoint the respondents as final liquidators of Castle Crest Properties 16 (PTY) LTD. The implication of this court order is that it took away powers of the Master to Act in terms of the provisions of the insolvency Act. When the Master decides as to who should be appointed he does not only consider the provisions of the Companies Act. The court order referred to specific Sections of the Companies Act.
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> 5. The court order made reference to section 369 (2)(a) of the companies Act, this section in turn refers to Section 370 of the Companies Act. The Master had already declined to appoint the respondents and they were notified as such. The Master did not notify them that he has accepted their nomination but he has done the opposite.
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> 6. I think it is prudent on my part to state that nomination at a meeting of creditors does not mean that the nominee will automatically be appointed. The Master has the authority to set aside the purported election or to act in terms of the nomination. I refer the Honourable Court to the ex parte application launched by the Master of the High Court South Africa (Case number 28042/11)

7. In this case the court found that no judge of the High Court of South Africa has the authority or jurisdiction to effect any appointment of any person to any position of trustee, liquidator or judicial manager.

8. I refer to the case of *De Wet and Another v Khammissa and others (358/2020)* paragraph 15 which provides that once the Master has taken a decision he cannot change it as he becomes *functus officio* and that there is (sic) no empowering provisions that allows him to revoke his decision.

9. As the Master, I am of the considered view that the court order directing the Master to appoint the respondents should be set aside as it has far reaching consequences.' (sic)

(b) In a second Master's report, also filed by Adv Netshitahame, on 28 July 2021, the following was stated:

'3. I would like to state that, the decision to remove the liquidator in this matter was made by the Master and as a result the Master cannot revoke or withdraw his own decision. This means that the removal stands until it is properly set aside.

4. The information before me reflects that the first responded was appointed based on the court order which directed the Master to appoint the first respondents. The master cannot ignore the court order issued by the above court.

5. I refer to the matter of Khammissa and others v the Master, where the court stated that the Master is functus officio and that there is no empowering provision that allows him to revoke his decision.' (sic)

Applicable Legislation

[27] The administration of insolvent estates is controlled by the Insolvency Act 24 of 1936 (the Insolvency Act). The Insolvency Act deals with the appointment of trustees and provisional trustees, responsible for the administration of insolvent estates of natural persons, and the manner and fashion in which trustees (and provisional trustees) have to deal with such estates. These provisions apply *mutatis mutandis* to the winding-up of insolvent companies, and the appointment and control over liquidators and provisional liquidators. The Companies Act 71 of 2008 (the 2008 Act) specifically preserves the winding-up provisions of the 1973 Act in Item 9 of Appendix 5.

[28] It is trite that a liquidator has a position of trust towards creditors, the company, the Master and the court, and must thus be independent. Section 55 of the Insolvency Act lists a range of factors which may disqualify a person from being appointed as a trustee or liquidator.[6]

[29] Section 57 gives the power to the Master to set aside the appointment of a liquidator who was not properly elected or is disqualified in terms of s 55 from being appointed. It also grants authority to the Minister to set aside a decision by the Master to confirm or to refuse to confirm the election of a liquidator. The court also has the power to declare a person disqualified from appointment, but this does not detract from the Master's capacity to do so. In addition, s 60 of the Insolvency Act empowers the Master to remove a liquidator on the grounds set out therein. It is important to note that the original version of the section granted that power to the court, but in 1965 an amendment transferred this capacity to the Master.

[30] In *Ex parte: Master of the High Court of South Africa (North Gauteng)*,[7] Bertelsmann J set out, in detail, the evolution of the Master's powers in terms of the

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[6] 'Any of the following persons shall be disqualified from being elected or appointed a trustee:—
(a) any insolvent;
(b) any person related to the insolvent concerned by consanguinity or affinity within the third degree;
(c) a minor or any other person under legal disability;
(d) any person who does not reside in the Republic;
(e) any person who has an interest opposed to the general interest of the creditors of the insolvent estate;
(f) a former trustee disqualified under section seventy-two;
(g) any person declared under section fifty-nine to be incapacitated for election as trustee, while any such incapacity lasts, or any person removed by the court, on account of misconduct, from an office of trust;
(h) a corporate body;
(i) Any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, or per jury and has been sentenced to imprisonment without the option of a fine, or to a fine exceeding R2 000;
(j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he undertook that he would, when performing the functions of a trustee or assignee, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law;
(k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for him as a trustee or to effect or assist in effecting his election as trustee of any insolvent estate;
(l) any person who at any time during a period of twelve months immediately preceding the date of sequestration acted as the bookkeeper, accountant or auditor of the insolvent;
(m) any agent authorized specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the estate concerned and acting or purporting to act under such special authority or general power of attorney.'

[7] *Ex parte: Master of the High Court of South Africa (North Gauteng)* [2011] ZAGPPHC 105; 2011 (5) SA 311 (GNP). (*Ex parte the Master*)

Insolvency Act in regard to the appointment of liquidators. What emerges, *inter alia*, from this decision is that—

'The master is in control of the entire process of administration and liquidation of insolvent estates, an important part of which consists of the oversight she or he exercises over the trustees in the performance of their functions as mandated by the Insolvency Act.'[8]

[31] Many of the powers and duties that the Master exercises in sequestration proceedings are applicable to the administration of companies that are liquidated. The Master has the power to appoint liquidators and to decline the appointment of a liquidator. Section 379(2) of the 1973 Act provides that a court may remove a liquidator if the Master fails to exercise this function. This power, however, is not expressed in the Act where a Master has failed to *appoint* a liquidator – only where a Master has failed to remove a liquidator. Bertelsmann J went on to state:

'Every stage of the administration of insolvent estates and companies and close corporations under winding-up, from the launching of the original sequestration or liquidation application to the rehabilitation of the insolvent or the deregistration of the corporate entity, is controlled by the master's office. Its duties include many specialised functions and administrative tasks that can only be carried out efficiently by a dedicated organisation that exists specifically for that purpose.

An organisation of this nature has the institutional knowledge and expertise to apply policy, and to assess the ability and integrity of trustees and liquidators, and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate. In this respect *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T), a full-bench decision of this court, provides useful guidance. It upheld the master's decision no longer to allow a particular individual to be appointed to any of the provisional offices under the former's control. In doing so, the court emphasised the intricacy and volume of work that the master's office has to perform, and recognised that the master keeps lists of the names of potential trustees, liquidators and judicial managers composed of persons who are prima facie qualified to be appointed. If the master comes to the bona fide conclusion that a particular person is no longer fit to fulfil the role of provisional trustee, liquidator or judicial manager, he has the power, but also the duty, to prevent such person's appointment. See further *Krumm and Another v The Master and Another* 1989 (3) SA 944 (D).

It is clear that the master has knowledge concerning the ability, integrity, honesty and

[8] Ibid para 19.

dedication of persons who may wish to be considered as trustees, liquidators and judicial managers, whether provisional or otherwise. This enables the master to carry out the policy to appoint persons from a previously disadvantaged background as additional trustees or liquidators, in addition to those elected by the creditors. The master's office is also more likely to be aware of any potential or actual conflict of interest a candidate might have in a particular instance that would prevent her or his appointment. This is information that is built up in the office dedicated to the administration and oversight of insolvencies and liquidations over a period of many years. It is information that the court simply does not possess, and that does not form part of the facts that are disclosed to the court when application is made for a provisional sequestration or liquidation.'[9]

[32] Bertelsmann J issued the following order in regard to the appointment of liquidators:

"1. It is declared that the Master of the High Court of South Africa is the only person authorised to appoint:

1.1.1 trustees and provisional trustees of sequestrated and provisionally sequestrated estates;

1.1.2 liquidators and provisional liquidators of companies and close corporations in liquidation or provisional liquidation; and

1.1.3 judicial managers and provisional judicial managers of companies in judicial management and provisional management; and

1.2 no judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to in para 1, *nor to make any recommendations to the master in respect of any appointment to any of these positions*.' [emphasis added]

[33] In *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO*,[10] the SCA referred with approval to the findings of Bertelsmann J in *Ex Parte The Master*. The SCA stated:

'Any doubt as may have existed as to the power of the high court to appoint judicial managers — and to my mind there ought to have been none — has now been laid to rest by the judgment of Bertelsmann J in *Ex parte The Master of the High Court South Africa (North*

[9] Ibid paras 25-27.
[10] *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) para 7. (*Motala*)

Gauteng) 2011 (5) SA 311 (GNP). In that matter the Master saw fit to approach the high court for declaratory relief. What motivated the application appears from the reported judgment (paras 2 – 4), which reads:

"The application has been necessitated by a practice that has developed over the past years that attorneys who apply for the sequestration of individuals or the liquidation of companies (or, for that matter, close corporations), or for judicial management of a company in terms of the Companies Act 61 of 1973 (see now Act 71 of 2008), include a prayer in the notice of motion and draft order for the appointment of a specific individual as trustee or provisional trustee, as liquidator or as provisional liquidator or judicial manager or provisional judicial manager.

Advocates who are instructed to appear in these applications, usually in the unopposed motion court, move for orders in these terms, and, as is apparent from a number of orders granted by judges of this court, do so successfully.

The Master contends that such orders are in conflict with the clear provisions of the relevant statutory provisions, and that officers of the court should not apply for, and this court should not grant, orders that interfere with the exercise of the applicant's functions."'

[34] Counsel for Astron and Standard Bank submitted that the South African insolvency system is creditor-driven and thus, the majority of creditors in number or claims have the right to elect trustees and liquidators, and to take decisions in respect of the manner in which assets falling into the estate or constituting property of a corporate body in winding-up should be dealt with. They referred in this regard to *Minister of Justice and Another v South African Restructuring and Insolvency Practitioners Association and Others*,[11] where it was held that*:*

'…the fundamental purpose of insolvency legislation … is to secure the realisation of the remaining assets of the insolvent and the distribution of the resulting amounts among creditors in accordance with the order of preference laid down by law. Although the master plays a vital role in overseeing the process of winding up an estate, the process is nonetheless creditor-driven. It is the majority of creditors in number or value of claims that have the right to elect trustees or nominate liquidators. … It is the creditors who stand to lose as a result of the insolvency. They are the best judges of their own interests and they are the

[11] *Minister of Justice and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2016] ZASCA 196; 2017 (3) SA 95 (SCA) para 55.

people best situated to instruct the trustee or liquidator how to go about the process of liquidation or winding-up.'

[35] However, in *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO*,[12] the SCA explained this as follows—

'…[Section] 367 of the 1973 Act makes it clear that the Master appoints liquidators for the purpose of conducting the winding-up of a company. The Master's office, which controls every stage of the administration of companies under winding-up, from the launching of liquidation applications to the deregistration of companies, has the institutional knowledge and expertise to apply policy and assess the ability and integrity of liquidators who may wish to be appointed. Although the South African insolvency system is creditor-driven and the majority of creditors have the right to elect liquidators, their choice of liquidator is subject to the Master's approval and the performance of the functions of liquidators is subject to the Master's control.'

[36] The wishes of the creditors, although persuasive, cannot take the pace of the Master's decision. Neither can a court exercise such function to the exclusion of the Master. This much is clear from prayer 1.2 of the order made in *Ex Parte The Master* which provided that a Judge may not make 'any recommendations to the master in respect of any appointment to any of these positions.'[13]

[37] Most authorities relating to this issue have concerned the court directly appointing a liquidator. Standard Bank and Astron attempted to distinguish the present case, as Bhoola J did not herself appoint the liquidator, but issued an order that the Master should appoint Mr Pollock as final liquidator. The argument of Dr Munsamy is that the court could not have granted the order because it had no power to do so; only the Master has the power to appoint the liquidator. This is a question of semantics and is specifically prohibited in terms of the order issued by Bertelsmann J in *Ex Parte the Master*, and approved by the SCA in *Motala.* The Master (erroneously) believed he could not disobey the court order until it was set aside. Whether an invalid order must be set aside will be dealt with below.

[38] The alternative relief sought by Astron and Standard Bank may have been the appropriate relief to seek, in view of the substantive and inexplicable

[12] *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* [2017] ZASCA 177; 2018 (4) SA 71 (SCA) para 32. (*City Capital*)
[13] See para [32] above.

delay by the Master in appointing a final liquidator. Such relief is competent in terms of s 370 and s 371 of the 1973 Act.

Rescission and Delay

[39] This matter was brought by way of an application for rescission. It was brought on one of three grounds:

(a) Rule 31(2)(b);

(b) Rule 42(1)(a); or

(c) The common law.

[40] The application was argued on the basis of Rule 42(1)(a):

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; …'

[41] The purpose of Rule 42(1)(a) is to correct an obviously wrong judgment or order. It requires proof that the judgment or order could not lawfully have been granted; that it was granted in the absence of a party; and that such party's rights or interests were affected by the judgment. Unlike a Rule 31 or common law rescission, good cause need not be shown for an applicant to succeed.[14] Standard Bank and Astron argued that the 20 day period provided for in Rule 31(2)(b) would be a reasonable period in terms of this Rule as well. However, that time period is not set in stone and depends on the circumstances of each case

[42] In regard to the delay, the applicants have provided a reasonable explanation for the delay of approximately seven months. The relevant reasons involved the onset of the lockdown, the COVID-19 regulations, Ms Adonis contracting COVID-19 and, in addition, having to undergo lumbar spine surgery. There were also enquiries made with the SIU and other entities during that period. Further, the conflicting decisions emanating from the Masters' office as to whether the removal of the liquidators had been effected,

[14] *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T) at 777C–G.

further delayed the applicants launching of the application. It is trite that the delay must be judged together with the merits of the case. The Constitutional Court in *Geldenhuys v National Director of Public Prosecution and Others* held that, '[t]he general rule is that non-compliance with the rules of this court will be condoned when it is in the interests of justice to do so.'[15]

[43] More recently, the Constitutional Court in *Ferris v FirstRand Bank Ltd* held that:[16]

'…lateness is not the only consideration in determining whether condonation may be granted … the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.'

[44] In the present case, the order was clearly not only erroneously sought and erroneously granted, but invalid, as the court had no power to grant it. The interests of justice thus demand that condonation should be granted.

Must the order be declared a nullity and set aside

[45] In view of what is set out above, the order of Bhoola J is invalid and thus constitutes a nullity.

[46] The courts, in respect of administrative and executive decisions, have consistently held that such decisions are 'legally effective' until set aside.[17] The general principle in respect of court orders, which echoes this position, is set out by the authors of *Erasmus: Superior Court Practice* as follows:

'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct.'[18]

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[15] *Geldenhuys v National Director of Public Prosecutions and Others* [2008] ZACC 21; 2009 (2) SA 310 (CC) para 21.
[16] *Ferris and Another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) para 10.
[17] See Mitchell Nold de Beer 'Invalid Court Orders' (2019) 9 *Constitutional Court Review* 283 at 284.
[18] D E van Loggerenberg et al *Erasmus Superior Court Practice* (RS 16, 2021) at D1-562.

[47] A court order is therefore presumed to be valid and correct until it is set aside. However, a somewhat different approach was taken by the SCA in the matter of *Motala*, wherein it was held—

'[The Judge] was not empowered to issue, and therefore it was incompetent for him to have issued, the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, [the Judge] served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect.... Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing.'[19]

[48] As the order granted by Bhoola J is a nullity, the question arises whether it is necessary for this Court to declare it invalid and/or rescind or set it aside. This question reflects the tension between legal certainty and the principle of legality, principles which both stem from the rule of law. The tension between these two principles is reflected in the diverging positions of the officials of the Master's office in respect of the status of the Bhoola J order – that is – can it be ignored, or must it be considered binding until it is set aside or rescinded?

[49] This tension has also found its way into the decisions (and dissents) of the SCA and the Constitutional Court, as demonstrated in *Oudekraal,*[20] *Kirland,*[21] *Merafong*[22] and *Magnificent Mile.*[23] In *Oudekraal*, the SCA held that our law had long recognised that, 'even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside'.[24]

[50] The Constitutional Court first had occasion to consider the *Oudekraal* decision in *Kirland*, where it examined the status of an improper administrative decision made

[19] *Motala* (note 10 above) para 14. See also *City Capital* supra where the order was a nullity but the appellant had not sought to review the decision of the Master's appointment of the liquidator, who was appointed by the Court. In the present case, a review application has been brought and is pending.
[20] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).
[21] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC).
[22] *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC).
[23] *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* [2019] ZACC 36; 2020 (4) SA 375 (CC).
[24] *Oudekraal* (note 20 above) para 26.

by a state official. In *Kirland*, the SCA had overturned a High Court's order setting aside the approvals for the establishment of two private hospitals on the basis that the validity of the approval was not an issue before the High Court, and that the High Court was thus not entitled to set it aside – the Department had not taken the approval on review. As Cameron J, in *Kirland* put it, '[t]hat was a fundamental error. For the decision does exist. It continues to exist until, in due process, it is properly considered and set aside.'[25] The court found that '[t]he essential basis of *Oudekraal* was that *invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process*.'[26] [emphasis added]

[51] Cameron J stated further that—

'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality.'[27]

[52] In the majority judgment in *Merafong*, again penned by Cameron J, he stated that—

'The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.'[28]

[53] Jafta J, in a dissenting judgment, found that such an approach was at odds with the principle of legality. He stated that the principle of legality cannot countenance an invalid administrative act for the simple reason that—

'…an illegal administrative act, although it may exist in fact, does not exist in law and consequently it may not be enforced because it is not binding. This is so because an

[25] *Kirland* (note 21 above) para 66.
[26] Ibid para 101.
[27] Ibid para 103.
[28] *Merafong* (note 22 above) para 41.

administrative act derives its legal force from its validity. Simply put an invalid act is unenforceable.'[29]

[54] However, in *Magnificent Mile*, Jafta J seemed to have softened his stance somewhat. He stated that—

'…we must acknowledge the principle that, just like laws, administrative actions are presumed to be valid until declared otherwise by a court of law. What this means is that any person who disregards such law or action does so at his or her own peril should it turn out that the law or action is valid. But the presumption like all presumptions is rebuttable.'[30]

[55] Directly relevant to the present case was Cameron J's statement in *Kirland*, which distinguished the position from an order granted by a court, which did not have jurisdiction to grant such order. He referred in this regard to *Motala* –

'In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting-aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.[31]

[56] The present case is not on all fours with any of the authorities referred to above. In *Motala*, it was a subsequent contempt (of an invalid order) that Ponnan J held was unenforceable. He stated—

'Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. *For as Coetzee J observed in Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA177 (W) at 183E:

"It would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration."'[32]

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[29] Ibid par 107.
[30] *Midnight Mile* (note 23 above) para 83.
[31] *Kirland* (note 21 above) at footnote 78.
[32] *Motala* (note 10 above) para 14.

[57] In *City Capital*, Schippers AJ held that, as City Capital did not seek to review the Master's decision appointing the respondents as liquidators, or to set aside that certificate of appointment, the finding that the court orders were a nullity, would have no practical effect.[33]

[58] In the present matter, the applicants have sought to do both. On the basis that the order of Bhoola J is a nullity, no order to that effect would be necessary, based upon Cameron J's reference to *Motala* in *Kirland*. But the situation is different. Firstly, it is the actual order that is under attack, not the later enforcement of it through contempt proceedings, as in *Motala*. Secondly, the order led to the Master's appointment of Mr Pollock, which decision the applicant seeks to review and set aside, which was not the case in *City Capital*. Thirdly, the applicants sought a rescission in terms of Rule 42. It is clear from what is stated above, that the order, in addition to being a nullity, was, axiomatically erroneously sought and granted.

[59] Thus, in view of the other applications, which are pending (and in particular, the review application), I believe that, to ensure certainty, the Court should issue a declaration of the order's pre-existing invalidity and set it aside. This order would follow by virtue of the Bhoola J order being invalid and/or by virtue of it being erroneously sought and granted.

Costs

[60] The applicants sought costs from the respondents in the case of opposition. However, the applicant seeks an indulgence and condonation from this Court in this application. The history of this matter also demonstrates that many delays have been caused by the applicants in this, and the related matters. The founding affidavit with the annexures runs to over a 1000 pages. Many, as yet, untested and offensive allegations have been made against the respondents. This matter turned on one crisp issue – was the High Court authorized to grant the order it did? The majority of the allegations and annexures were not necessary for a decision on this point. I am accordingly of the view that the applicants should pay the costs of the application up until the

[33] *City Capital* (note 12 above) paras 43-44.

filing of the notice of intention to oppose. All subsequent costs should be costs in the liquidation.

Accordingly, the following order is made:

1. Condonation is granted to the applicants for the delay in launching of the application for rescission of the order granted on 16 September 2019.

2. The order granted by Bhoola J on 16 September 2019 is declared a nullity and set aside.

3. The applicants are to pay the costs of the application up until the filing of the notice of intention to oppose. All subsequent costs should be costs in the liquidation.

_____

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 September 2021.

Date of hearing:	5 August 2021
Date of judgment:	15 September 2021

Appearances:

Counsel for the applicants:	S van Rensburg SC
Attorney for the applicants:	Vathers Attorneys
Counsel for the 1st & 2nd respondents:	J Smit; A McKenzie
Attorney for the 1st & 2nd respondents:	Fairbridges Wertheim Becker