REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NUMBER: A308/2014
DATE OF HEARING:11 August 2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES	
(2) OF INTEREST TO OTHER JUDGES: YES	
SIGNATURE Robert Sutherland	DATE 2022/08/19

In the matters between:

MOLATUDI PHUKUBJE DINGAAN **Appellant**

and

THE STATE **Respondent**

This judgment has been delivered by being uploaded to the caselines profile on 19 August at 10h00 and communicated to the parties by email.

JUDGMENT

Sutherland DJP (with whom Mudau J and Todd AJ concur)

Introduction: the issue

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[1] A controversy has arisen about the implications of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA), as amended by section 10 of the Judicial Matters Amendment Act 42 of 2013, (JMA Act) read with section 43(2) of the JMA Act. The National Prosecuting Authority (NPA) which represents the State and Legal Aid South Africa (LASA) which represents Mr Molatudi, the applicant, have differing views.

[2] The relevant portion of section 309 (1) reads:

> "309: Appeal from lower court by person convicted
> (1) (a) .... any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided ....."

[3] Section 35(3)(o) of the Constitution provides a guarantee to a person charged with a criminal offence of a right of appeal to a higher court. Access to a court of appeal is generally hedged with ancillary statutory requirements, usually including the need to apply for and be granted leave to appeal, as alluded to in the cited portion of section 309(1). By contrast, the underlined portion of section 309(1)(a) creates an automatic right of an appeal on both the conviction and the sentence from a Magistrates' Court judgment if that judgment and order imposes a sentence of life imprisonment on the convicted person. Section 43(2) of the JMA Act made the provisions retrospective to the date of 1 April 2010.

[4] The JMA Act plainly articulates a radical policy change in which a person at peril of life imprisonment was to be spared the need to seek leave to appeal from the Magistrate. The font of the policy choice to make that benefit retrospective derives from the self-evident moral imperative that a person who faces a future denied of liberty should be guaranteed the benefit of another higher court examining the correctness of the conviction and the propriety of the sentence, and that this guarantee was important enough to extend it to persons declined an appeal for a specified period.

[5] The problem which arises and the different approaches of the NPA and of LASA were captured in a stated case in which three questions have been put to the court:

"THE PARTIES ARE AD IDEM ON THE FOLLOWING:

1. On 25 September 2012 the appellant was convicted of the rape of a minor in the Kempton Park Regional Court.
2. On 27 September 2012 the appellant was sentenced to life imprisonment by the Kempton Park Regional Court.
3. On 18 April 2013 the appellant applied for leave to appeal and this was refused by the Regional Magistrate.
4. The appellant then petitioned the above Honourable Court for leave to appeal against both the conviction and sentence.
5. On 21 August 2014 the above Honourable Court gave an Order in respect of the appellant's petition under case number P156/2014. In terms of the Order the appellant was granted leave to appeal against the sentence only. Leave to appeal in respect of his conviction was refused.

An appeal was subsequently heard by the above Honourable Court on 8 October 2015.

6. In January of 2014 sections 10 and 11 of the Judicial Matters Amendment Act 42 of 2013, as read with s 43(2) of the same Act came into effect. It amended the provisions of section 309(1)(a), read with section 309B(1)(a) of the Criminal Procedure Act 51 of 1977. The effect of this amendment was that it granted all persons sentenced to life imprisonment by a regional court an automatic right of appeal. These provisions have retrospective effect in that they are deemed to have come into operation on 1 April 2010.

7. The appellant's legal representative in the appeal did refer to the above-mentioned in the Heads of Argument she submitted. However, the submissions relating to the conviction amounted to only two paragraphs.
8. On 15 October 2015 the above Honourable Court handed down Judgment in the appeal. In giving Judgment the Court stated that the appeal was with leave of the Court against the sentence of life imprisonment. The Court did not make reference to the above provisions relating to the automatic right of appeal.

QUESTIONS OF LAW TO BE DETERMINED

9. The appellant contends that he has an *ex lege* automatic right of appeal against his conviction due to the retrospective operation of Act 42 of 2013. The fact that he had petitioned the High Court for leave to appeal and had been unsuccessful cannot mean that he has now lost this right.

10. The respondent contends that the above Honourable Court is now functus officio due to the fact that the petition which was dismissed seeking leave to appeal against conviction cannot be disregarded.

11. The questions of law for determination in this matter can be formulated as follows:

    11.1 Did the fact that the above Honourable Court dismissed the appellant's petition for leave to appeal against conviction exclude him from gaining the retrospective automatic right of appeal from the provisions of 10 and 11 of the Judicial Matters Amendment Act 42 of 2013 and its amendment of section 309(1)(a), read with section 309B(1) (a) of the Criminal Procedure Act 51 of 1977?

    11.2 Did the above Honourable Court have the power to make an Order refusing the appellant leave to appeal against his conviction in light of the fact that sections 10 and 11 of the Judicial Matters Amendment Act 42 of 2013 had already come into effect on which came into operation on 22 January 2014?

    11.3 Does the above Honourable Court have jurisdiction to hear the appellant's appeal against conviction in light of the fact that the above Honourable Court dismissed the appellant's petition seeking leave to appeal against conviction?"

Evaluation

[6] Both the NPA and LASA are agreed that an appeal against the conviction is appropriate. Both are prepared to label the High Court order of 21 August 2014, refusing leave to appeal the conviction, a nullity. The difference between them is

about the logistics of getting the case to the High Court to hear the appeal. The NPA contends that the order refusing leave on the conviction must first be set aside and that can be done only by an appeal to the Supreme Court of Appeal (SCA). By contrast, LASA contends that the effect of section 309(1)(a) is that the High Court order of 21 August 2014 can be treated as if it had never been made and thus that no legal impediment or formality exists to bar an immediate direct appeal to be enrolled before the High Court.

[7] Upon the facts presented to this court in the stated case, when the High Court, on 21 August 2014, dealt with the application for leave to appeal, it did so, ostensibly, in ignorance of the changes in the law which were already of full force and effect from 22 January 2014. This decision was made after the JMA Act came into force and thus the retrospectivity of the provisions plays no part in the controversy: ie, when the order was made by the High Court on 21 August 2014 it was an irregularity *at the time it was made*.

[8] A pertinent distinction exits between an order made where no jurisdictional power exists to make it and an order made where a power to make a decision of the class in question exists, but the order made is unlawful or wrong for another reason. The former is a nullity. The latter is simply wrong. How is an order that is "null and void" to be treated?

[9] The view of LASA is that it may be ignored because the statute trumps the order. The idea that a court order which is bereft of jurisdictional authority is a nullity and can be

"ignored" *by another court* is addressed by Ponnan JA in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & Others 2012 (3) SA 325 (SCA).* In that matter a judge in the High Court had given an order appointing certain persons as judicial managers. However, the laws regulating insolvency were held to reserve that function exclusively for the Master of the High Court to exercise. Accordingly, the judge's order was a purported exercise of a power that did not exist and hence automatically a nullity. Ponnan JA traversed long-established legal authority about the consequences that flow from that fact:

> "[11] What appeared to weigh with Legodi J was the following general proposition: all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A – C; *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229). No doubt there are important policy considerations why that must be so. But, that raises a logically anterior question, which Legodi J described as 'the most vexing aspect of this judgment' — namely the status of the order of Kruger AJ. The Master contended that it was a nullity and could, without more, be disregarded. Legodi J took a contrary view.
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> [12] As long ago as 1883 Connor CJ stated in *Willis v Cauvin* 4 NLR 97 at 98 – 99:
> 'The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. The maxim *extra territorium jus dicenti inpune non paretur (Dig.* 2.1.20) is applicable (*Dig.* 50.17.170 & 2.1.20; *Cod.* 7.48.1 & 14.4; *Wes. ibi Poth. Pand.* 42.1.(14, 15); *Voet* 42.1.48; *Wes. ad. Dig.* 42.1.(5); *Wes. ad. Dig.* 50.17.170 & 2.1.(50); *Groenwn. ad. Cod.* 7.64; *Christin. Decis.* 4.94.2); . . . .'
> *Willis v Cauvin* was cited with approval in *Lewis & Marks v Middel* 1904 TS 291; and *Sliom v Wallach's Printing & Publishing Co, Ltd* 1925 TPD 650. In the former, Mason J (with whom Innes CJ and Bristowe J concurred) held at 303:
> 'It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, *ad Cod.* 2; 41; 7, 54; *Willis v Cauvin*, 4 N.L.R. 98; *Rex v Stockwell*, [1903] T.S. 177*; Barnett & Co. v Burmester & Co.,* [1903] T.H. 30).'
> And in the latter Curlewis JP (Krause J concurring) held at 656:
> 'The action, therefore, of the respondent company in applying for judgment, apparently by default, against the individual partner Sliom, the appellant in the

present case, was an illegal and wrongful act. A judgment was thereby obtained against a person who had not been legally cited before the Court, and the effect of that judgment is that it is a nullity; it is invalid and of no effect. In the case of *Lewis & Marks v Middel*, to which Mr *Murray* has referred us, and also in an earlier case where the Roman-Dutch authorities were examined, it was laid down on the authority of *Voet* that a judgment given against a person who had not been duly cited before the Court is of no effect whatsoever. It is a nullity and can be disregarded. It seems to me that is the position here. A judgment was obtained against the individual Sliom personally, whereas he had never been cited personally and individually to appear before the Court. Therefore, that judgment was wrongly obtained against him, and that judgment, in my opinion, was a nullity as far as he was concerned. The only judgment the plaintiff, on that citation, was entitled to was against the partnership.'

[13] *Lewis & Marks* and *Sliom* were cited with approval by this court in *S v Absalom* 1989 (3) SA 154 (A) at 164E – G, which held:

'Dit volg dus dat die Volle Hof myns insiens geen bevoegdheid gehad het om die appèl aan te hoor nie. Die gevolg, meen ek, was, soos voorspel deur Strydom R, dat die Volle Hof se uitspraak 'n nietigheid was. Sien, benewens die bronne, aangehaal deur Strydom R, Voet *Commentarius ad Pandectas* 49.8.1 en 3; Groenewegen *De Legibus Abrogatis, Ad Cod* 7.64; *Lewis & Marks v Middel* 1904 (TS) 291 op 303; *Sliom v Wallach's Printing and Publishing Co Ltd* 1925 TPD 650 op 656 en *Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA 177 (W) op 183D-E. Soos blyk uit hierdie bronne, het die uitspraak van 'n hof wat nie regsbevoegdheid het nie, geen regskrag nie, en kan dit eenvoudig geïgnoreer word. *Groenewegen (loc cit)* sê wel dat, waar dit gaan oor die nietigheid van 'n uitspraak van die Hooggeregshof, die *Princeps* se hulp ingeroep moet word, maar hierdie reël geld nie meer by ons nie.'

(See also *S v Mkize* 1962 (2) SA 457 (N) at 460; and *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) paras 18 and 19.)

[14] In my view, as I have demonstrated, Kruger AJ 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, Kruger AJ 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 (*Schierhout v Minister of Justice* 1926 AD 99 at 109). 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) SA 177 (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.'

(See also *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren and Others and the Taxing Master* 1964 (1) SA 162 (O) at 164D – H.)"

(Underlined emphasis added)

[10] In *MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd t/a Eye and Institute 2014 (3) SA 481 (CC),* the Constitutional Court held that a decision by an organ of state to ignore its own earlier administrative decision because that earlier decision was unlawful and could therefore be ignored by a person or entity subordinated to it, was a wrong perspective; rather, it was held, it is necessary to formally expunge an unlawful decision by a court in a review where it could be set aside.[1] *Kirland* related to an administrative decision, not a court order. The decision-maker in that case had the authority to make the decision and no question of an absence of jurisdictional power arose. Cameron J commented on the import of the decision in *Motala:*[2]

> "In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others*.... 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."
> (Underlined emphasis added)

[11] The argument on behalf of the NPA that a formal setting aside was a prerequisite, in this instance, by the SCA as the court having appeal jurisdiction over the High court, sought to draw support from other caselaw.[3] Certain passages from the decision in

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[1] See esp paras [87] – [106] of the judgment where the law on this topic is extensively traversed.
[2] Footnote 78 of the judgment to para [1-3], supra.
[3] The decision in *S v Umude 2017 JDR 1836 (SCA)* was invoked by the NPA. The text of the report of this case is difficult to follow, is marred by patent errors and by cryptic references, and the proposition being articulated is obscure. In our view it is dangerous to rely on it. It has no safe precedent value and the Publishers, Juta & Co would do well to withdraw it from the compendium. The facts in that matter, ostensibly, were that Umude and others, after being convicted in the Specialised Crimes Court (a lower court), applied to that court for leave to appeal. The application was dismissed. They then petitioned the Eastern Cape Division of the High Court. That petition was dismissed. They then petitioned the SCA for leave to appeal. The remarks in the SCA judgment which are apparently relied upon by the NPA are these:

> [3] The order by the court a quo dismissing the appellants' petition is an order of that court (see *S v Khoasasa*), which stands until set aside on appeal by this court. In terms of the Supreme Court

Department of Transport & Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) were invoked, from which it was argued that there was support for its stance that any court order, regardless of the rationale for its irregularity, had to be respected until set aside by another court. *Tasima* was in certain respects critical of *Motala.* The relevant critique in the majority judgment is thus:

> "[182] This reading of s 165(5)[4] accepts the judiciary's fallibilities. As explained in the context of administrative decisions, 'administrators may err, and even . . . err grossly'. Surely the authors of the Constitution viewed judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.
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> .....
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> [186] .... the legal consequence that flows from non-compliance with a court order is contempt. The 'essence' of contempt 'lies in violating the dignity, repute or authority of the court'. By disobeying multiple orders issued by the High Court, the Department and the Corporation repeatedly violated that court's dignity, repute and authority and the dignity, repute and authority of the judiciary in general. That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an

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> Act 9 of 1959, [sic] an application for leave to appeal the order had to be lodged with that court (the high court). If that court took the view that it was wrong in its earlier decision to dismiss the petition to it and that on further reflection there were indeed reasonable prospects of the contemplated appeal succeeding, then it granted leave to appeal to this court. However, all that served before this court on appeal was the correctness of the high court's dismissal of the appellant's petition to it. This court therefore did not enter into substantive merits of the envisaged appeal, save for the limited purposes of considering whether or not it had reasonable prospects of succeeding.
> [4] In terms of the Act *[sic; ? which Act – the Superior Courts Act 10 of 2013?]* the high court lacks jurisdiction, as it previously did [? in terms of the Supreme Court Act?] to consider an application for leave to appeal against its dismissal of a petition to it. As a dismissal by the high court of a petition in terms of s 309C(2) [of the Criminal Procedure Act 51 of 1977]is a decision on appeal to it, an application for special leave to appeal against that decision now lies to this court in terms of s 16(1)*(b)* of the Act.*[ie S 16(1) (b) of the Superior Courts Act 10 of 2013]*
> (Underlined emphasis added)

Over and above our reluctance to rely on this report, our view is these passages do not address the issue at stake in the present matter. The general proposition in the first cited sentence establishes no point of novelty. In any event, the critical question posed in this matter was not raised.

[4] Section 165 (5) of the Constitution: "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.

[187] The essence of contempt brings us back to the Constitution. Section 165(4) provides that —

> '(o)rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court'.

Fundamentally, these measures must include complying with a court order. As the Supreme Court of Appeal in *Meadow Glen* explained, we are 'entitled to expect' that our public bodies 'make serious good faith endeavours to comply with [court orders]', including by taking the initiative to challenge decisions with which they disagree. Neither the effectiveness nor the dignity of the judiciary is protected when an organ of state ignores a court order, let alone several. The Department, an organ of state, had a duty, above and beyond that of the average litigant, to comply with the court orders. The integrity of the Constitution demanded this.

[188] The Department nevertheless contends that there has been 'no valid basis ex contractu [arising from the contract] for the purported extension' and '(a)ccordingly the orders giving effect to the purported extension could not have been granted'. The first judgment similarly finds that '(i)n law conduct or a decision taken in contravention of a statutory prohibition is invalid', and that the court orders therefore had no consequence. I disagree. The Supreme Court of Appeal's decision in *Motala*, cited by the first judgment, should not be relied upon to support this view. The only post-1996 authority on which *Motala* relied for its conclusion on the effect of an invalid court order was *Von Abo II*. In *Von Abo*, the government was ordered to take steps to remedy the violation of the rights of a South African citizen living in Zimbabwe. After a hearing relating to the government's compliance with a first court order, a second order was issued concerning damages. It was only then that the government appealed both orders.

[189] This court confronted the issue whether the government's appeal against the first order was perempted by its attempts to comply with that order and its failure to appeal it timeously. *Von Abo* explained that, were the first order wrong in law, the second would be legally untenable. The government's failure to appeal the first order could not prevent the *court* from reaching a conclusion on the first order. *Von Abo* said nothing about the rights of *parties* to ignore a court order. Nor did it take a view on whether a court must ignore the injury to the rule of law suffered when a party ignores a court order. The same is true of the subsequent decision of the Supreme Court of Appeal in *Von Abo II*, in which the first order was set aside by the court.

[190] Even the pre-1996 cases on which *Motala* relied do not support its conclusion. These ancient decisions' findings on validity occur in the context of a discussion of the binding nature of an invalid order on another court. In *Willis*, the

court stated that the general rule is that a judgment without jurisdiction 'is ineffectual and null'. But this comment is made in the context of assessing the limits of res judicata. Moreover, after writing in Latin that 'one who exercises jurisdiction out of his territory is not obeyed with impunity,' the court immediately stated that this does not mean 'that an appeal may not generally be necessary to prevent executions being available'. The Latin speaks to courts; the clause which follows speaks to parties. Prior to being set aside by a court, an order can still be executed, or, in the parlance of *Oudekraal*, has 'legal consequences'.

[191] *Lewis & Marks* is also res judicata-oriented. The court there states that orders from proceedings with uncited parties are 'null and void: *and upon proof of invalidity the decision may be disregarded* . . .'. The act of proving something irresistibly implies the presence of a court. It is the *court* that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations.

[192] *Shifren* is to the same effect. 146 The court there quoted Voet:

> 'If a decision is *ipso jure* void, there is no need of an appeal. Nay the plaintiff can, notwithstanding the judicial decision, set in motion once more the same action, and will by a replication of fraud or of nullity shut out a defence of *res judicata* which has been raised against him by his opponent. Likewise on the other side a defendant who is sued in the action *rei judicatae* on a decision *ipso jure* void will easily evade such action by setting up the nullity.'

The focus here was on what effect an invalid order would have on another court. The point is that the ordinary consequences flowing from res judicata do not apply where the original decision is '*ipso jure* void'. This does not upset the requirement that a court order must be appropriately challenged in order to be set aside.

[193] Other cases cited in *Motala* do make broader statements concerning a party's right to disregard an invalid order. *Sliom*, for example, stated that the order in that case 'was a nullity as far as [one of the parties] was concerned'. But in reaching this position, the court relied on *Lewis & Marks*. I have already suggested that *Lewis & Marks* does not support that conclusion. The expansive pronouncement in *Trade Fairs* is similarly unsound. There, the court stated:

> '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 make such a declaration.'

But *Trade Fairs* relied on *Shifren*, and *Shifren* did not speak to the obligations of parties. Instead, it spoke to the obligations on *courts* where a previous decision is a nullity.

[194] The issue of parties' obligations to obey an order was not an issue in either *Sliom* or *Trade Fairs*, and their dicta on the effect of an invalid order on parties should be read in this light. In fact, the issue of a party's obligations was not

before the court in all but one of the cases cited in *Motala*. That one exception, *Mkize*, is inapposite for the determination of the current case. There, a recently convicted defendant was found in contempt, shortly after resisting an order the judge was not authorised to give, while still in court. On review, the court held that the defendant could not have disobeyed an invalid order. The case is unhelpful because, the finding of contempt coming immediately after the order, the defendant did not have the opportunity to set the invalid order aside. In this it bears some of the hallmarks of a 'classical' reactive challenge brought in the administrative-law context.

[195] *Motala* also endorsed the slightly different principle that 'a thing done contrary to a direct prohibition of the law is void and of no force and effect'. The only case cited in support of this proposition, *Schierhout*, considerably predates our Constitution. And the 'thing' in that case was not 'done' by a court of law.

[196] *Motala*'s final defect is that, in setting aside the order of contempt, it did not even mention s 165(5) of the Constitution: a deficiency shared by *Von Abo*. In the latter case, the absence of s 165(5) is understandable because the binding nature of court orders was not before it. This reinforces the point that the effect of an invalid court order on parties was not at issue in that matter, and therefore could not have formed the basis for the conclusion that invalid court orders can be ignored without more.

[197] In any event *Motala* dealt with a different issue. There, Kruger AJ, sitting in the High Court, was found to have lacked jurisdiction to appoint judicial managers. The order was treated as a nullity because it purported to exercise power that was specifically assigned to the Master by legislation. In the present matter, Mabuse J clearly had jurisdiction to hear the case. As explained in *Tsoga*,[5] *Motala* is only authority for the proposition that if a court 'is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded'. This is a far cry from the inference that any court order that is subsequently found to be based on an invalid exercise of public power can be ignored.

[198] Whether or not the Mabuse J order is enforceable depends on whether Mabuse J had the authority to make the decision that he did *at the moment that he made it*. Thus, if the extension had been challenged and set aside before Mabuse J made his order, or even during those proceedings by way of counter-application, then the Mabuse J order would be baseless and the implications set out in the first judgment would follow. But, as the extension was successfully challenged only after Mabuse J made his order, the outcome of this review has no bearing on the order's validity. The interdict granted by Mabuse J only falls away once the counter-application is upheld by a court. Until this point, it is binding and enforceable.

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[5] *Provincial Government: North West Province & Another v Tsoga Developers CC and Others 2016 (5) BCLR 687 (CC) at para [50]* where *Motala* was said to be an example where the nullity "jumps out of the page"

(Underlined emphasis added)

[12] In our view the law can be summed up thus:

1.1 An order of a court, regardless of its dubious validity must be deferred to by whomsoever is subordinated to it.

1.2 When an order of court which is invalid stands in the way of subsequent legal proceedings *the court* which hears that subsequent matter may *disregard* it on the grounds of voidness.

[13] In our view, when a legal proceeding is contemplated in respect of which a court order of void status is implicated, it is plain that the court which hears that subsequent matter should be alerted to the fact of the void order so that, *if necessary*, a formal recognition of the absence of validity of the earlier order can be made. An example of when that might be necessary could be in circumstances where it is thought that some degree of doubt exists about the status of the allegedly void order. The practical approach would therefore be to seek, in addition to the principal relief sought in that later proceeding, a declaratory order to end any debate about the status of the allegedly void order.

[14] The present set of facts illustrate that the NPA is concerned about having to make a decision about whether to defer to an order or defer to the statute. A degree of anxiety about making the right decision is understandable but is perhaps an over-reaction in present circumstances. The act of processing an appeal in accordance with the automatic right created by the amended section 309 is not an act of defiance or a

contempt of an order of court. The order was manifestly irregular. It follows that it is unnecessary to take the High Court order of 21 August 2014 on appeal to the SCA to clear the way for an appeal to be enrolled before the High Court.

[15] An illustration of the better approach is that taken by Weiner J, in *Munsamy & Another v Astron Energy (Pty) Ltd & Others 2022 (4) SA 267 (GJ)* when presented with a supposed quandary over what to do about a void order. The facts in *Munsamy* were a replica of those in *Motala*. When the case was heard, the caselaw on the issue had multiplied and Weiner J dealt with several decisions, but not with *Tasima*. Weiner J tackled the "tension" as she described it, between, on the one hand, the notion that an order, regardless of the circumstances could only be set aside by a court, and, on the other hand, the logical implication of true nullity, which is that the void order should be treated as if it did not exist. (at para [48]). Ultimately Weiner J resolved it thus:

> "[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.
> [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*.[6] 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 applicants seek 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 — 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."
> (Underlined Emphasis added)

[6] See the passage cited above in para [10].

[16] What Weiner J achieved by the declaratory order was a pragmatic solution to eliminate any debate. Axiomatically, what a declaratory order does is recognise an existing state of affairs – in this example, the nullity of the earlier court order. Such an order creates nothing new. Semantically, it could be said that it was not truly necessary to amplify the articulation of the declarator by stating that the void order was also "set aside", but nothing turns on that nit-pick.

[17] The upshot is that Mr Molatudi's automatic right to an appeal against the conviction, pursuant to the amendment in section 10 of the JMA Act must be given effect to because the statute overrides whatever contradicts its effect. No further proceeding is necessary to 'set aside' the High court decision because there is, in law, no such decision, but rather, merely a purported decision with no legal foundation. Had there been no controversy between the parties on the logistics of the case, an appeal could have been enrolled in the High Court and that court could then at that time have been asked to issue a declaratory order that the order of 21 August 2014 was a nullity, *ex abundante cautela*. Because the matter is before this court it is practical to include that declaratory order at this time. In future, separate proceedings ought not to be instituted to declare a void order ineffective; the matter should proceed directly to the court appropriate to be seized with the substantive issue, and a collateral declaratory order can be sought as may be necessary.

[18] The text of orders we have granted differ marginally, but nevertheless substantively, from the text of the questions posed.

The Order

(1) A declaratory order shall issue thus:

a. The fact that the High Court on 21 August 2014 dismissed the applicant's petition for leave to appeal against conviction does not exclude him from benefitting from the automatic right of appeal derived from the provisions of 10 and 11 of the Judicial Matters Amendment Act 42 of 2013 and its amendment of section 309(1)(a), read with section 309B(1) (a) of the Criminal Procedure Act 51 of 1977.

b. The High Court on 21 August 2014 had no power to make an order refusing the appellant leave to appeal against his conviction in light of the fact that sections 10 and 11 of the Judicial Matters Amendment Act 42 of 2013 had already come into effect on 22 January 2014; moreover, the application for leave to appeal to that court was itself, *per se,* irregular.

c. The High Court has jurisdiction to hear the appellant's appeal against conviction despite the fact that the High Court on 21 August 2014 dismissed the appellant's petition seeking leave to appeal against conviction, which decision is declared to be a nullity by reason of the effect of section 10 of the JMA Act and the amended section 309(1)(c) of the CPA.

(2) The parties are directed forthwith to enrol an appeal on the conviction before the High Court.

SUTHERLAND DJP

MUDAU J

TODD AJ

Heard: 11 August 2022

Judgment: 19 August 2022

For the Applicant:

Adv E Guarneri of Legal Aid South Africa

For the State:

Adv F Mohamed of the National Prosecuting Authority.

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