

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2019/41681

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

.....
B.C. WANLESS 20 DECEMBER
2022

EAMONN COURTNEY

Applicant

and

IZAK JOHANNES BOSHOFF N.O.

First Respondent

WINNIE GLADNESS GUMEDE N.O.

Second Respondent

ABSA BANK LTD

Third Respondent

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

Fourth Respondent

The judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 20 December 2022.

JUDGMENT

WANLESS AJ

Introduction

- [1] This matter was heard as a Special Motion. It generated a considerable amount of paper and consisted of an urgent application; a conditional counter-

application and an interlocutory application to deliver a further affidavit. In addition, there are references to various other applications both in South Africa and in Scotland.

- [2] That said, the genesis of the entire matter is to be found in the unopposed motion roll of this Division on the 4th of May 2020. That day, a fairly run of the mill matter, namely, an application for the sequestration of a debtor's estate, was enrolled before Moultrie AJ. This would have been just one of a many number of matters on the Acting Judge's unopposed motion roll. Regrettably, nowhere in all of the application papers placed before this Court, is there any indication as to whether or not there was any discourse entered into between Moultrie AJ and the legal representative of the petitioning creditor when the matter was called in respect of the nature of the relief sought by the Applicant and, if so, the nature of that discourse. In that regard, it would have been a relatively simple matter to have obtained a transcript of those proceedings and placed same before this Court. None of the parties elected to do so.
- [3] The Applicant and petitioning creditor in the sequestration application was ABSA BANK LIMITED (*"the Bank"*) and the Respondent was EAMONN COURTNEY. In the present application before this Court COURTNEY, an adult male, is the Applicant and the Bank is the Third Respondent. For ease of reference, COURTNEY will be referred to as *"the Applicant"* and the Third Respondent will be referred to as *"the Bank"* in this judgment. It is either common cause or cannot be seriously disputed in this matter that the application for the sequestration of the Applicant's estate was properly served upon the Applicant; the Applicant gave notice to oppose the application; the Applicant then failed to serve and file any answering affidavits and the Bank's attorneys served a Notice of Set Down upon the Applicant's attorneys in respect of the matter having been enrolled for hearing on the unopposed motion roll on the 4th of May 2020. Moreover, it is common cause that there was no appearance on the 4th of May 2020 on behalf of the Applicant.
- [4] What made this particular application for the sequestration of the Applicant's estate very different to all other applications of a similar nature and which should, from the very outset, have drawn the attention of the presiding Acting Judge hearing the unopposed motion roll on that day to this particular matter, was the manner in which the relief sought had been framed by the Bank. In this regard, it is trite that in an application for the sequestration of a debtor's estate the petitioning creditor, as applicant, must first seek a provisional order of sequestration of the debtor's estate in terms of section 10 of the Insolvency Act, Act 24 of 1936 (*"the Act"*). The effect thereof is that if the court is satisfied that the petitioning creditor has made out a *prima facie* case for the sequestration of the debtor's estate, it will issue a *Rule Nisi* returnable on a fixed date. The applicant is then obliged to satisfy the provisions of sections

11 and 12 of the Act and, if the court is satisfied on the return date that the creditor has made out a proper case for the sequestration of the debtor's estate, it is then at that stage (and only at that stage), that the court will grant a final order of sequestration.

- [5] In this particular case the Bank's Notice of Motion had been framed in what can only be described as a most unusual manner. This is so since, in the first instance the Bank sought an order, in paragraph 1 of the Bank's Notice of Motion, as follows:-

*"That the estate of Eamonn Courtney be placed under **final** sequestration in the hands of the Master of the above Honourable Court."*

- [6] It is only in paragraph 2 of the Bank's Notice of Motion that, in the **alternative** to the final order of sequestration sought in terms of paragraph 1, the Bank sought a provisional order of sequestration with the issuing of a *Rule Nisi*. With regard thereto, it is also noted that this paragraph of the order falls woefully short of what should have been set out in terms of the peremptory requirements of sections 11 and 12 of the Act. The highly unusual nature and form of the relief sought by the Bank should also have been contained in the Bank's Practice Note which is a requirement in this Division and must be filed prior to a matter being heard on the unopposed motion roll in order to assist the presiding Judge when reading the application papers.

- [7] On the 4th of May 2020, Moultrie AJ granted an Order in the following terms:-

"1. The estate of Eamonn Courtney is placed under final sequestration in the hands of the Master of the above Honourable Court.

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

The learned Acting Judge did so without giving either a brief judgment or reasons therefor.

- [8] Thereafter, on the 13th of July 2020, IZAK JOHANNES BOSHOFF, an adult male (*"the First Respondent"*) and WINNIE GLADNESS GUMEDE, an adult female (*"the Second Respondent"*), were appointed by the Master of this Court as the joint provisional Trustees of the Applicant's sequestrated estate. The appointment of the First Respondent and the Second Respondent as the joint final Trustees of the Applicant's estate only took place on the 12th of May 2022.

- [9] A plethora of litigation has taken place since the granting of the final order of sequestration of the Applicant's estate on the 4th of May 2020 and the hearing of this matter on the 10th of August 2022. To set out all of that litigation at this stage of the judgment would serve no real purpose and only result in burdening this judgment unnecessarily. In the premises, reference will be made thereto later in this judgment if and wherever necessary.
- [10] On or about the 29th of April 2022 the Applicant instituted an urgent application in this Court under case number 41681/2019. In terms thereof, the Applicant sought interim relief as set out in PART A (PENDENTE LITE) and final relief as set out in PART B (MAIN APPLICATION) of the Applicant's Notice of Motion. The interim relief sought by the Applicant was to prevent the First and Second Respondents from taking any further steps in the administration of the Applicant's estate, together with a suspension of the operation of the *ex parte* order of 8 September 2020 whereby the powers of the First and Second Respondents were extended under subsection 18(3) of the Act ("*the ex parte order*"). In terms of PART B of the Notice of Motion the final relief sought by the Applicant was a declaration of nullity, *alternatively*, the setting aside of the final order of sequestration and an order declaring the appointment of the First and Second Respondents as Trustees a nullity, *alternatively*, setting such appointment aside. In addition to the foregoing the Applicant also sought the setting aside of the *ex parte* order, together with an order declaring all steps taken by the First and Second Respondents in the administration of the Applicant's estate to be of no force and effect, *alternatively*, setting them aside. Further, the Applicant sought an order that the First and Second Respondents provide the Applicant with a full account in respect of their administration of his estate. Finally, the Applicant sought leave to approach this Court on supplemented papers pursuant to receiving the accounting from the First and Second Respondents to seek such further relief and further directions as may be appropriate.
- [11] It was common cause between the parties (and an earlier order had in fact been made by this Court to that effect) that PART A and PART B were to be heard at the same time by this Court. In the premises, it was further (correctly) agreed between the parties that it was only necessary for this Court to decide whether or not the Applicant was entitled to the final relief as set out in PART B of the Applicant's Notice of Motion.
- [12] With regard to the final relief sought by the Applicant, Adv Smit, during the course of his address, advised this Court that the Applicant would no longer be seeking the relief sought in the Applicant's Notice of Motion or the relief as set out in a Draft Order which had been placed on caselines a few days prior to the matter being heard. Rather, the Applicant would now be seeking relief

in terms of an Amended Draft Order. Regrettably, that order was not available to hand in to the Court. Furthermore, neither the legal representatives of the First and Second Respondents, nor those of the Bank, had been given notice of the Applicant's intention to amend his Notice of Motion and to seek relief in terms of this Amended Draft Order.

[13] During the course of the hearing the Applicant produced a Notice of Amendment in terms of which the Applicant sought to amend his Notice of Motion by deleting it in its entirety and replacing it with the following:-

1. It is declared that the order of this court dated 4 May 2020 issued under case number 41681/2019 pursuant whereto the estate of Eamonn Courtney was finally sequestrated is a nullity and set aside.
2. The *ex parte* order of this court dated 8 September 2020 issued under case number 2020/23030 pursuant whereto the powers of the first and second respondents were extended in accordance with Section 18(3) of the Insolvency Act, 1936 is set aside.
3. The first and second respondents shall within a period determined by this court render a full accounting to this court of their administration of the applicant's estate under Master's reference number G506/2020.
4. Upon delivery of the accounting by the first and second respondents as ordered in paragraph 3 above, the applicant is granted leave to approach this court on supplemented papers and notice for such further relief, and to seek such directions thereanent (sic), as may be appropriate.
5. Costs of the application are to be paid by the first to third respondents jointly and severally, the one paying the other to be absolved.
6. The third respondent's conditional counter-application is dismissed with costs.

[14] The amendments sought by the Applicant and as set out in paragraphs 2, 3 and 4 of the said Notice of Amendment were opposed by both the First and Second Respondents and the Bank. After hearing argument this Court made a ruling that the amendment as sought in paragraph 2 was refused but that the remainder of the amendments sought by the Applicant (including paragraphs 3 and 4) were granted. The matter then proceeded on that basis.

[15] On or about the 14th of May 2022 the Bank filed a conditional counter-application. In this counter-application the Bank, in the event that the

Applicant is successful in the relief sought in the application, seeks an order that the final sequestration order be varied to be a provisional sequestration order and declaring that the provisional order is deemed to be effective from 4 May 2020, *alternatively*, an order declaring that all steps taken by the First and Second Respondents pursuant to 4 May 2020 and prior to the variation, be declared as valid and effective.

The Issues

[16] The issues which this Court is required to determine on the application papers before it may, as simply as possible, be summarised as follows:-

16.1 Should the First Respondent be granted leave to deliver a further affidavit in the application dealing with, *inter alia*, facts raised by the Applicant in his replying affidavit pertaining to the question as to whether or not the Applicant should be declared a fugitive from justice?

16.2 Does the Applicant have the requisite *locus standi* to institute this application? In this regard the First and Second Respondents, together with the Bank, have taken the point that the Applicant should be found to be a fugitive from justice and, as such, should be denied access to this Court.

16.3 If the answer to the foregoing is in the affirmative (that is, the Applicant *does* have the requisite *locus standi* to institute this application) , then, upon a proper interpretation of subsection 9(5) of the Act, did Moultrie AJ have the authority to grant a final order of sequestration of the Applicant's estate on the 4th of May 2020?

16.4 In the event of this Court holding that Moultrie AJ did have the authority to grant the order that he did, then the application must be dismissed and the conditional counter-application need not be decided.

16.5 However, in the event of this Court holding that Moultrie AJ did *not* have the authority to grant a final order of sequestration of the Applicant's estate on the 4th of May 2020, then it is necessary for this Court to decide:-

16.5.1 Whether or not the Applicant is entitled to the relief sought by the Applicant in the Amended Draft Order; and

16.5.2 If so, whether the Bank should be granted the relief sought in the conditional counter-application;

16.6 Issues of costs.

The interlocutory application by the First and Second Respondents for the First Respondent to be given leave to deliver a further affidavit in the application

- [17] A formal application was instituted by the First and Second Respondents for the First Respondent to deliver a further affidavit in the application in terms of subrule 6(5)(e) of the Uniform Rules of Court. This application was served by the First and Second Respondent's attorneys upon the attorneys representing the Applicant on the 6th of June 2022. This Court was advised by Adv Smit that the said interlocutory application was opposed by the Applicant. However, no notice of opposition thereto was ever filed on behalf of the Applicant and no answering affidavits were ever filed in respect thereof. The Bank did not object to the First and Second Respondents supplementing the application papers with a further affidavit. This Court was asked to make a finding in respect thereof. For the sake of convenience, all of the parties agreed that the Court should include such a finding in its judgment at the conclusion of the matter.
- [18] As already noted above, there was no formal opposition by the Applicant to this interlocutory application instituted by the First and Second Respondents. Had this been the case, one would have expected that same would possibly have been dealt with on the Special Interlocutory Roll which exists in this Division prior to the matter being heard by this Court. In the premises, this Court must decide the merits thereof based upon, *inter alia*, the facts as placed before this Court on oath by the First Respondent and the correct legal principles to be applied to applications of this nature.
- [19] The basis upon which the First and Second Respondents allege that the First Respondent should be allowed to file a further affidavit in these proceedings is relatively simple and straightforward. In the answering affidavit of the First and Second Respondents in the application the issue of the Applicant allegedly being a fugitive from justice and therefore having no *locus standi* to approach this court, was pertinently raised by the First and Second Respondents in opposition to the relief sought by the Applicant. Not surprisingly the Applicant, in his replying affidavit, dealt with these allegations in some detail. This factual information, due to no fault of any of the parties but rather, simply due to the sequence of affidavits, together with the nature of the relief sought and that of the defence raised, has given rise to new matter being placed before this Court by the Applicant in his replying affidavit (which he could not have been expected to foresee and deal with in his founding affidavit). That said, this Court must agree with the submissions made in the said further affidavit and by Adv Symons SC that the First and Second Respondents are entitled to

respond thereto by filing a further affidavit. Not only does this ensure that the First and Second Respondents will suffer no prejudice but it will also assist this Court to arrive at a just decision in the interests of justice.¹

[20] It is true that the further affidavit is not restricted solely to dealing with facts raised by the Applicant in his replying affidavit in respect of the defence that the Applicant lacks the requisite *locus standi* to institute the application. It also deals with, *inter alia*, facts pertaining to the convening of the first meeting of creditors and the administration (on the Applicant's version the maladministration) of the Applicant's estate. In this regard, what the Court has stated above in relation to the issue of the Applicant's *locus standi* applies equally to these last mentioned issues. In the premises, this Court finds that the First and Second Respondents are successful in the interlocutory application. An appropriate order in that respect will follow at the end of this judgment.

The Applicant's *locus standi* to institute the application

[21] The First and Second Respondents allege that the Applicant and his wife are "*fugitives from justice*" and, as such, the Applicant lacks the requisite *locus standi* to institute the application for the relief sought. Resolution of this issue must necessarily involve both conclusions of law and findings of fact.

The law

[22] It has long been an accepted principle of our law that a would-be litigant should approach the court with clean hands or that person cannot expect the court to come to his or her assistance. As an extension of that principle, it can be accepted that, depending on the facts of each case, where such a person may be classified as a fugitive from justice the decision of a court not to allow that person a hearing would be a serious one indeed, having regard to the right of every individual to have access to the courts in terms of our Constitution.²

[23] In the matter of *Mulligan v Mulligan*³ it was held, *inter alia*, that:-

"Before a person seeks to establish his rights in a Court of law he must approach the Court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the Court (whether criminal

¹ Bader v Weston 1967 (1) SA 134 (C) at 138D; Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (AD) at 628F; Cohen NO v Nel 1975 (3) SA 963 (WLD) at 970B; Dawood v Mahomed 1979 (2) SA 361 (D & CLD) at 365H; Nampesca (SA) Products (Pty) Ltd v Zaderer 1999 (1) SA 886 (CPD) at 892J-893A; Dhladhla v Erasmus 1999 (1) SA 1065 (LCC) at 1072D; South Peninsula Municipality v Evans 2001 (1) SA 271 (CPD) at 283A-H.

² Section 34 of the Constitution: **Access to courts.** - Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

³ 1925 (WLD) 164 at 167.

or civil) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests. Were it not so, such a person would be in a much more advantageous position than an ordinary applicant or even a peregrinus, who is obliged to give security. He would have all the advantages and be liable to none of the disadvantages of an ordinary litigant, because, if unsuccessful in his suit, his successful opponent would be unable to attach either his property, supposing he had any, or his person, in satisfaction of his claim for costs. Moreover, it is totally inconsistent with the whole spirit of our judicial system to take cognisance of matters conducted in secrecy. It is true the applicant is entitled to present his petition through a solicitor, but, none the less, while disclosing his whereabouts to his solicitor, he withholds that information from the Court and from his opponent. As a fugitive from justice, he is not only not amenable to the ordinary criminal and civil processes of the Court, but, as far as this Court is concerned, it cannot call upon him to appear in person to give evidence on oath; it cannot order his arrest in case the facts testified to in his affidavit are proved to be false, whereas on the other hand he would be able to incept criminal proceedings for perjury proved to have been committed by his opponent. And, in this case, he would be able to invoke the authority of the Court to arrest his opponent if she were suspected of flight with the property sought to be interdicted. Such a litigant might, moreover, conceivably be the cause of the Court's being unable to arrive at any decision on the facts sought by him to be determined, if, during the hearing of the application, the Court were to find that justice could not be done unless he was called to give evidence on oath before it. Were the Court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets law and order in defiance.”

[24] Adv Symons SC, on behalf of the First and Second Respondents, submitted to this Court that the principles as set out in *Mulligan* not only remained relevant today but should, on the facts of this particular matter, be applied. If this Court had to categorise the approach contended for on behalf of the First and Second Respondents in this matter, it could be said that it was a stricter or more traditional one in respect of the principles applicable in determining whether or not a fugitive from justice had the *locus standi* to litigate in our courts. On the other hand, Adv Smit, for the Applicant, contends for what may possibly be described as a broader and more modern approach to the interpretation and application of those established principles in our law.

[25] These varying approaches have their roots not only in the decision of *Mulligan* itself but also in the manner in which that decision has been interpreted by various courts which have come after it. It is true, as pointed out by Adv Symons SC, that in the matters of *Maluleke v du Pont N.O. and Another*⁴ and

⁴ 1967 (1) SA 574 (AD).

*Herf v Jermani*⁵ the principles as enunciated in *Mulligan* were followed. However, as relied upon by Adv Smit in support of his argument and, as correctly conceded by Adv Symons SC, it was more recently held, in the matter of *Harris and Others v Rees and Others*,⁶ when dealing with the *Mulligan* matter, that:-

“As a general statement of the law on this aspect, the comments of De Waal J in Mulligan v Mulligan cannot be faulted. However, I do believe that, when a court has to consider the right of a person to approach the court for relief, in circumstances where such a person can either be categorised as a fugitive from justice or a person who has deliberately placed himself beyond the jurisdiction of the court, in having regard to the principles enunciated in Mulligan v Mulligan, it will have to deal with each case on its own facts. I say this for the reason that, to close the doors of the court to a litigant, will always be a serious thing to do.”⁷

- [26] Also in *Harris*⁸ the Court held, *inter alia*, that the principles enunciated in *Mulligan* had to be read against the background of the Constitution which guaranteed a party the right of access to the courts and described the latter as a strongly regarded constitutional right which should not be easily deviated from.
- [27] Both Counsel then referred this Court to the matter of *Nash and Others v Mostert and Others*⁹ where it was held, *inter alia*, that the *extreme* position pronounced in *Mulligan* has *not* stood the test of time in its principled rigidity and that even where an applicant *is* a fugitive from justice, this is no more than a factor which a court may take into account in considering whether the fugitive applicant should be heard. However, in this regard, Adv Symons SC submits that the court in *Nash* cites, as authority for the proposition that *Mulligan* has not stood the test of time the decision of *Harris* but that *Harris* in fact held that *Mulligan* had stood the test of time. Adv Symons SC further submitted that what in fact was decided in *Harris* was that each case must be determined on its own facts. So it is in this sense, submits Adv Symons SC, that the principle in *Mulligan* is not to be seen as rigid and it is wrong to find that the test in *Mulligan* has not stood the test of time.

⁵ 1978 (1) SA 440 (TPD).

⁶ 2011 (2) SA 294 (GSJ) at 301C-E.

⁷ Emphasis added.

⁸ at 300 F-I.

⁹ 2017 (4) SA 80 (GP) at 32.

- [28] Insofar as determining what a fugitive of justice actually is the court in the matter of *Botes v Goslin*¹⁰ cited with approval the definition of a fugitive from justice as set out in the matter of *Escom v Rademeyer* as one who is “avoiding the processes of the law through....voluntarily exile or hiding within the jurisdiction of the court”¹¹
- [29] Adv Symons SC also relied on the decision in the matter of *Chetty v Law Society of the Transvaal*¹². In that matter an attorney who had been struck off the roll and had left the country for reasons which were in dispute, applied while remaining beyond the borders of a country for a rescission of the order striking him off the roll of attorneys. The court found that the applicant had put himself beyond the reach of the law by fleeing the country and therefore could not claim the protection of the court.
- [30] At this stage, it is necessary to recognise, as obvious as this may seem, that this Court is dealing with an application and, as such, is to be guided by the accepted legal principles when deciding same. That is, if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent, together with the facts as alleged by the applicant that are admitted by the respondent, justify such an order.¹³ But how do these principles apply in the present matter when this Court must decide whether or not the Applicant should be classified as a fugitive from justice?
- [31] To answer this question it is first necessary to determine where the onus lies. In all matters, whether by way of action or application, the onus must lie with the plaintiff or applicant to allege and prove, on a balance of probabilities, that he or she has the requisite *locus standi* to institute the action or application. This is trite. Where *locus standi* is simply denied then the onus of proof must remain with the plaintiff or applicant. However, if the defendant or respondent is not satisfied with a mere denial but sets up a “special defence” then the onus of proof shifts from the plaintiff or applicant to the defendant or respondent.¹⁴ In the present application the First and Second Respondents have clearly raised, in their answering affidavit, the special defence that the Applicant is a fugitive from justice and, as such, does not have the requisite *locus standi* to institute the application in this Court. This is supported by the Bank. In the premises, the First and Second Respondents, together with the Bank, have attracted the onus of proving, on a balance of probabilities, that

¹⁰ 1987 (2) SA 716 (C) at 721A-C.

¹¹ 1985 (2) SA 654 (TPD) at 658H

¹² 1983 (1) SA 777 (T).

¹³ *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (CPD) at 235; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634.

¹⁴ *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706(AD); *Pillay v Krishna and Another* 1946 AD.

this Court should find that the Applicant is a fugitive from justice.¹⁵ Should this onus be discharged, it thereafter falls upon this Court to decide whether or not the Applicant should be denied access to this Court. If the answer is in the affirmative, it must follow that the Applicant does not have the requisite *locus standi* to institute this application in this Court.

[32] In respect of this particular issue and when deciding whether or not the onus in respect thereof has been discharged, it will be necessary for this Court to consider the facts as alleged by the First and Second Respondents, together with the Bank, which are admitted by the Applicant, to determine whether those facts justify such an order (that is, an order that the Applicant is a fugitive of justice).

The Facts

[33] Facts pertaining to whether or not the Applicant should be found by this Court to be a fugitive from justice and which could potentially give rise to this Court making a finding that the Applicant does not have the requisite *locus standi* in this particular matter to institute the application, have been set out, in some detail, in the application papers. In addition thereto, Adv Smit and Adv Symons SC dealt extensively therewith both in their Heads of Argument and during argument before this Court. Little purpose would be served by this Court simply repeating those facts in this judgment. Rather, what appears hereunder is a summary of, *inter alia*, the versions of the respective parties; their submissions made in relation thereto; facts which are either common cause or cannot seriously be disputed by any of the parties and those issues where there appear to be genuine or *bona fide* disputes of fact.

[34] The First and Second Respondents paint a grave picture of the financial pressure which they allege both the Applicant and his wife must have been experiencing towards the middle of 2019 and which they say was only amplified by a number of legal challenges as at December 2019. It is this, according to the First and Second Respondents, that caused the Applicant and his wife to leave South Africa towards the beginning of December 2019, never to return.

[35] It is common cause that the Applicant's wife has never returned to South Africa. On his own version the Applicant has returned to South Africa only once. This was during or about the period 5 February 2020 to 19 March 2020. Both the First and Second Respondents, together with the Bank, point out that whilst the Applicant and his wife have instituted numerous applications in

¹⁵ *Penderis v De Klerk 2021 JDR 0333 (Nm)*: In this matter and other cases cited therein the question of onus was not specifically dealt with but it is clear from a reading thereof that those matters were decided on the basis of the fact that evidence had to be placed before the courts to show, on a balance of probabilities, that the party was indeed a fugitive from justice.

South Africa pursuant to leaving this country the Applicant has taken no action until this late stage in respect of the final order sequestrating his estate on the 4th of May 2020 and has not co-operated at all in either the sequestration of his estate or in the winding-up of the companies in respect of which he stood guarantee. It is alleged by the First and Second Respondents that by remaining outside the jurisdiction of this Court the Applicant avoids prosecution in respect of the contravention of his obligations under the Act and has shielded himself from the recovery of costs in litigation. It is further alleged that the Applicant has also obstructed the administration of his insolvent estate through the removal of movable assets in a covert and secret manner.

[36] Insofar as the Applicant's business interests in South Africa are concerned (as opposed to those in Scotland the relevance of which will become more apparent later in this judgment) the Applicant and his wife were the directors and shareholders of two corporate entities, namely Salt House Investments (Pty) Ltd, a property owning entity of five properties, three of which were residential and two commercial and Allied Mobile Communications (Pty) Ltd which was active in the mobile communications industry. Both of these entities were finally wound-up during May 2020. The Applicant and his wife had provided security for the overdraft facilities extended by the Bank to the two entities by way of limited personal guarantees to the combined extent of R 54.5 million.

[37] On the Applicant's version he and his wife were never resident in South Africa but were in this country as foreign investors. As such, they both had to return to Scotland periodically in terms of their investment visa conditions. In this regard the Applicant states that each year he and his wife would return to Scotland during the Christmas period and holidays, particularly since they have two minor children aged 14 years of age (twins) who reside with the Applicant and his wife in Scotland. As set out above the Applicant remained in South Africa from the 5th of February 2020 until the 19th of March 2020. It is common cause that attempts were made between the Applicant and the Bank to convene a meeting on or about the 5th of February 2020 but a dispute of fact exists as to the reasons why this meeting never took place. On or about the 19th of March 2020, he flew back to Scotland soon after the Covid-19 pandemic hard lockdown but prior to the ban on international flights. It is the Applicant's version that he returned to Scotland on 19 March 2020, some seven days prior to the international travel ban for the singular purpose of being with his children for the duration of the pandemic and to attend to his business interests abroad, at all times regarding Scotland as his home and not South Africa. Thereafter, it is the Applicant's version that the ban on international air travel due to the pandemic severely restricted his ability to travel between Scotland and South Africa.

[38] The Applicant points to, *inter alia*, communication via email; virtual meetings via Skype; the full disclosure of his contact details; the fact that he has resided at the same address in Scotland for the past 33 years and the fact that the provisional order obtained by the First and Second Respondents in the Court of Session in Scotland was served upon him at that address, together with the fact that the Applicant instituted no less than four urgent applications in this Court during 2020, to show, on a balance of probabilities, that the First and Second Respondents, together with the Bank, have, at all material times, known of his whereabouts.

Findings

[39] On the basis of these facts, Adv Symons SC has urged this Court, in the first instance, to find that the Applicant should be classified as a fugitive from justice. He is supported in this regard by Adv Subel SC for the Bank, although the latter's submissions on this point (for various reasons) were largely confined to the fact of the lateness of the Applicant instituting the application dealing with the sequestration order. In that regard, it can be accepted that, by the latest, the Applicant had knowledge of the final sequestration order during July 2020.

[40] As found earlier in this judgment the onus of proof falls upon the First and Second Respondents, together with the Bank, to prove, on a balance of probabilities, that this Court should find that the Applicant should be declared a fugitive from justice. On those facts which can be accepted by this Court either to be common cause or where there are no genuine or *bona fide* disputes of fact and/or are not disputed by the Applicant on the application papers before this Court, it is the finding of this Court that the said onus has not been discharged. The reasons for this finding are as set out hereunder.

[41] Much has been made by the First and Second Respondents of the fact that the Applicant's affidavits are devoid of any real detail pertaining to, *inter alia*, the travels he and his wife undertook between South Africa and Scotland prior to 2019; the nature of the visa granted to him by the South African authorities and whether the Applicant's minor children attended boarding school when the Applicant and his wife were spending time in South Africa. In the opinion of this Court these criticisms are unwarranted and, at the end of the day, carry little or no weight when considering whether or not the Applicant should be declared a fugitive from justice. Moreover, it would appear to this Court that these criticisms are founded on an incorrect assumption on the part of the First and Second Respondents (and possibly the Bank) that somehow the Applicant had to discharge an onus of proof and place facts before this Court to prove that he was not a fugitive from justice. The First and Second

Respondents were quite capable of investigating most, if not all, of the so-called concerns raised by them and placing the relevant evidence before this Court at the hearing of this matter in support of their allegations that the Applicant should be declared a fugitive of justice. They declined to do so.

[42] In addition thereto, the First and Second Respondents have criticised the Applicant for remaining outside the jurisdiction of this Court to allegedly avoid prosecution in respect of the contravention of his obligations under the Act and to shield himself from the recovery of costs in litigation. As noted earlier in this judgment, it is further alleged that the Applicant has also obstructed the administration of his insolvent estate through the removal of movable assets in a covert and secret manner. All of these facts, taken at face value, may initially strike one as compelling reasons why a party should be declared a fugitive from justice. However, upon a proper reading of the affidavits placed before this Court, it is clear that each and every one of these averments lack the factual foundation to establish the veracity thereof and, more particularly, discharge the burden of proof. This is so, despite the First Respondent having been given the opportunity to deliver a further affidavit in the application. In addition to the failure of the First and Second Respondents to deal, in any real or material manner whatsoever, with any alleged contraventions of the Act of which the Applicant may be guilty; the penalties in respect thereof and the steps taken, if any, to prosecute the Applicant in light of his alleged contraventions and to bring the alleged fugitive to justice, most importantly, no reference is made by the First and Second Respondents having alternative remedies available to them (or not) to achieve the same goals, even in the continued physical absence of the Applicant from South Africa. In this regard, it is important to remember that the First and Second Respondents have already obtained the *ex parte order* which, in terms of subsection 18(3) of the Act, extended their powers to act within South Africa and the provisional order in the Court of Sessions in Scotland which is part of the petition sought which will entitle them to pursue the Applicant's assets in Scotland.

[43] On the other hand, there is nothing improbable in respect of the version put forward by the Applicant wherein he denies that he is a fugitive from justice. The First and Second Respondents (together with the Bank) do not dispute that the Applicant returned to Scotland just before the hard lockdown as a result of the Covid-19 Pandemic which had a dramatic effect on international flight travel for some time thereafter. What also appears to be common cause on the application papers before this Court is that the Applicant has considerable business interests and assets in Scotland. Hence the institution by the First and Second Respondents of the petition in the Court of Sessions in Scotland to enable the First and Second Respondents to pursue the Applicant's assets in that country. In the premises, there is nothing improbable in respect of the Applicant's version that he resided in South Africa as an

investor by way of a special visa and always regarded Scotland as his permanent home.

- [44] Moreover, it must be accepted by this Court that, at all material times, the Bank, together with the First and Second Respondents, were not only in possession of the Applicant's residential addresses but also of all of his contact details. Any so-called confusion in this regard on behalf of either the First and Second Respondents (by referring to Notice of Withdrawals by erstwhile attorneys and the like) or the Bank, appears to be self-created. The Applicant has, through one means or another, always been in contact with the First and Second Respondents, *alternatively*, the Bank. His actions are not those that fit the definition of a fugitive from justice.
- [45] On behalf of the Applicant, Adv Smit raised an important point. It was the fact that following his departure from South Africa the Applicant has been involved in numerous applications (apart from the present application) related to the sequestration of his estate and the winding-up of Salt House Investments (Pty) Ltd. Arising therefrom, Adv Smit has drawn the attention of this Court to the fact that, apart from his submission that the very institution of no less than four applications during 2020 by the Applicant shows a propensity to be involved in the processes rather than a propensity to avoid, the special defence of the Applicant being a fugitive from justice was never raised in any of these previous applications. It is therefore submitted by Adv Smit that this special defence has only been raised in the present matter as an afterthought. This Court accepts the validity of these submissions made on behalf of the Applicant.
- [46] For the reasons set out above, this Court holds that the First and Second Respondents, together with the Bank, have failed to discharge the onus incumbent upon them to prove, on a balance of probabilities, that the Applicant is a fugitive from justice. Even if this Court is incorrect and the said Respondents, together with the Bank, have not attracted the onus of proof in the true sense, then those parties have failed to place before this Court sufficient evidence to satisfy this Court that it should find that the Applicant is indeed a fugitive from justice.
- [47] Having found that the Applicant is *not* a fugitive from justice it must follow that it is unnecessary for this Court to consider whether or not the Applicant has the requisite *locus standi* to institute the application. In passing, had this Court found that the Applicant *was* a fugitive from justice, it is highly unlikely that this Court would have found, in this particular matter, that the doors of this Court should be closed to the Applicant. From the foregoing it may be accepted that this Court would have adopted the approach that the fact that the Applicant was a fugitive from justice is only one of the various factors in this

matter to be considered and that the constitutional right to access to our courts should be guarded jealously and protected wherever possible. These principles carry even greater weight in a matter like the present where it would appear, even *prima facie*, that the Applicant seeks to correct a grave injustice by the granting of a final order sequestrating his estate without the prior granting of a provisional order of sequestration in terms of the Act.

[48] In so doing, this Court would have favoured the approach as postulated in *Harris* and as contended for by the Applicant, in that to close the doors of the court to a litigant is a serious thing to do. This would not in any manner whatsoever have been in conflict with the long-standing principles as established in *Mulligan* since, as is clear from a correct reading of *Harris*, each case must be considered on its own particular facts.

Did Moultrie AJ have the authority to grant a Final Order of Sequestration of the Applicant's estate?

[49] At this stage, it is worthy to note that no less than four (4) Counsel, together with their instructing attorneys, represented the relevant parties in the present matter before this Court. These were, Adv Smit for the Applicant; Adv Symons SC for the First and Second Respondents and Adv Subel SC (with Adv Vorster) for the Bank. Not one of these Advocates, or those instructing them, could provide this Court (when asked) with a single example of where a court, in this Division or any other Division within the Republic of South Africa, had granted a final order of sequestration of a debtor's estate without first granting a provisional order. It was also acknowledged that there was nothing in the Practice Directives of either the Gauteng Local Division or the Gauteng Division that entitled a court to do so under any circumstance.

[50] It is convenient at this stage for this Court to deal with the relevant sections of the Act pertaining to the sequestration of a debtor's estate.

[51] Section 9 of the Act (*Petition for sequestration of estate*) deals, in essence, with the formalities and requirements of an application for the sequestration of a debtor's estate. For present purposes the important provisions of this section are contained in subsection (5) which reads as follows:-

"The court, on consideration of the petition, the Master's or the said officer's report thereon and of any further affidavit which the petitioning creditor may have submitted in answer to that report, may act in terms of section ten or may dismiss the petition, or postpone its hearing or make such other order in the matter as in the circumstances appears to be just."¹⁶

¹⁶ *Emphasis added.*

[52] Section 10 of the Act, as its title suggests (*Provisional sequestration*), empowers a court, if satisfied on a *prima facie* level, that the requirements as set out in subsections (a); (b) and (c) have been met, to provisionally sequester the debtor's estate. If a court makes an order provisionally sequestering a debtor's estate it must, in terms of subsection 11(1) of the Act, simultaneously grant a *rule nisi* calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestered finally. The remaining provisions of this section deal with the requirements pertaining to the service of the *rule nisi*.

[53] Section 12 of the Act (*Final sequestration or dismissal of petition for sequestration*) reads as follows:-

“(1) *If at the hearing pursuant to the aforesaid rule nisi¹⁷ the court is satisfied that-*

(a) *the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*

(b) *the debtor has committed an act of insolvency or is insolvent; and*

(c) *there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestered,*

it may sequester the estate of the debtor.

(2) *If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration¹⁸ or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die.”*

[54] As already noted earlier in this judgment the Bank sought an order finally sequestering the Applicant's estate in terms of section 12 of the Act. Moultrie AJ granted such an order. When he did so, he must have been aware, or should reasonably have been aware, of the fact that such an order (that is a final sequestration order in terms of section 12) had never been granted by a court in this Division or any other court, prior to a provisional order of sequestration being granted in terms of section 10 of the Act. Moultrie AJ

¹⁷ *Emphasis added.*

¹⁸ *Emphasis added.*

would also have been aware, or should reasonably have been aware, that there existed no practice in this Division to that effect, either codified in the written Practice Directives applicable thereto or, if unwritten, accepted by the practitioners and Judges of this Division. If he was not, it would surely have been incumbent upon the legal representative who appeared on behalf of the Bank to bring these matters to his attention. In addition to the foregoing, it is important to note that Moultrie AJ, having presumably read the application papers of the Bank in support of the application for the sequestration of the Applicant's estate prior to the hearing of the matter on the 4th of May 2020, would have been aware of the fact that no mention was made in the founding affidavit of the Bank as to why a final order of sequestration should be granted rather than following the usual procedure and requesting the court to grant a provisional order of sequestration first. Most regrettably (as already noted earlier in this judgment), despite electing to deviate from the clear prescripts of the Act and the countless orders of other Judges before him by declining to grant a provisional order of sequestration but moving forward and granting a final order sequestrating the Applicant's estate (with all of the far reaching effects which flow from the granting of such an order) the learned Acting Judge elected not to provide even a brief judgment or reasons explaining why he had chosen to follow this extraordinary route. The relevance of the foregoing will also become more apparent later in this judgment, particularly when dealing with certain submissions made by Adv Subel SC where, in support of the conditional counter-application instituted by the Bank, submitted before this Court that Moultrie AJ had clearly made a mistake.

[55] It was submitted by the Applicant that the order granted by Moultrie AJ on the 4th of May 2020 whereby his estate was finally sequestrated, is a nullity and should be set aside.¹⁹ In support of this submission the Applicant relies, *inter alia*, on the matter of *Knoop NO and Another v Gupta (Execution)*²⁰ which confirmed the earlier decision of *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others*²¹ and is, according to the Applicant, authority for the principle that if what a court has ordered cannot be done under the enabling legislation the order of that court is a nullity and can be disregarded. It is the Applicant's case that Moultrie AJ did not have the jurisdiction or power or competence to issue a final sequestration order in respect of the Applicant's estate on the 4th of May 2020. This is so, submits the Applicant, since section 12 of the Act specifically stipulates, as a jurisdictional condition to any sequestration, that the court has to be satisfied of certain matters at the hearing pursuant to the issuing and service of a *rule nisi*. There is no provision in the enabling legislation (the Act) for only one hearing.

¹⁹ See the relief sought by the Applicant in paragraph 1 of the Amended Draft Order.

²⁰ 2021 (3) SA 135 (SCA) at [34].

²¹ 2012 (3) SA 325 (SCA).

- [56] Both the First and Second Respondents, together with the Bank, take the opposing view and submit that the order is *not* a nullity. They say that the court *did* have the authority to make the order of final sequestration on the 4th of May 2020. It is further submitted that this authority is derived from a proper interpretation of subsection 9(5) of the Act, together with the fact that the said authority is not limited by an express provision of the Act.
- [57] In support of the foregoing, reliance is placed on the wording of subsection 9(5) of the Act, with particular reference to the words “...or make such other order in the matter as in the circumstances appears to be just”. Arising therefrom, it is submitted that the subsection postulates various options available to the court when considering a petition for sequestration and, in the premises, subsection 9(5) is the source of the court’s authority.
- [58] So, in essence, what is contended for, is an interpretation of subsection 9(5) of the Act which would have given Moultrie AJ the authority to (and for all intents and purposes) be the first judicial officer since the 1st of July 1936 (the commencement date of the Act) to elect not to follow the specific provisions of sections 10 and 11 of the Act but, at the first hearing of the application, grant a final order in terms of section 12 of the Act sequestrating the Applicant’s estate.
- [59] Putting aside for present purposes the applicable principles of interpretation, it is imperative, in the first instance, to note that the argument in support of an interpretation of subsection 9(5) being wide enough to enable the court presented with an application for the sequestration of a debtor’s estate to grant a final order without first granting a provisional order, is premised upon the fact that the court so petitioned in terms of the Act is entitled, firstly, to ignore the provisions of sections 10 and 11 of the Act. This Court has grave difficulty in accepting such a proposition, particularly when one considers that there appears to be no conceivable basis upon which a court would be entitled to do so. This must be so, particularly considering the nature and purpose of these provisions (*sections 10 and 11*) within the context of the Act. The foregoing must also be seen in light of that as stated hereunder.
- [60] It has, as set out above, been submitted that there is no express provision in the Act limiting the authority of a court to grant a final order sequestrating a debtor’s estate. This may be true but an express, *alternatively*, implied provision effectively arriving at the same result must give rise to, or at the very least support, an interpretation negating any authority on behalf of a court to grant a final order of sequestration without first granting a provisional order. As set out earlier in this judgment, subsection 12(1) of the Act specifically states that a final sequestration may only be granted “*at the hearing pursuant*

to the aforesaid rule nisi “.²² In addition, subsection 12(2) of the Act makes it clear that the hearing for a final order of sequestration must be a second hearing pursuant to the granting of a provisional order of sequestration since specific reference is made to the fact that “*If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration.....*”²³ So the legislator clearly envisaged a two-step procedure in every case where a debtor’s estate is to be sequestrated. Hence the formulation of a process encompassing both provisional and final sequestration orders; the very existence of sections 10; 11 and 12 in the Act and the refinement of various subsections of sections 9 and 11 over the years, pursuant to the commencement of the Act.

- [61] The Act provides important protections for the rights of creditors. It is also trite that the sequestration of a debtor’s estate has important implications in respect of the debtor’s status. In the premises, formalities and requirements prescribed in the Act must be strictly complied with. Arising therefrom, it is the duty of our courts to not only ensure that these formalities and requirements are properly and fully satisfied before granting sequestration orders but that the provisions of the Act are restrictively interpreted.
- [62] Since the commencement of the Act on the 1st of July 1936, various amendments have been enacted by the legislature to section 9 thereof (*Petition of sequestration of estate*) with particular reference to subsections (3) and (4A) which deal with information to be contained in the application and service thereof.²⁴ It is however worthy to note that since the commencement of the Act the legislature has not seen fit to effect any amendments whatsoever to subsection 9(5).
- [63] It is also important to note that since the commencement of the Act the legislature has not seen fit to effect any amendments whatsoever to either section 10 (*Provisional sequestration*) or section 12 (*Final sequestration or dismissal of petition for sequestration*) of the Act. So, whilst the legislature has found the provisions of these sections of the Act to be “fit for purpose” since the 1st of July 1936, it has, at the same time, deemed it necessary to effect amendments to section 11 (*Service of rule nisi*) of the Act.²⁵
- [64] From the foregoing, it is clear that the legislature has recognised and accepted the importance of the principles governing the Act and our laws of

²² *Emphasis added.*

²³ *Emphasis added.*

²⁴ *Subsection 9(3) amended by subsection 6(b) of Act 16 of 1943 (wef 19 April 1943) and substituted by section 2 of Act 99 of 1965 (wef 7 July 1965) and by section 1 of Act 122 of 1993 (wef 1 September 1993). Subsection (4A) inserted by section 2 of Act 69 of 2002, date of commencement 1 January 2003.*

²⁵ *Section 11 substituted by section 3 of Act 69 of 2002 (wef 1 January 2003).*

insolvency by accepting that whilst sequestration is undoubtedly a necessary mechanism in order to protect the rights of creditors, it remains fundamental (even more so in a constitutional democracy) to recognise that the sequestration of a debtor's estate has a major effect on that debtor's status which also requires the protection of the legislature. Hence, whilst the legislature has found it necessary to amend the provisions of those sections dealing with the formalities and requirements as set out above (*sections 9 and 11*) it has, at the same time, deliberately left intact those provisions of the Act (*sections 10 and 12*) which set out the procedure in terms of which our courts are to consider sequestration orders and implement same. In this way, the procedure (and safeguards) of the court first having to be satisfied that the requirements of section 9 have been complied with; the granting of a provisional order of sequestration if the court is satisfied, *prima facie*, that the factors in section 10 have been satisfied; the court thereafter being satisfied that proper service of the *rule nisi* has been effected in terms of the provisions of section 11 and then (and only then) the court being entitled to grant a final order of sequestration in terms of section 12 of the Act, has been preserved by the legislature. Unsurprisingly, there has (certainly as far as this Court is aware) been no call from insolvency practitioners; the legal profession or the general public, for amendments to the Act which would categorically and without doubt provide a court, in certain circumstances (or perhaps even in each and every circumstance) to have the authority to grant a final order of sequestration of a debtor's estate where certain requirements had been complied with and facts proven by an applicant without first having to grant a provisional order of sequestration.

[65] From the foregoing, it should be apparent that the interpretation of subsection 9(5) of the Act, as contended for by the First and Second Respondents, together with the Bank, cannot be correct. On the other hand the interpretation as put forward by the Applicant is not in conflict with the well-known and oft-cited principles of interpretation as stated in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁶ where the Supreme Court of Appeal ("SCA") held:-

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those

²⁶ 2012 (4) SA 593 (SCA) at paragraph [18].

responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[66] In the premises, this Court finds that it is unable to interpret subsection 9(5) of the Act as contended for by the First and Second Respondents, together with the Bank. Further, this Court finds that Moultrie AJ did *not* have the authority to make the order on the 4th of May 2020 whereby the estate of the Applicant was finally sequestrated in terms of section 12 of the Act.

Is the Applicant entitled to the relief sought in the Amended Draft Order ?

[67] The submissions made on behalf of the Applicant as to why the order of Moultrie AJ is a nullity and should be set aside, have been dealt with earlier in this judgment.²⁷ This Court has held that the interpretation of subsection 9(5) of the Act, as contended for by the First and Second Respondents, together with the Bank, is incorrect and, in light of the correct interpretation of that subsection of the Act, that Moultrie AJ did *not* have the authority to grant the order that he did. Nonetheless, Adv Subel SC submitted to this Court, on behalf of the Bank, that the Applicant can still not succeed with a declaration of invalidity *ab initio*. This submission was based on the following:-

67.1 There is no dispute that the Court faced with the sequestration application had the jurisdiction and authority to make a sequestration order;

67.2 The sole dispute is whether or not the Court ought to have granted a provisional order as opposed to a final order;

67.3 By then granting a final order and not a provisional order the Court did not act unlawfully but made a mistake.

²⁷ Paragraph [55] *ibid*.

- [68] It was further submitted that whilst the Applicant has, in his founding affidavit, placed reliance on Rule 42, *alternatively*, the common law, to set aside the order, no case was made out for such relief and any reliance thereon is seemingly abandoned in the Applicant's Heads of Argument.
- [69] Counsel for the Bank drew the attention of this Court to the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*²⁸ where the Constitutional Court reaffirmed the principle that a judgment was 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.*"²⁹
- [70] Following therefrom, it was submitted that there is nothing to suggest that the Court would not have granted a provisional sequestration order on the 4th of May 2020. It was therefore submitted that the largely unexplained and substantial delay in launching the application mitigates against any relief in favour of the Applicant under Rule 42 or the common law.³⁰
- [71] It was further submitted that it is in the interests of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of court. Persons affected by such orders should be entitled, within a reasonable time after the issue thereof, to know that the last word has been spoken on the subject. The power created by Rule 42(1) is discretionary "*.....and it would be a proper exercise of that discretion to say that, even if the appellant proved that Rule 42(1) applied, it should not be heard to complain after the lapse of a reasonable time.*"³¹
- [72] Based on, *inter alia*, the foregoing, it was submitted that the Applicant was not entitled to a declarator that the order of this court dated 4 May 2020, issued under case number 41681/2019, pursuant whereto the estate of the Applicant was finally sequestrated, is a nullity and should be set aside.
- [73] As dealt with earlier in this judgment, Adv Smit, in support of his submissions on behalf of the Applicant that the order of Moultrie AJ was a nullity *ab initio* and should be set aside because "*nothing could be built on nothing*", relied primarily on the matters of *Knoop*³² and *Motala*.³³

²⁸ 2021 (11) BCLR 1263 (CC).

²⁹ At paragraph [62].

³⁰ First National Bank of SA Ltd v Van Rensburg NO and Others 1994 (1) SA 677 (T); Ngutshane v Standard Bank of South Africa Ltd & Others (31843A/2012) [2013] ZAGPPHC 421 (6 December 2013).

³¹ Van Rensburg NO. (supra) at 681 F-H.

³² 2021 (3) SA 135 (SCA).

³³ 2012 (3) SA 325 (SCA)

- [74] The Constitutional Court, in the matter of *Department of Transport and Others v Tasima (Pty) Ltd*,³⁴ was called upon to consider the effect of an invalid court order and whether or not the alleged invalidity of the court order could excuse a party's non-compliance therewith. It was held, *inter alia*, that "*The general rule is that orders that **do not** concern constitutional invalidity **do** have force from the moment they are issued. And in light of s 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside.*"³⁵
- [75] Importantly, whilst criticizing *Motala* the Constitutional Court in *Tasima* also found³⁶ that *Motala* dealt with a different issue and "...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." In the present matter the court could grant a sequestration order. The mistake of Moultrie AJ was to grant a final sequestration order before granting a provisional sequestration order.
- [76] *Knoop* is relied upon by Adv Smit insofar as the SCA confirms the principles as set out earlier by that court in *Motala*. In this regard, Wallis JA stated:-³⁷
- "I am aware that some of the reasoning in Motala has been subjected to criticism by the Constitutional Court. However, it remains 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 principle can be invoked where the invalidity appears on the face of the order as in Motala and in this case. The suspension order granted by the full court was therefore a nullity."*
- [77] In the premises, the Applicant's reliance on *Knoop* takes the Applicant's case no further as both *Motala* and *Knoop* are distinguishable from the present matter. On the other hand, the principles as set out in *Tasima* have, fairly recently, been confirmed, once again, by the Constitutional Court in the matter of *Municipal Manager OR Tambo District Municipality and Another v Ndabeni*.³⁸
- [78] So, the correct statement of the principles of law applicable to the status of the order in the present matter are to be found in *Tasima* and *Ndabeni*.

³⁴ 2017 (2) SA 622 (CC).

³⁵ At paragraph [180]; Emphasis added.

³⁶ At paragraph [197].

³⁷ Paragraph [34].

³⁸ (2022) 43 ILJ 1019 (CC) at [23] to [26]

Following thereon, the final order of sequestration granted by mistake by Moultrie AJ on the 4th of May 2020 is not a nullity *ab initio*. As questionable as the motives of the Bank may or may not have been to move for a final order of sequestration rather than follow the established practice of first seeking a provisional order of sequestration, together with the regrettable consequences and actions that followed thereafter, the order remained in place until challenged by the Applicant.

Findings

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

Should the Bank be granted the relief as sought in the conditional counter-application?

[80] The relief sought by the Bank in its conditional counter-application is as follows:-

- “ 1. The order of Moultrie AJ dated 4 May 2020 is varied to read as follows:
 - “1. *The estate of Eamonn Courtney (“the Respondent”) is placed under provisional sequestration in the hands of the Master of the High Court.*
 2. *The Respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate on theday of..... at 10.00 or as soon thereafter as the matter may be heard.*

3. *A copy of this order must forthwith be served –*
 - 3.1 *on the Respondent by way of service on his attorneys of record Gothe Attorneys Incorporated situated at 225 Muller Street, Queenwood, Pretoria;*
 - 3.2 *on the employees of the Respondent, if any;*
 - 3.3 *on all trade unions of which the employees of the Respondent are members, if any;*
 - 3.4 *on the Master;*
 - 3.5 *on the South African Revenue Services.”*
4. *The costs of this application are to be costs in the administration of the Respondent’s estate. “:*
2. Declaring that the provisional sequestration order granted in terms of paragraph 1 will be deemed effective as from 4 May 2020;
3. Alternatively, to paragraph 2 declaring that all steps taken by the First and Second Respondents following their appointment as the provisional and final trustees of the insolvent estate of Eamonn Courtney to be valid and effective.
4. Ordering the Applicant and any Respondent who opposes this application to pay the costs thereof.
5. Further and/or alternative relief.”

[81] In support of the relief sought the Bank relied upon subsection 149(2) of the Act which provides that:-

“The court may rescind or vary any order made by it under the provisions of this Act”

[82] In the matter of *Naidoo and Another v Matlala NO and Another*, Southwood J stated the following:³⁹

³⁹ 2012 (1) SA 143 (GNP) at paragraph [4] at page 152 of the judgment.

“For present purposes I shall accept the statement of the relevant principles gleaned from the authorities by Gautschi AJ in Storti v Nugent and Others 2001 (3) SA 783 (W) at 806D–G:

- (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) This 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.”*

[83] As correctly pointed out by Counsel for the Bank the Act does not specify any ground upon which the Court may rescind or vary an order. Further, the Court's authority to act under subsection 149(2) has been interpreted to mean that:-

83.1 The Court must exercise its discretion in light of all of the circumstances;⁴⁰

83.2 There are no limitations to this power and the intention of the provision is to enable the Court to exercise such power in any circumstances which it may consider just;⁴¹

83.3 This includes circumstances where the order was made in error and should not have been made at all;⁴²

⁴⁰ Meskin's Law of Insolvency, paragraph 15.1.6.2.

⁴¹ Ibid.

⁴² Mars: The Law of Insolvency in South Africa, 10th Edition, 2019, paragraph 6.1.1, page 171 and the cases cited therein.

83.4 The court will not exercise its discretion in favour of an application in terms of subsection 149(2) if undesirable consequences will follow.⁴³

[84] In light of the principles as encapsulated in the matters of *Tasima* and *Ndabeni*, namely that court orders exist in fact and have legal consequences, it was submitted by Counsel for the Bank that:-

84.1 the court order must be set aside by an order of this Court;

84.2 the act of setting aside an order is akin to the rescission of the judgment and entitles this Court, under section 149(2) of the Act, to either vary it or set it aside.

[85] Insofar as the *grounds* for justifying a variation of the order granted by Moultrie AJ, it was submitted by Adv Subel SC that the Bank's case for a variation thereof had been formulated in the application papers before this Court as follows:-

85.1 the sequestration process has been ongoing for two years and the First and Second Respondents had, with the Bank's financial backing, expended a significant amount of time and money to administer and wind-up the Applicant's insolvent estate;

85.2 the sudden and belated challenge to the sequestration order is raised as an afterthought and only came to the fore when the First and Second Respondents took steps in Scotland to pursue the Applicant's foreign assets;

85.3 the Applicant remains indebted to the Bank for a substantial amount and is unable to pay the debt;

85.4 the First and Second Respondents have administered the insolvent estate; sold assets to third parties for two years; paid the Bank an interim dividend and it is no longer possible to "unscramble the egg".

[86] It was further pointed out on behalf of the Bank that the Applicant has provided no response to the aforesaid allegations. Moreover, in their affidavits, the First and Second Respondents explain the steps they have taken during the administration of the estate and provide a draft liquidation and distribution account which confirms that the First and Second Respondents have:-

⁴³ Zadi v Body Corporate of Outeniqua 2011 JDR 1096 (GNP) paragraph 5 at page 5.

- 86.1 appointed an investigative firm to conduct an investigation and prepare a report on the Applicant's assets;
- 86.2 on the 24th of June 2021, sold an immovable property jointly owned by the Applicant and his wife;
- 86.3 collected rental income from the lease of the said immovable property prior to the sale;
- 86.4 paid an interim dividend to the Bank in the amount of R 2 425 000.00; and
- 86.5 initiated proceedings in the Court of Sessions, Scotland to pursue the Applicant's assets in that country.

[87] In light of the foregoing and the fact that these are all undisputed facts before this Court, it was submitted on behalf of the Bank that these facts overwhelmingly support a variation of the order of Moultrie AJ granted on the 4th of May 2020.

[88] The counter-application instituted by the Bank is conditional upon the Applicant being granted the relief sought in the application to have the order of Moultrie AJ declared a nullity and set aside. In light of the fact that the Applicant was unsuccessful in obtaining such relief the counter-application must, technically, fall away. However, this does not mean that this Court is prevented from making a suitable order in terms of subsection 149(2) of the Act whereby the order of Moultrie AJ, granted by mistake on the 4th of May 2020, is varied. In this regard, subsection 149(2) specifically entitles a court to rescind or vary any order made by it under the provisions of the Act. The order in the present matter is clearly one made in terms of the provisions of the Act. In addition thereto, subsection 149(2) of the Act merely codifies the court's inherent jurisdiction to regulate its own process and, *inter alia*, to rectify any mistakes. In the premises, provided there are grounds justifying the variation of the order granted by Moultrie AJ on the 4th of May 2020 and applying the principles as referred to, *inter alia*, in the matter of *Naidoo*, this Court may be justified in acting, *mero motu*, to vary the said order in terms of subsection 149(2) of the Act. Indeed, it was never submitted by any of the parties to this matter that should the Applicant's application be dismissed this Court would be unable to do so.

[89] Having regard to all of the relevant facts pertaining to this matter, it is the finding of this Court that it would be just and equitable for this Court, in the exercise of its discretion, to vary the order granted by Moultrie AJ on the 4th of

May 2020 in terms of subsection 149(2) of the Act. The form of this order and the reasons therefor (where applicable) will be dealt with hereunder. In exercising its discretion to vary the order as aforesaid, it is important to note (as dealt with above) the broad discretion granted to this Court in terms of subsection 149(2) of the Act to do so.

[90] In the first instance, the variation of the order rectifies the mistake made by Moultrie AJ when granting the final order of sequestration of the Applicant's estate on the 4th of May 2020 without first granting a provisional order of sequestration. At the same time, such a variation makes clear, without doubt, that the actions of the Bank in moving for a final order of sequestration, in direct conflict with the peremptory provisions of the Act pertaining to sequestration orders, should not be countenanced. The variation of the order granted by Moultrie AJ on the 4th of May 2020 should also act as a clear indication to petitioning creditors; insolvency practitioners and legal representatives alike, that the provisions of subsection 9(5) of the Act can never be interpreted to be so wide-ranging as to give a court the authority to grant a final order of sequestration of a debtor's estate without first granting a provisional order of sequestration.

[91] With regard to the facts of this particular case, a variation of the order at this stage from a final order of sequestration to a provisional order of sequestration plays a dual role. Not only does it rectify the mystifying actions of the Bank in applying for a final order of sequestration without first applying for a provisional order of sequestration but it also takes into consideration the fact that the Applicant considerably delayed taking any positive action to rectify those actions. The variation of the order from a final to a provisional order of sequestration not only (with suitable orders in addition thereto) maintains the *status quo* but also enables the provisions of sections 11 and 12 of the Act to be complied with.

[92] Returning to the relief sought by the Bank in the conditional counter-application, if the order of Moultrie AJ was varied by this Court from a final to a provisional sequestration order, the Bank sought additional orders to the effect that the provisional order should be deemed effective from the 4th of May 2022, *alternatively*, the Bank sought a declarator that all steps taken by the First and Second Respondents be deemed to be valid.

[93] The consequences of the final sequestration order granted by Moultrie AJ were that:-

93.1 Firstly, the Master appointed the First and Second Respondents provisionally. Thereafter, creditors appointed the First and Second Respondents finally.

93.2 Secondly, on the basis of those appointments the First and Second Respondents took various steps to administer the insolvent estate and to comply with their duties in terms of the Act. As already noted, assets were sold to third parties; the Bank advanced funding for the administration of the estate; legal proceedings were instituted and interim dividends were paid to the Bank.

93.3 Thirdly, all interested parties, including the Applicant, accepted the insolvent estate and engaged and/or participated in the estate on that basis.

[94] The purpose of these declaratory orders are clear. It is to preserve the factual position on the Applicant's status as an insolvent that has existed since 4 May 2020. A variation order would operate with effect from the date that the original order was granted.

[95] This factual position was accepted by all interested parties, including the Applicant. There is further no suggestion by the Applicant that his status as an insolvent is incorrect or that his estate should not have been provisionally sequestrated. Instead, the dispute is limited to the contention that it should not have been *finally* sequestrated.

[96] The additional relief sought by the Bank was thus to preserve the Applicant's status as an insolvent for the period between 4 May 2020 until the date of the variation, *alternatively*, to preserve the steps taken by the First and Second Respondents for the same period.

[97] In the premises, it must follow that the additional relief should be incorporated into the Court's order. In this manner it will be ensured that the Applicant's present status remains the same whilst giving effect to the provisions of the Act. As to the nature of this additional relief, same will be to preserve the Applicant's status as an insolvent for the period between 4 May 2020 until the date of the variation (the date of this judgment). In this way the *status quo* is maintained whilst at the same time this Court makes no order in respect of the steps taken by the First and Second Respondents for the same period. Not only is this Court not in a position to do so but to grant such an order as set out in the Bank's Notice of Motion in the counter-application (*in the alternative*) could potentially act as a bar to the Applicant (or any other party) seeking redress for any alleged maladministration of the Applicant's insolvent estate.

The relief sought by the Applicant as set out in paragraphs 3 and 4 of the Notice of Amendment amending the Applicant's Notice of Motion

[98] In paragraph 3 of the Applicant's Notice of Amendment the Applicant seeks an order that the First and Second Respondents render a full accounting to this Court of their administration of the Applicant's estate. Whilst the Applicant has complained of an alleged maladministration of his insolvent estate on the part of the First and Second Respondents, there was no real basis for this particular relief set out by the Applicant in the application papers before this Court. What did arise was a genuine and *bona fide* dispute of fact between the respective parties in relation to whether or not the First and Second Respondents had properly administered the Applicant's estate. In addition, this Court is of the opinion that should the Applicant require further information he may, apart from his common law rights, properly obtain same through the mechanisms of the Act and the various remedies available to him as contained therein. Moreover, in light of this Court's findings as set out above, with particular reference to the fact that it would be just and equitable for this Court to vary the order granted by Moultrie AJ along the lines of that sought by the Bank in the conditional counter-application, the relief sought by the Applicant in paragraph 3 of the Applicant's Notice of Amendment must, by implication, be excluded thereby. In the premises, this Court declines to grant the Applicant the said relief. In light of the fact that the relief sought by the Applicant in paragraph 4 of the same Notice of Amendment is dependent upon the granting of the relief in paragraph 3 thereof, this relief must fall away.

Costs

General principles

[99] It is trite that the question of costs falls within the discretion of the Court and that, unless exceptional circumstances exist, costs would normally follow the result. That said, it is not the intention of this Court to burden this judgment unnecessarily by setting out a lengthy rendition either of the multitude of decisions by our courts dealing with the issue of the awarding of costs or the various legal principles enunciated therein.

The Applicant's application

[100] This application was unsuccessful and must be dismissed. As clearly set out in this judgment the reasons therefore were based primarily on the fact that the Applicant misconstrued the basis upon which the application should have been brought. The order granted by Moultrie AJ on the 4th of May 2020 was clearly a mistake but it was not a nullity. As such, it stood until it was either varied or set aside. In the premises, it was not competent for the Applicant to

seek the relief that he did that the order of Moultrie AJ be declared a nullity and be set aside by this Court on that basis alone. What should have happened was for the Applicant to seek competent relief from this Court, in terms of Rule 42 of the Uniform Rules of Court, *alternatively*, the common law, *alternatively*, the Act, whereby this Court could set aside, *alternatively*, vary, the order granted by Moultrie AJ on the 4th of May 2020.

[101] However, whilst the Applicant may not have been successful in the application, sight should not be lost of the fact that the Bank had obtained an order finally sequestrating the Applicant's estate to which it was clearly not entitled and which, to make matters worse, was then granted by mistake. Following thereon, in terms of this order (granted by mistake but not a nullity) the First and Second Respondents (presumably experts in the Laws of Insolvency and all matters ancillary thereto) accepted their appointments as provisional Trustees of the Applicant's estate by way of an order clearly granted by mistake and happily proceeded to confidently commence with the sequestration of the Applicant's estate, even increasing the costs of sequestration by, *inter alia*, incurring legal costs with the institution of an application for the extension of their powers in terms of subsection 18(3) of the Act and the institution of the application in Scotland.

[102] So, on the one hand, whilst it was correctly pointed out that there was an undue and unjustified delay on the part of the Applicant in instituting his application to set aside the order granted by Moultrie AJ, it is also true that not only did the Bank deliberately seek an order to which it was not entitled but, having been granted that order by mistake, did nothing to rectify the situation until it was forced to do so by the institution of the Applicant's application. Likewise, the First and Second Respondents took no positive action to rectify the order granted by mistake and in terms of which they had been appointed. In this regard, it would appear that the application papers before this Court are devoid of any indication whereby the First and Second Respondents may have sought directions from the Master in respect thereof. Certainly, no such actions were ever brought to the attention of this Court during the course of argument.

[103] To make matters worse, once faced with the Applicant's application to set aside the order erroneously granted, the First and Second Respondents vehemently opposed the granting of such relief largely based on the grounds that the Applicant should be declared a fugitive from justice and thus lacked the requisite *locus standi* to institute the application. This opposition has not been upheld by this Court for the reasons as set out earlier in this judgment. Equally difficult to explain is the conduct of the Applicant when faced with the relief sought by the Bank in the Bank's counter-application. At that (*albeit* rather late) stage, it should have been abundantly clear to the Applicant that

the relief sought by the Bank therein was not only based upon solid grounds but was imminently reasonable. What should have followed was a withdrawal of the application and a settlement of the entire dispute between the parties in terms of an appropriate order gleaned from the Bank's counter-application. Instead, this Court was burdened with the lengthy hearing of a Special Motion preceded by lengthy application papers.

[104] When considering the award of costs insofar as same is applicable to the Applicant's application, this Court has not lost sight of the fact that apart from dismissing the application on the basis that the Applicant was not entitled to the declaratory relief as set out above the Court has also dismissed the application on the basis that the Applicant was not entitled to the further relief sought in paragraphs 3 and 4 of the Notice of Amendment. However, this Court regards the issues involved when deciding whether or not to grant this latter relief as relatively minor when compared to those which demanded the focus of this Court both prior to and in the finalization of this matter. In the premises, the refusal by this Court to grant to the Applicant this latter relief has no material bearing on the issue of costs.

[105] Having regard to all of the foregoing factors, it is the opinion of this Court, in the exercise of its discretion, that it would be just and equitable if this Court made an order whereby each party paid their own costs. Insofar as the First and Second Respondents are concerned, for the reasons set out above, together with the fact that there is no reason why the estate of the Applicant should be burdened any further by the incurring of legal costs, these costs will be paid by the First and Second Respondents in their personal capacities.

The application by the First and Second Respondents that the First Respondent deliver a further affidavit

[106] In respect of this application it was held that the First Respondent was entitled to deliver a further affidavit in the application. This application was not formally opposed by the Applicant but was opposed at the hearing. As such, the Applicant should pay the costs of that application.

The conditional counter-application by the Bank

[107] Whilst no order was made in terms of this conditional counter-application from a formal or technical perspective, it is clear from this judgment that this Court was greatly assisted thereby. In that respect it can be accepted that this application was successful. The only criticism in respect thereof was that it should have been instituted earlier. In this regard the actions of the Bank in seeking an impermissible order; the conduct of the Bank once the order was granted by mistake and the failure of the Bank to react sooner in seeking

and/or attempting to agree with the Applicant, together with the First and Second Respondents, to a suitable order varying the order granted by Moultrie AJ by mistake, have all been dealt with earlier in this judgment. With regard to the present issue of costs the costs order granted in respect of the Applicant's application, as set out above, caters adequately therefor. In the premises, there is no reason to deprive the Bank from its costs in respect of the counter-application and the Applicant is ordered to pay the Bank's costs in respect thereof.

Order

[108] This Court makes the following order:-

1. The First Respondent is granted leave to deliver the further affidavit annexed to the First and Second Respondents' Notice in terms of Rule 6(5)(e) of the Uniform Rules of Court;
2. The Applicant is to pay the costs of the application by the First and Second Respondents for the relief as set out in paragraph 1 hereof;
3. The application instituted by the Applicant is dismissed and the Court specifically declines to grant the relief sought by the Applicant in paragraphs 1, 3 and 4 of the Applicant's Notice of Amendment dated the 10th of August 2022;
4. The Applicant; First Respondent; Second Respondent and Third Respondent are to pay their own costs in respect of the application referred to in paragraph 3 hereof;
5. In respect of the costs payable by the First and Second Respondents in terms of paragraph 4 hereof, these costs are to be paid by the First and Second Respondents in their personal capacities and are not to be paid from the administration of the Applicant's insolvent estate;
6. The order of Moultrie AJ dated 4 May 2020 under case number 41681/2019 is varied to read as follows:

- "1. The estate of Eamonn Courtney ("the Respondent") is placed under provisional sequestration in the hands of the Master of the High Court.*
- 2. The Respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the court should not grant a final order of*

sequestration of the said estate on the 27th day of February 2023 at 10.00 or as soon thereafter as the matter may be heard.

3. *A copy of this order must forthwith be served –*
 - 3.1 *on the Respondent by way of service on his attorneys of record Gothe Attorneys Incorporated situated at 225 Muller Street, Queenwood, Pretoria;*
 - 3.2 *on the employees of the Respondent, if any;*
 - 3.3 *on all trade unions of which the employees of the Respondent are members, if any;*
 - 3.4 *on the Master;*
 - 3.5 *on the South African Revenue Services.”*
4. *The costs of this application are to be costs in the administration of the Respondent’s estate. “:*
7. The provisional sequestration order granted in terms of paragraph 6 hereof will be deemed effective as from 4 May 2020;
8. The Applicant is to pay to the Third Respondent the costs of the Third Respondent’s conditional counter-application, such to include the costs of two (2) Counsel.

B. C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 10 August 2022
Judgment: 20 December 2022

Appearances

For Applicant: Adv. JG Smit
Instructed by: Gothe Attorneys Inc.

**For First/Second Respondents:
Instructed by:**

Adv. S Symon SC
Cox Yeats

**For Third Respondent:
Instructed by:**

Adv. A Subel SC (with Adv. A Foster)
Cox Yeats