**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no: 172/11

MASTER OF THE HIGH COURT
NORTH GAUTENG HIGH COURT, PRETORIA — Appellant

and

ENVER MOHAMED MOTALA NO — First Respondent
MABUTHU LOUIS MHLONGO NO — Second Respondent
AMOURE YEUN NO — Third Respondent
REALEKA INVESTMENTS SA (PTY) LTD — Fourth Respondent

**Neutral citation:** ***Master of the High Court NGP v Motala NO*** **(172/11) [2011] ZASCA 238 (1 December 2011)**

**BENCH:** **PONNAN, MALAN and WALLIS JJA**

**HEARD:** **18 NOVEMBER 2011**

**DELIVERED:** **1 DECEMBER 2011**

**SUMMARY:** **Contempt of court – order giving rise to alleged contempt a nullity – effect of**

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**ORDER**

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**On appeal from**: North Gauteng High Court (Pretoria)
(Legodi J sitting as court of first instance):

The appeal succeeds and the following paragraphs of the order of the court below are set aside:

'1. The acting Master of the court, Ms Nthabiseng Ntsoane and the Deputy Master of this court Ms Christine Roussouw, are hereby found in contempt of the court order of the 5 August 2010;

2. Sanction or punishment in respect of the contempt of court order aforesaid is hereby postponed indefinitely.'

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**JUDGMENT**

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**PONNAN JA (MALAN and WALLIS JJA concurring):**

[1] On 5 August 2010 the North Gauteng High Court (per Kruger AJ) issued inter alia the following order:

'1. THAT the First Respondent, Realeka Investment SA (PTY) LTD [Realeka] is hereby placed under provisional judicial management in terms of the provisions of the Companies Act, Act No. 61 of 1973 ("the Act");

. . .

3. THAT Hendrik Abram van Vuuren, Second Applicant, jointly with Mabutha Mhlongo (the judicial managers), are hereby appointed as joint judicial managers to be in full control of all aspects of the First Respondent and as prescribed by Section 430 of the Act.'

The appellant, the Master of the North Gauteng High Court, declined to issue a certificate of appointment to Mr van Vuuren. Instead, on 19 August 2010 the Master appointed the first respondent, Mr Enver Mohamed Motala and the third respondent, Ms Amoure Yeun together with Mr Mhlongo, the second respondent, as the joint provisional judicial managers of Realeka with the powers set out in s 430 of the Companies Act 61 of 1973 (the Act). A day later and at the instance inter alia of Mr van Vuuren, Mavundla J issued a rule nisi returnable on 26 October 2010 interdicting the Master from 'appointing any other judicial managers save in terms of the court order dated the 5th of August 2010'. In addition, Mavundla J ordered Realeka, which by that stage was already under a provisional judicial management order, and the Master to pay the costs of that application jointly and severally.

[2] On 6 September 2010 and on the application of Messrs Motala and Mhlongo and Ms Yeun, Raulinga J interdicted Mr van Vuuren from carrying out any of the functions of a provisional judicial manager 'whether conferred by the Companies Act or purportedly conferred by the court order dated 5 August 2010 issued by his lordship Mr Justice Kruger'. Mr van Vuuren then approached the high court seeking to discharge the interdict that had issued before Raulinga J. That application came before Legodi J on 13 September 2010 who, *mero motu* it would seem, raised the issue of the Master's possible contempt of the order of Kruger AJ dated 5 August 2010 and directed the Master to file an affidavit by not later than 15 September 2010 explaining 'why he/she should not be found to be in contempt of the court order of 5 August 2010 by refusing to issue [Mr van Vuuren] with letters of appointment as judicial manager of Realeka'.

[3] The Assistant Master, Mr Wynand Jakobus Cilliers, who deposed to the affidavit in compliance with the order of Legodi J, states:

'22

It was never the intention of this office to be in contempt of Court and in support of this statement I wish to place the following facts before the Honourable Court:

22.1 No papers were served on this office in terms of the mandatory provisions of section 427 read with section 346(4)(a) of the Companies Act 61 of 1973;

22.2 When the Court grants an order to place a company under judicial management such order places the estate or assets of the company in the hands of the Master in terms of section 429 of the Companies Act;

22.3 The Court does not make an order with regard to the appointment of liquidators and judicial managers as this function is that of the Master in terms of section 429 of the Companies Act. In practice the Court does however often make a recommendation that the appointment be made urgently or the Court can make a recommendation that a specific person be appointed. The Master must however consider and take into account the inputs of all other creditors and the policies of the Department of Justice before an appointment is made;

22.4 On 20 August 2010 when the Honourable Mr Justice Mavundla interdicted the Second Respondent in this application, this office had already made the appointment and issued the appointment certificate of the judicial managers in this matter;

22.5 Mr van Vuuren changed the wording of the affidavit of non-interest certificate as he does have a substantial interest in the affairs of the Fourth Applicant and can therefore not be appointed. There is a very strong case to be made out that his own interest and those of other creditors may be in conflict of each other;

22.6 Mr van Vuuren is not known to this office and has never been appointed in a fiduciary capacity as liquidator, trustee or judicial manager;

22.7 Mr van Vuuren does not comply with the minimum requirements by this office before a person can be placed on the Master's panel of liquidators or judicial managers. He is not an admitted attorney or auditor and is therefore not a suitable person to be appointed;'

In explaining how Mr Motala and Ms Yeun came to be chosen, Mr Cilliers states:

'13

The Master has a discretion to consider who he will appoint as judicial manager. The Master will normally also consider the inputs of creditors. Numerous requisitions were submitted and the main creditor (Absa Bank) supported Mr E M Motala. The normal policy of this office is also to appoint a previous disadvantaged person (PDI) in each estate in order to get exposure as liquidators or judicial managers. This is the reason why Ms A Yeun was appointed. This appointment was done in terms of the provisions of section 429 of the Companies Act.'

[4] Legodi J was not persuaded by the explanation proffered. He concluded:

'1. The acting Master of the court, Ms Nthabiseng Ntsoane and the Deputy Master of this court Ms Christine Roussouw, are hereby found in contempt of the court order of the 5 August 2010; [and]

2. Sanction or punishment in respect of the contempt of court order aforesaid is hereby postponed indefinitely.'

The present appeal against those orders is before this court with the leave of Legodi J. The respondents have intimated that they abide the decision of this Court. In what follows I shall endeavour to demonstrate that both the reasoning as also the conclusion reached by the learned Judge cannot be supported.

[5] A useful starting point has to be the recognition that our insolvency administration is wholly a creature of statute. In *Gilbert v Bekker & another* 1984 (3) SA 774 (W) at 777G-H, Coetzee J put it thus: '[o]ur courts are not entrusted with insolvency administration as in England. The Court, when called upon to do so, merely applies the law to a given situation'. Section 429 of the Act empowered a court on application to it to grant a provisional judicial management order. It provided:

'Upon the granting of a provisional judicial management order—

(*a*) all the property of the company concerned shall be deemed to be in the custody of the Master until a provisional judicial manager has been appointed and has assumed office;

(*b*) the Master shall without delay—

(i) appoint, in accordance with policy determined by the Minister, a provisional judicial manager (who shall not be the auditor of the company or any person disqualified under this Act from being appointed as liquidator in a winding-up) who shall give such security for the proper performance of his or her duties in his or her capacity as such, as the Master may direct, and who shall hold office until discharged by the Court as provided in section 432(3)(*a*);

(ii) convene separate meetings of the creditors, the members and debenture holders (if any) of the company for the purposes referred to in section 431.'

[6] That section reserved to the Master the power to appoint a judicial manager. The effect of such a provision as Potgieter J observed (albeit in respect of s 151 of the Insolvency Act 24 of 1936) in *Goldfields Trading Company (Pty) Ltd v Schutte* 1956 (3) SA 1 (O) at 2D is that: '[t]he appointment of a provisional trustee is purely statutory and I cannot see how the Court has any inherent power where such power is vested in the Master by statute'. That was echoed by Myburgh J in respect of the Act here under consideration in *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 671G, who stated: '[a]s to any such provisional appointments [of trustees, liquidators and judicial managers] the Master clearly has an unfettered and sole administrative discretion and it is within his enacted powers to give directions to his staff about such appointments'.

[7] Any doubt as may have existed as to the power of the high court to appoint judicial managers — and to my mind there ought to have been none — has now been laid to rest by the judgment of Bertelsmann J in *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP). In that matter the Master saw fit to approach the high court for declaratory relief. What motivated the application appears from the reported judgment (paras 2-4), which reads:

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

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

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

Bertelsmann J issued inter alia the following order:

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

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

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

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

2 no judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to in paragraph 1.'

[8] It thus was plainly impermissible for Kruger AJ to appoint the provisional judicial managers of Realeka. What is more, nothing in the order of 5 August 2010 required the Master to do or not do something. In particular it did not direct the Master to appoint Mr

van Vuuren as the judge had already purported to do that or for that matter to issue him with a certificate of appointment. Nor, on the authorities that I have already cited, could it. It follows that whatever the Master may have done or not done that could not have constituted disobedience of the order of 5 August 2010 so as to found any contempt on his part.

[9] It remains to consider the order of Mavundla J. According to Mr Cilliers, although the order of Kruger AJ issued on 5 August 2010, the Master's office was only served with a copy of the papers on 18 August 2010. On that very day officials in the employ of the Master proceeded in terms of s 429 of the Companies Act to appoint Messrs Motala and Mhlongo and Ms Yeun as the provisional judicial managers of Realeka. A certificate to that effect issued on 19 August 2010. Thus by the time that Mavundla J had issued the rule nisi interdicting the Master ‘from appointing any other judicial manager save in terms of the court order dated 5th August 2010’ the officials in the employ of the Master's office had already acted in terms of s 429. It follows that here as well there was no disobedience of the order of Mavundla J. To my mind, had Mavundla J been aware that an appointment had already been made, he could hardly have issued the order that he did on 20 August 2010. Like Kruger AJ before him, Mavundla J, also misconceived the legal position. Mavundla J went further than Kruger AJ though in purporting to compel the Master to act in a particular way. That, with respect to the learned Judge, he could not do, for as Innes CJ explained in an analogous context in *Hoisain v Town Clerk Wynberg* 1916 AD 236 at 240:

'It is sought to compel the Town Clerk to place the applicant's name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which this statute does not allow him to do; in other words we are asked to force him to commit an illegality.'

[10] Moreover, although it was not incumbent upon the Master to do so, Mr Cilliers explained why the Master did not see his way clear to appointing Mr van Vuuren:

‘It must be noted that this office do not know Mr van Vuuren and we have never appointed him in any estate in a fiduciary capacity especially as liquidator, trustee or judicial manager. He also in terms of the

new guidelines used by this office does not qualify to be appointed as such. The guideline presently applied to be admitted to the Master's panel of liquidators / judicial managers is that the applicant must be an admitted attorney or auditor.'

It is undisputed that Mr van Vuuren was neither an admitted attorney nor an auditor. Nor was he independent, so his appointment would have been contrary to the general rule that liquidators and judicial managers should be entirely disinterested persons, unconnected with the affairs of the company (*In re Greatrex Footwear (Pty Ltd (II)* 1936 NPD 536 at 538-9). In those circumstances it could not be said that the Master had not exercised his discretion honestly, nor could it be said that he had acted *mala fide* (see *Krumm & another v The Master & another* 1989 (3) SA 944 (D)). Legodi J was not persuaded, however, and dealt with the Master's explanation thus:

'Instead of dealing with the essence of the court order, they were carried away by the fact that the second respondent was not on the panel of their insolvency practitioners. This cannot be a reasonable explanation to escape contempt.'

With respect to the learned Judge once again he appears to have misconceived the position. In *Hartley v The Master* 1921 AD 403, where although the facts are not in point, but the general doctrine formulated is instructive, Innes CJ stated (at 407):

'In the meanwhile [the Master's] refusal bars the way, and under the general rule applicable to such cases there are no grounds here upon which interference of the Court could be invoked. For the matter is left to his entire discretion. The test is what he thinks with regard to prejudice, not what we think. We have no power to compel him to change his mind in respect of a question which he has duly considered'.

[11] What appeared to weigh with Legodi J was the following general proposition: all orders of court whether correctly or incorrectly granted have to be obeyed until they are properly set aside (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C; *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229). No doubt there are important policy considerations why that must be so. But, that raises a logically anterior question, which Legodi J described as 'the most vexing aspect of this judgment' - namely the status of the order of Kruger AJ. The Master contended that it was a nullity and could, without more, be disregarded. Legodi J took a contrary view.

[12] As long ago as 1883, Connor CJ stated in *G W Willis v L B Cauvin* 4 NLR 97 at 98-99:

'The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. The maxim *extra territorium jus dicenti inpune non paretur* (*Dig*. 2.1.20) is applicable (*Dig*. 50.17.170 & 2.1.20; *Cod.* 7.48.1 & 14.4; *Wes*. *ibi Poth. Pand.* 42.1.(14,15); *Voet* 42.1.48; *Wes. ad. Dig*. 42.1.(5); *Wes. ad. Dig.* 50 17.170 & 2.1.(50); *Groenwn. ad. Cod.* 7.64; *Christin. Decis*. 4.94.2).'

*Willis v L B Cauvin* was cited with approval in *Lewis & Marks v Middel* 1904 TS 291 and *Sliom v Wallach's Printing and Publishing Company Ltd* 1925 TPD 650. In the former Mason J (with whom Innes CJ and Bristowe J concurred) held at 303:

'It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, *ad Cod*. 2; 41; 7, 54; *Willis v Cauvin*, 4 N.L.R. 98; *Rex v Stockwell*, [1903] T.S. 177*; Barnett & Co. v Burmester & Co.,* [1903] T.H 30).'

And in the latter, Curlewis JP (Krause J concurring) held at 656:

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

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

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

word. *Groenwegen* (*loc cit*) sê wel dat, waar dit gaan oor die nietigheid van 'n uitspraak van die Hooggeregshof, die *Princeps* se hulp ingeroep moet word, maar hierdie reël geld nie meer by ons nie.'
(See also *State v Mkize* 1962 (2) SA 457 (N) at 460; *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) paras 18 and 19.)

[14] In my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect *(Schierhout v Minister of Justice* 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. For as Coetzee J observed in *Trade Fairs and Promotions (Pty) Ltd v Thomson & another* 1984 (4) SA 177 (W) at 183E: '[i]t would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration'. (See also *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren & others and the Taxing Master* 1964 (1) SA 162 (O) at 164D-H.)

[15] It follows that Legodi J's conclusion that the acting Master, Ms Nthabiseng Ntsoane and the Deputy Master, Ms Christine Roussouw, had acted in contempt of the order of Kruger AJ of 5 August 2010 cannot be supported. In the result the appeal must succeed and that finding as also the order postponing indefinitely the imposition of punishment on them fall to be set aside.

[16] One further aspect merits attention: During the course of his judgment, Legodi J passed certain comments about the conduct of the Master. The learned Judge expressed himself thus:

‘The events after the 19 August 2010 and some actions of the Master in relation to the order of the 5 August 2010 worry me a lot. Such actions border around unethical and unprofessional conduct on the part of the Master.

. . .

The approach in chambers and in the absence of the other parties, was not only uncalled for, unethical and unprofessional, but was also as I see it, meant to embarrass and compromise the Judge concerned. In paragraph 20 of Mr Cilliers's affidavit deposed to on 15 September 2010, it is suggested that the Judge concerned in chambers expressed his views as follows . . .’

The ‘approach in chambers’ that provoked such strong feelings of disquiet in the learned Judge is explained in a supplementary affidavit filed by Mr Cilliers, who states:

'3.

On 24 August 2010 a Mr Norman Prigge of the firm E W Serfontein and Associates Incorporated Attorneys, visited Ms Rossouw on behalf of a creditor enquiring about the status of this judicial management.

4.

Ms Rossouw brought the Mr Prigge to my office and I agreed to accompany him to make enquiries at the Registrar of the Court. I did this because Mr Prigge informed me that he could not trace the Court file in the judicial management application and that it appeared that the application had not yet been registered on the Court's computer system.

5.

We approached Mr D M Pietersen, the Chief Registrar. We then located the matter on the urgent roll of 5 August 2010 and Mr Pietersen instructed his staff to locate the file but they were unsuccessful in doing so. Mr Pietersen could also not locate the application on the Court's computer system.

6.

Mr Pietersen then suggested that we approach the Honourable Mr Acting Justice Kruger, who heard the matter, and he then took us to the Judge's office.

7.

Mr Kruger AJ then informed us that he will investigate the matter and that he will revert to us. On 27 August 2010 I received a telephone call from the Judge's secretary informing me that the Judge wanted to see me and my attorney in his chambers. The State Attorney dealing with this matter, Mr C Malan, was attending to another matter and I requested another State Attorney, Mr P Cavanagh, to accompany me to the Judge's chambers.

8.

Mr Kruger AJ then informed us that he still could not locate the Court file but that he had listened to the Court tapes, that he discussed the matter with most of his colleagues and that two suggestions had been made to him. He further informed us that the one school of thought was that he is *functus officio* to rectify

his own order and that the other school of thought was that we should have a look at Rule 42(1). He however was of the opinion that Rule 42(1) had limited applicability and would not be of any use to us.'

I do not share the learned Judge's disquiet. As Mr Cilliers states, the contact with Kruger AJ was prompted by the desire to find a missing court file. The initial visit to the learned acting Judge's chambers was initiated by the high court registrar. The second was at the instance of the Judge himself. I cannot imagine that Mr Cilliers could have declined to attend on the Judge's chambers when he had been specifically invited by the latter's secretary to do so. That the learned acting Judge may have expressed himself on the matter in the absence of the other litigants hardly redounds to the discredit of Mr Cilliers, particularly as the Master was then not a litigant before the court but a statutory functionary endeavouring to discharge statutory functions under trying circumstances. In my view nothing in the conduct as explained by Mr Cilliers, appears to have been unethical or designed to embarrass the Judge. On the contrary it was perfectly innocuous and certainly not deserving of the censure and opprobrium visited on it by Legodi J.

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**V M PONNAN**
**JUDGE OF APPEAL**

APPEARANCES:

| | |
|---|---|
| For Appellant: | M P van der Merwe |
| | Instructed by:<br>The State Attorney<br>Pretoria<br>The State Attorney<br>Bloemfontein |
| For Respondent: | No appearance |