THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1121/2015

In the matter between:

JOHANNES GEORGE KRUGER **APPELLANT**

and

JOINT TRUSTEES OF THE INSOLVENT ESTATE OF PAULOS BHEKINKOSI ZULU **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS, PIETERMARITZBURG **SECOND RESPONDENT**

Neutral Citation:	*Kruger v Joint Trustees* (1121/2015) [2016] ZASCA 163 (10 November 2016).
Coram:	Mpati AP, Willis, Saldulker, Dambuza JJA and Potterill AJA
Heard:	15 September 2016
Delivered:	10 November 2016

Summary: Banking Law: unregistered person conducting the business of a bank in contravention of certain provisions of the Banks Act 94 of 1990: appointment of a repayment administrator in terms of s 84 of Banks Act to recover and take possession of assets of the unregistered person: extent of powers of repayment administrator: unregistered person subsequently sequestrated and trustees appointed: effect of powers of trustees on those of repayment administrator.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Radebe J sitting as court of first instance):

The appeal is upheld and the order of the court a quo is set aside and replaced with the following:

'1 The points *in limine* are dismissed.

2 The costs shall be costs in the sequestration.'

JUDGMENT

Dambuza JA (Mpati, Willis, Salduker JJA and Potterill AJA concurring):

[1] This appeal concerns the interpretation of certain provisions in Chapter VIII of the Banks Act 94 of 1990, (the Banks Act) relating to repayment of money obtained by unregistered persons who conduct the business of a bank. The central issue is the extent of the powers of a repayment administrator under s 84(1A)*(b)*(i) of the Banks Act when recovering and taking possession of assets belonging to the unregistered persons in managing the repayment process. The appeal is against an order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Radebe J) (the high court), dismissing an application in which the registrar of banks (the registrar) sought to take possession of assets in the estate of Mr Paulos Bhekinkosi Zulu, the first respondent before the court a quo, pursuant to a direction issued by the registrar of banks in terms of s 83(1) of the Banks Act. The appeal is with leave of the high court.

[2] Following an inspection conducted in terms of s 12 of the Reserve Bank Act 90 of 1989,[1] the registrar concluded that an entity known as Travel Ventures

[1] The section deals with inspection of affairs of a persons and businesses, by the registrar of banks, at the direction of the governor or deputy governor, where there is a suspicion that the person or

Marketing Agency (Newcastle) or Travel Ventures Institution (TVI), controlled by Mr Zulu, had engaged in the business of obtaining money by conducting the business of a bank without being registered as such in terms of s 17 of the Banks Act or being authorised to conduct such a business under s 18A(1) of the Banks Act.[2] TVI was described on its website as: 'an International Direct Selling Company having Alliances and Channel partners all across the world' and as 'one of the fastest growing companies in the Network Marketing Industry today'. It claimed to operate in over 160 countries across the globe and that its head office was in London.

[3] The business entailed the marketing and sale of a travel voucher, mostly in electronic form. The voucher purportedly gave members significant discounts for international travel and accommodation with 'travel partners' including the Hilton Hotels, Lufthansa, Swissair, South African Airways and many other reputable companies. It had to be bought electronically at USD250[3] via TVI's website. Each had a unique number and a member purchasing it was accorded a particular status, such as an 'Associate' or 'Distributor'. The member would be granted certain rewards such as a seven day holiday at a partner's three to five star hotel or resort, a free companion flight and a lifetime access to TVI's promotions and discounts in relation to air travel, accommodation, car hire and travel insurance.

[4] The structure of the institution and its business was that of a typical pyramid scheme. A member had to traverse two boards, the 'traveller' and the 'express' boards. Upon joining, members were initially given positions at level one of the traveller board and would thereafter travel across four levels until they exited the first (traveller) board. On exiting the first board they received a reward of USD250 in cash and USD250 in vouchers ('double your investment'!). But to qualify for the rewards they had to 'sponsor' two new entrants. A member exiting the traveller board would then go on to the first level of the express board where the exit reward was USD10 000. Thereafter the member could go on to the next express board, *ad*

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business not registered in terms of the Banks Act is carrying on the business of a bank or mutual bank.

[2] In terms of s 17 of the Banks Act the Registrar of Banks considers and grants an application made under s 16 of the Banks Act to register a business as a Bank where an applicant has been authorised under s 13 of the Banks Act to establish an institution as a bank. In terms of s 18 the registration under s 17 of an institution as a bank shall be subject to the prescribed conditions and to such further conditions, if any, as the Registrar may determine.

[3] United States Dollars.

infinitum. A member would also earn five to ten per cent of sales made by his or her 'downline' (those that he sponsored and those sponsored by them), and be eligible for numerous other prizes. As a marketing gimmick, TVI's presentation displayed endorsements of network marketing companies by Messrs Warren Buffet, Bill Clinton, Robert Kiyosaki and Donald Trump.

[5] Unsurprisingly, TVI was declared an illegal scheme in various jurisdictions throughout the world.[4] In this country, the institution had brutally taken advantage of the informal communal savings structures (the stokvels) through distributors, some of whom were religious ministers, politicians, and civil servants, including magistrates and prosecutors. The total investment into the institution, within the country, was estimated at R1,6 billion. Mr Zulu, was one of the distributors. He had opened bank accounts in the name of TVI.

[6] On 18 March 2011 the registrar appointed, amongst others, the appellant, Mr Johannes George Kruger, as a temporary inspector in terms of s 11 (1), read with s 12(1), of the South African Reserve Bank Act 90 of 1989, to conduct an inspection into the business practices of, amongst others, TVI. After his appointment, Mr Kruger identified numerous investments of R2 700 each, or multiples thereof, as possible investment deposits in Mr Zulu's bank accounts opened in the name of TVI. He also identified certain assets owned by Mr Zulu, including four immovable properties situated in Kwazulu-Natal and three motor vehicles registered in his name. Mr Kruger established that some of the investment funds received were used to purchase Mr Zulu's assets.

[7] As a result of the inspection, the registrar was satisfied that TVI and Mr Zulu had obtained money by conducting the business of a bank without being registered as such in terms of s 17 of the Banks Act, or without being authorised in terms of the provisions of s 18A(1) of the same Act, to conduct the business of a bank. On 28 November 2012 the registrar issued a repayment direction in terms of s 83(1) of the Banks Act and appointed Mr Kruger as a repayment administrator in terms of s

[4] These countries, according to the appellant, include Hungary, the United States of America and Canada, to name a few.

84(1), to ‘manage and control’ repayment of all the moneys obtained by Mr Zulu in contravention of the Banks Act.

[8] Mr Kruger then brought an urgent, ex parte application in the high court, for an order authorising him to recover and take possession of all of Mr Zulu’s assets, including certain identified fixed properties, in terms of the provisions of s 84(1A)*(b)*(i) of the Banks Act. He also sought to have the title deeds of the identified immovable properties endorsed by the registrar of deeds with *caveats*. On 18 January 2013 a rule nisi was granted and a search warrant was issued in terms of s 5(1)*(b)* of the Inspection of Financial Institutions Act 80 of 1998, authorising Mr Kruger to search Mr Zulu’s premises at 16 Mountford Street, Pioneer Park, Newcastle Extension 63 in Newcastle.

[9] In opposing the application, Mr Zulu contended that it constituted an abuse of court process and was unnecessary. He raised three points *in limine*. The first was lack of urgency. The second was that he should have been given notice of the application. The third was non-joinder of interested parties. With regard to lack of urgency, Mr Zulu argued that, given that Mr Kruger had the powers he relied on as far back as 22 March 2012, about nine months prior to approaching the court a quo, there was no urgency in the matter. On that date Mr Kruger, as a temporary inspector appointed in terms of ss 11(1) and 12 of the Reserve Bank Act, had obtained another warrant in terms of s 5(1)(b) of the Inspection of Financial Institutions Act which, for all intents and purposes, was in the same terms as the one subsequently issued on 18 January 2013. Further, Mr Zulu highlighted that he had readily made himself available previously, when requested to do so. He had previously attended an inquiry held at the offices of Mr Kruger’s attorneys. The special pleas of a failure to give notice and an unwarranted failure to observe the prescribed filing periods were based on this previous interaction. Mr Zulu contended that the failure to disclose the previous interaction constituted non-disclosure of material information and, therefore, an abuse of court process. The non-disclosure was fatal to the ex parte application, so it was contended.

[10] With regard to non-joinder, the contention was that seven people (Mr Zulu’s wife and her siblings), each of whom held a 14 per cent interest in three of the cited

immovable properties, should have been joined in the proceedings. Further, the financiers of the motor vehicles should also have been joined in the application. In any event, so it was argued, Mr Zulu had sold one of the vehicles as far back as 2005, but transfer of ownership had not been registered with the relevant licencing authorities.

[11] On the merits of the application, Mr Zulu's argument was that, the provisions of s 84(1A)*(b)*(i) of the Banks Act were limited to assets acquired from proceeds obtained in contravention of the Banks Act or through activities performed in contravention of the Act. The contention was that Mr Zulu's wife and her siblings had inherited the immovable properties from their parents who had acquired them prior to the contravention of the Banks Act. And, he had bought the fourth immovable property in 2007, prior to the contravention of the provisions of the Banks Act. Therefore, all these assets were not liable to attachment under s 84. It was not in dispute, however, that Mr Zulu and his wife were married in community of property to each other.

[12] On the return date, in November 2013, the court a quo discharged the rule nisi on the basis of the three points *in limine*. The court found that each point in limine was, on its own, fatal to the application. However, the discharge of the rule nisi was founded, largely, on Mr Kruger's failure to disclose certain material information. The learned judge reasoned that because Mr Kruger had already obtained some of the information he sought from Mr Zulu, without any resistance, pursuant to the search warrant issued in parallel proceedings (on 22 May 2012,under case no 4178/2012), the matter had not been urgent. The learned judge also found that there had been non-joinder of the co-owners of the immovable properties. The court found that Mr Kruger had been 'highhanded' in the manner in which he handled the matter and awarded punitive costs against him.

[13] By the time the appeal came before us Mr Zulu's estate had been sequestrated and the trustees of his insolvent estate had been substituted in his stead. The trustees had filed a notice to abide by the decision of this court. Mr Kruger's legal representative was invited to make submissions as to whether, in the light of the trustees having assumed authority over the assets in Mr Zulu's insolvent

estate, it would be competent for this court, on appeal, to reverse the order of the court a quo and thus also authorise Mr Kruger to (also) take the same assets into his possession.

[14] Mr Kruger accepts that the assets over which he seeks authority are now correctly in the hands of the trustees of the insolvent estate. However, it was submitted, on his behalf, that although the issues, in this appeal, had become moot, confirmation of the rule nisi remained competent and appropriate because of the incorrect findings made by the court a quo. It was submitted further that it was necessary for this court to consider the appeal because if the findings of the court a quo were allowed to stand, the implications would be disastrous for future attempts, by repayment administrators, to take possession of assets under s 84(1A)*(b)*(i) of the Banks Act.

[15] Section16(2)*(a)*(i) of the Superior Courts Act 10 of 2013[5] provides that where, at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. The underlying principle is that courts of law exist for settlement of concrete disputes and infringement of rights rather than pronouncing upon abstract questions or advising on differing contentions.[6] However, where questions of law, which are likely to arise frequently, are in issue, the court of appeal has a discretion, and may hear the merits of an appeal and pronounce upon it. The test is whether, notwithstanding that the issues between the parties have become moot, there remains a discrete legal issue of public importance that will affect matters in future. Where the decision contested on appeal will influence future litigants, this court has generally exercised its discretion in favour of considering the appeal even when consideration of the issues will have no practical effect. See: *Centre for Child Law v Hoërskool Fochville*[7] in which this court examined a number of cases in which appeals were considered in similar circumstances.

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[5] See also the predecessor to this section, s 21A(1) to (3) of the now repealed Supreme Court Act 59 of 1959. The position as interpreted in case law in respect of s 21(A) still obtains: see for instance, *Legal Aid South Africa v Magidiwana & others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA).
[6] D E van Loggerenberg *Erasmus*; *Superior Courts Practice* (Loose-leaf) 2 ed vol 1 at A2-49.
[7] *Centre for Child Law v Hoërskool Fochville & another* [2015] ZASCA 155; 2016 (2) SA 121 (SCA).

[16] In this case, it is apparent that when considering the points *in limine* the court a quo ignored the purpose of the application, which was, essentially, to enable the exercise by the repayment administrator, of powers bestowed under s 84(1A)*(b)*(i) of the Banks Act. This erroneous approach and the consequent findings of the court a quo will, in all probability, influence how litigants view the issues attendant in this appeal and similar matters in the future.

[17] Therefore, although Mr Zulu's assets can no longer be placed in Mr Kruger's possession, it is, in my view, still necessary for this court to consider the appeal to clarify the powers and obligations of a repayment administrator under s 84(1A)*(b)*(i) of the Banks Act and to set out the correct approach when considering similar matters. For a proper understanding of these powers a comprehensive examination of other provisions of the Banks Act, which regulate the conduct of the banking business, is required. The following are the relevant provisions.

[18] Section 11 of the Banks Act provides an entry point to companies wishing to conduct business as banks. The section stipulates that companies must register with the office of the registrar of banks.[8] The process is rigorous. The section prescribes, as the first step, an application by the company concerned, to the registrar, for authorisation to establish a bank.[9] Section 13(2) sets out numerous factors which the registrar must take into account in considering the application. Upon satisfaction of the requirements the application is approved under s 13(1). A company to whom authorisation has been granted under s 13 of the Act may then apply to the registrar for registration as a bank. This application must, in terms of s 16(1), be made within the 12 month period following the granting of authorisation (computed from the date of the granting of authorisation). The application for registration of a bank may be granted in terms of s 17, subject to conditions that may be set in terms of s 18. The company may then commence to conduct business as a bank.

[8] The section provides: 'Subject to the provisions of section 18A, no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.'
[9] Section 12 of the Banks Act.

[19] In s 1 of the Banks Act the definition of 'business of a bank' includes:

(a) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question;

(b) the soliciting of or advertising for deposits;

(c) the utilisation of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph *(a)*-

(i) for the granting by any person, acting as lender in such person's own name or through the medium of a trust or a nominee, of loans to other persons;

(ii) for investment by any person, acting as investor in such person's own name or through the medium of a trust or a nominee; or

(iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a trust or a nominee;

(d) the obtaining, as a regular feature of the business in question, of money through the sale of an asset, to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so sold or any other asset; or

(e) any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the *Gazette* declared to be the business of a bank'.

[20] For obvious reasons, the conduct of a business of a bank is subject to stringent supervision of the registrar. Strict audit requirements are in place.[10] Section 70 stipulates maintenance of a minimum share capital and unimpaired reserve funds requirements. Section 72 sets minimum liquid asset requirements. Section 75 provides for the filing of returns to enable the Registrar to determine whether ss 70 and 72 are complied with.

[21] Unregistered institutions which conduct the business of a bank evade supervision by the registrar, always with catastrophic results. Hence the powers granted to the registrar to conduct investigations where there is suspicion of unauthorised conduct of the business of a bank. Obviously, where investigations reveal a contravention of the provisions of the Banks Act, swift intervention is necessary to limit the damage.

[10] Section 64 of the Banks Act.

[22] Chapter V111 of the Banks Act, entitled 'Control of Certain Activities of unregistered persons', empowers the registrar to deal with contraventions of the Act. Section 83(1) provides that:

'**83 Repayment of money unlawfully obtained**

(1) If as a result of an inspection conducted under s 12 of the South African Reserve Bank Act, 1989 (Act 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized, in terms of the provisions of s 18A(1), to carry on the business of a bank, the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.'

[23] Section 84 regulates the repayment of the money pursuant to the direction issued under s 83(1). The relevant portions provide that:

'**84 Management and control of repayment of money unlawfully obtained**

(1) Simultaneously with the issuing of a direction under section 83 (1), or as soon thereafter as may be practicable, the Registrar shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the repayment administrator) to manage and control the repayment of money in compliance with the direction by the person subject thereto: Provided that the Registrar may afford the person subject to the directive a reasonable period of time to devise and implement an alternative plan of action that is in the interests of the investors and to which the Registrar has no objection.

(1A) *(a)* The repayment administrator shall at the request of the Registrar, as soon as may be practicable report to the Registrar whether or not the person subject to the relevant direction is, in the repayment administrator's opinion, solvent, and if the repayment administrator finds that the person subject to the direction is insolvent, the repayment administrator shall comment on whether such person is technically or legally insolvent.

(b) On appointment of a repayment administrator and whilst the person is subject to the relevant direction as contemplated in this section-

(i) the repayment administrator shall recover and take possession of all the assets of the person subject to the relevant direction'. (My emphasis.)

[24] Section 84(1A) regulates two steps in the management and control, by the repayment administrator, of repayment of money obtained in contravention of the

Banks Act. Firstly, as set out in s 84(1A)*(a)*, as soon as possible after appointment, and at the request of the registrar, she must report to the registrar whether the person who is subject to the directive is solvent or not. Secondly, as provided in s 84(1A)*(b)*(i), she must recover and take possession of all the assets of the person subject to the direction. This appeal relates to the second of the two functions.

[25] It is also important to note that once the Registrar serves the letter of appointment of the repayment administrator on the person subject to the directive, as she is obliged to do so under s 84(2) of the Act, the latter is prohibited from dealing with any assets specified in the letter of appointment without the permission of the repayment administrator.

[26] In terms of s 84(4)*(a)* it is the duty of the repayment administrator to conduct such further investigations into the affairs of the person subject to the direction as he or she may deem necessary, to establish the 'true amount of money unlawfully obtained' by the person under direction, the identities of the persons from whom the money was obtained, where such money or assets into which it was converted are kept, and any other fact which, in the opinion of the registrar or the repayment administrator, needs to be established in order to facilitate repayment. It is important to note that up to this stage the steps taken by the repayment administrator are aimed at investigating and collating information necessary to facilitate the actual repayment.

[27] Once the necessary information is to hand, s 84(4)*(b)*(i) then obliges the repayment administrator to:

> '. . . take all reasonable steps (including the liquidation of assets into which money unlawfully obtained as contemplated in section 83 (1) has been converted) which may serve to expedite and ensure the repayment of money in accordance with the requirements of and within the period specified in the relevant direction.'

[28] Turning to the facts of this case, in his founding affidavit Mr Kruger correctly contended that he is generally entitled to exercise the powers bestowed on him under s 84(1A)*(b)*(i) and that he did not need a court order to do so. He explained that his decision to approach the court was motivated by an expectation that some of

the assets he sought to attach might not be in Mr Zulu's possession. He also asserted that he had learnt from previous experience that individuals under a directive seldom willingly handed over their assets for purposes of attachment. He reasoned that if need were to arise for him to approach a court after attempting to use his powers, the provisions of s 84 were likely to be defeated. For this reason he sought a declarator that he was empowered to take possession of the specified assets, and an order that Mr Zulu be directed to declare, under oath, the whereabouts of all his assets and to identify them with sufficient particularity to enable him to recover them.

[29] As already stated, the court a quo was of the view that because of previous interaction between Mr Kruger and Mr Zulu, there was no basis for approaching the court on an urgent basis. The court ignored the purpose of the application and the underlying concern that the assets might be dissipated. The court erred in this regard and also in ignoring the fact that, generally, the risk of dissipation of assets increases after the wrongdoing or guilt of a person has been established, particularly as Mr Kruger had explained that this had been his experience in previous similar matters. The fear he entertained, that Mr Zulu could dissipate the assets if given notice, was well-founded.

[30] The fact that Mr Kruger had previously interviewed Mr Zulu was irrelevant to the attachment of assets under s 84(1A)*(b)*(i) of the Banks Act to facilitate investigations in preparation for repayment of money in terms of s84. It must have been the intention of the legislature that, once a contravention of the Banks Act has been established, the process of repayment be executed promptly. It is for that reason that the person subject to the directive is immediately prohibited from dealing with the assets listed in the letter of appointment from the date she is served with the letter of appointment of the repayment administrator. For the same reason the duty on the repayment administrator to recover and take possession of the assets of a person who is the subject of a directive comes into existence *on appointment*. To require the repayment administrator to approach a court on notice to the person subject to the directive and to require adherence to normal filing times would defeat the purpose of the repayment process.

[31] It was submitted, on behalf of Mr Kruger, that the relief he sought was comparable to preservation orders provided for under s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA), rather than the common law anti-dissipation relief. This comparison was made to illustrate that the law provides for applications for anti-dissipation orders of this nature to be made on an urgent, ex parte basis. I agree with this analogy insofar as it demonstrates the intrinsic urgency in attachments made in terms of s 84(1A)*(b)*(i). However, it seems to me that for a full appreciation of the basic nature of the powers and duties of the repayment administrator under that section a further analogy must be made. The powers and duties of a repayment administrator are comparable with those of trustees or liquidators of insolvent estates. These powers and obligations arise by operation of the law (ex lege), rather than as a result of a court order. Just as the assets in an insolvent estate vest in the Master immediately on sequestration or liquidation and thereafter on the trustees or liquidators[11], by operation of law, the assets of a person who is the subject of the registrar's directive vest in the repayment administrator immediately on his or her appointment. In the same manner that a trustee, on appointment, assumes control of an insolvent estate, the repayment administrator, on appointment, forthwith takes control and possession of the assets of a person under a directive.

[32] Whilst caution is generally advised when considering applications brought *ex parte*, courts should be mindful that recommended precautionary safeguards, such as notice to the other party, are intended to limit abuse of court process and not meant for ritualistic imposition as a matter of routine. The court has a discretion even when considering urgent *ex parte* applications. The purpose of the application remains central to the exercise of that discretion.

[33] Was there an obligation to join the co-owners of the immovable properties and the creditors in Mr Zulu's estate? Mr Zulu alleged that Mr Kruger had failed to disclose the co-ownership. That allegation was improperly made. In his founding affidavit Mr Kruger listed four properties in respect of which he sought a caveat. He

[11] Section 20 of the Insolvency Act 24 of 1936.

stated, in respect of three, that they were: 'jointly registered in the name of the first respondent (Mr Zulu) and six others'.[12] The title deeds of these properties, which show the names of the co-owners, formed part of the founding papers.

[34] It is apparent from the title deeds that each co-owner holds a 14 per cent interest in each of the three properties. The legal implications are that because Mr and Mrs Zulu are married in community of property to each other, their shares in the property are combined and indivisible, and may be attached and realised in respect of Mr Zulu's transgressions. Mrs Zulu (assuming that she is an innocent party) will be given her proportionate share of the proceeds if the interest is realised to raise funds for repayment. As to the rest of the co-owners, the relevant principle is that ordinary co-ownership rights are capable of being separated because they are held separately by the owners.[13] Our law in this regard is settled. Recently, in *Mazibuko v National Director of Public Prosecutions*[14], this court considered the effect of a preservation order made in terms of s 38(2) of the POCA on the estate of the innocent spouse who was married in community of property to the guilty spouse. The court distinguished between divisible and indivisible co-ownership and found that whereas ordinary rights of co-ownership are capable of being separated from one another, because they are held separately by the co-owners, the co-ownership rights of spouses who are married in community of property ('tied co-ownership) are not divisible.[15]

[35] In this case the record only reveals that Mr Kruger sought an order that the title deeds of the relevant properties be endorsed with a *caveat.* The exact terms of the *caveat* are not set out. The correct position is that only the indivisible interest of Mr and Mrs Zulu should have been attached. Further, although it does not necessarily follow that third parties, whose rights and obligations are affected by an order sought, must invariably be joined as parties to the application, the general practice is that in cases such as this, where a party or spouse has a direct and substantial interest in the matter, the court will decline to hear the matter until the

[12] It seems that the number stated excludes Mr Zulu's wife. See para 61 of the founding affidavit.
[13] See *Mazibuko & another v National Director of Public Prosecutions* [2009] ZASCA 52; 2009 (6) SA 479 (SCA) para 47.
[14] See *Mazibuko* supra.
[15] Para 48.

joinder has been effected.[16] Mrs Zulu should, therefore, have been joined as a respondent in the application and the rule nisi should have been served on her. However, her non-joinder was not fatal to the application. The court has an inherent power to order joinder of further parties in an action which has already begun in order to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment are before the court.[17] The financiers of the motor vehicles are essentially creditors of Mr and Mrs Zulu's estate. It was not necessary to join them. They would be served with a copy of the order in the same manner as in insolvency proceedings.[18]

[36] Regarding the contention, by Mr Zulu, that only assets acquired through the operation of the illegal scheme were liable to attachment, this argument flies in the face of the provisions of s 84(1A)*(b)*(i) of the Banks Act. The dictionary meaning of 'all' is: 'The whole amount, extent, substance, or compass of; all that is possible; [t]he entire number of, without exception'.[19] The use of the words 'all assets' in s 84(1A)*(b)*(i) is conclusive on the issue. There is no basis for distinguishing between assets acquired through the operation of the unlawful banking business and those acquired innocently. The source and manner of acquisition is immaterial. In fact, it seems to me that even s 84(4)*(b)* does not exclude honestly acquired assets from consideration for realisation for purposes of raising repayment funds. The section merely sets out, as one of the duties of the repayment administrator, the taking of reasonable steps to expedite repayment of money. Such steps may include liquidation of the assets into which money unlawfully obtained had been converted. But such a step may not be necessary where repayment funds are readily available.

[37] The court a quo therefore erred in discharging the rule nisi. Mr Kruger had made out a proper case for the relief he sought. In fact he had been entitled, even without the court order he sought, to take the steps in respect of which he sought the court's pronouncement. However, in the light of Mr Zulu's sequestration and the consequent appointment of trustees to assume control of his estate, it is not open to this court to grant an order the effect of which would be to authorise Mr Kruger to

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[16] .Van Loggerenberg *Erasmus;* Superior Courts Practice (supra) at B1-96.
[17] *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T)
[18] Regard may be had to ss 83 and 84 of thee Insolvency Act 24 of 1936
[19] The Shorter Oxford English Dictionary; vol 1.

also take control of the assets in Mr Zulu's estate. The role of a repayment administrator is essentially different from that of a trustee. The functions of the former are limited to repayment of money unlawfully obtained in the conduct of an unregistered banking business. The role of a trustee is much wider. It entails the administration of all different facets of an insolvent estate. In this case, therefore, once the order of sequestration or liquidation was granted, the powers of the trustees, upon appointment, took precedence over those of the repayment administrator.

[38] Consequently, the following order is made:

The appeal is upheld and the order of the court a quo is set aside and substituted with the following:

'1 The points *in limine* are dismissed.

2 The costs shall be costs in the sequestration.'

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N DAMBUZA

JUDGE OF APPEAL

APPEARANCES:

For appellants:	A R Bhana SC and A Friedman R Williams SC A Platt SC Instructed by: Baker & McKenzie Attorneys, Johannesburg c/o, Lovius Block Attorneys, Bloemfontein
For first respondent:	Usher Attorneys, Pietermaritzburg c/o, McIntyre & Van Der Post, Bloemfontein