THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Eamonn Courtney v Izak Johannes Boshoff NO & Others (483/2023) [2024] ZASCA 104 (21 June 2024)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal from the Gauteng Division of the High Court, Johannesburg (high court). Its order was: 'the appeal against paragraph 1, 2 and 3 of the order of the high court is dismissed with costs, including the costs of two counsel; paragraph 4 to 8 of the order of the high court are set aside.'

Mr Courtney, a citizen of the United Kingdom, who was resident in South Africa at the time, set up two companies, Salt House Investments (SHI) and Allied Mobile Communications (Pty) Ltd (AMC). He and his wife Mrs Cole-Courtney, were the sole directors of the two companies.

On 21 November 2014, Mr Courtney irrevocably and unconditionally guaranteed payment by SHI of its liabilities to Absa, limited to the amount of R27 million. On 17 May 2018, he did the same in respect of AMC, limited to the amount of R27,5 million. His wife concluded identical guarantees.

By the end of 2018, AMC was under considerable financial pressure. Multiple companies had launched liquidation applications against AMC and on 21 May 2020, AMC was placed under a final liquidation order. Both SHI and AMC defaulted on their overdraft facilities to Absa. In addition, Mr Courtney failed to make payment in terms of the guarantees.

As a result, Absa launched an application to place Mr Courtney's estate under final sequestration, alternatively provisional sequestration. The application was served on him personally at his place of residence on 28 November 2019. On 3 December 2019, the Courtney's left South Africa and appear to have permanently settled in Scotland.

The hearing of the sequestration was set down for 5 February 2020. On 10 December 2019, Crawford and Associates, representing Mr Courtney sought an indulgence until

17 January 2020 to file an answering affidavit but failed to do so. A notice of set down for 4 May 2020 was hand delivered to Crawford and Associates. Neither Mr Courtney nor his attorneys appeared at the hearing. Consequently, a final sequestration order was granted on an unopposed basis.

On 5 May 2020, Crawford and Associates withdrew as Mr Courtney's attorneys. Thereafter Mr Courtney appointed new attorneys, Banda and Associates, in respect of contemplated litigation concerning AMC and SHI. Through his new attorneys, he was aware that the trustees were continuing with the administration of his insolvent estate and when called upon by the trustees to comply with his obligations under the Insolvency Act 24 of 1936, he failed to do so.

Almost 2 years later, on 9 March 2022, the trustees launched an ex parte application in the Court of Sessions in Scotland in order to locate his assets which were situated in that jurisdiction. Only then did Mr Courtney challenge the final sequestration order on the sole basis that it was not preceded by a provisional order and was therefore null and void *ab initio*.

Mr Courtney launched an urgent application in the high court during April 2022 in order to set aside the final sequestration order on the basis that it was a nullity. Absa launched a conditional counter application to vary the final order of sequestration to a provisional order in the event that, the court set aside the final order of sequestration. The high court dismissed Mr Courtney's application but nevertheless varied the final order to a provisional order effective from the date of the final order. It also granted a costs order against the trustees in their personal capacities.

In the SCA, the Court held that a court may issue a sequestration order, whether provisional or final. Because the high court was empowered to issue the final sequestration order, although it may have done so too early, the final order was not a nullity. That being the case, Mr Courtney's only option was to apply for a rescission of the order under rule 42(1)*(a)* of the Uniform Rules of Court or under the common law. He, however, did not participate in the application for his final sequestration, failed to put any defence and chose to ignore the order of final sequestration for two years. Rescission was not available to Mr Courtney in these circumstances.

As a result, the SCA dismissed the appeal. It set aside the order varying the final sequestration order to a provisional order and the personal costs order against the trustees.

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