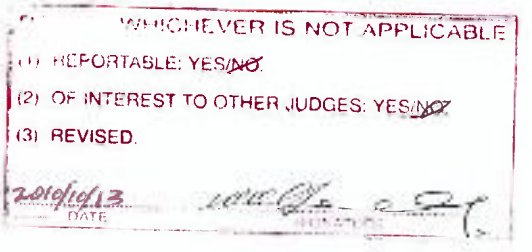
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH, PRETORIA)

13/10/2010

Case no. 50516/10



In the matter between:

ENVER MOHAMED MOTALA N.O.	First Applicant
MABUTHU LOUIS MHLONGO	Second Applicant
AMOURE YEUN N.O.	Third Applicant
REALEKA INVESTEMENTS SA (PTY) LTD	Fourth Applicant

and

ITT FINANCIAL CORPORATION (PTY)	First Respondent
HENDRICK ABRAM VAN VUUREN	Second Respondent
ABSA BANK LIMITED	Third Respondent
MASTER OF THE HIGH COURT	Fourth Respondent

JUDGMENT

LEGODI J

INTRODUCTION

[1] An order that was granted on the 5 August 2010 became a centre of controversy around the appointment of judicial managers, on the 19 August 2010, by the Master of this Court.

[2] Several issues arose as a result of an interdict that was obtained on the 3 and 6 September 2010 by the three provincial judicial managers in respect of whom the Master issued a letter of appointments as such for Realeka Investments SA (PTY) Ltd (the fourth applicant).

[3] The order of the 3 September 2010 reads as follows:

"1. The second respondent is interdicted from:

1.1 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 ("the court order"). The court order is attached hereto marked "X",

1.2 representing himself as the provisional judicial manager of Realeka to any third person,

1.3 acting in terms of the court order or giving effect thereto;

1.4 disposing, alienating or in any way whatsoever encumbering of any of Realeka's assets;

1.5 obstructing the Master's provisional JMs either directly or indirectly from carrying out their duties as joint provincial judicial managers of Realeka;

1.6 *interfering either directly or indirectly in the Master's JMs control of or management of Realeka,*

1.7 *from effecting any debits to the account held by Amber Mountain Investments 183 (PTY) Ltd at the Haartebespoort branch of Absa Bank, account number 40/6193/1737,*

1.8 *from taking any steps in terms of paragraphs 3 to 6F of the court order,*

2. *Divesting the second respondent of the control and management of Realeka.*

3. *Compelling the second respondent:*

3.1 *to forthwith take all steps necessary to hand over the control and management of Realeka to the Master's JMs,*

3.2 *to forthwith hand over possession of all Realeka's construction sites and all other assets, including the handing over of all keys,*

3.3 *to forthwith fully co-operate with the Master's JMs in any manner that they require and in relation to anything concerning Realeka's business and activities;*

3.4 *to within 3 days of this order report in writing fully (with sufficient particularly so that the Master's JMs are apprised of the actions taken by the second respondent and his activities to enable them to investigate the actions and activities) to the Master's JMs on:*

3.4.1 *all discussions, and meetings held with third parties in relation to and/or concerning Realeka;*

3.4.2 *all transactions concluded on behalf of Realeka or negotiations conducted on behalf of Realeka,*

3.4.3 *all payments made on behalf of Realeka;*

3.4.3.1 *all payment made to Realeka;*

3.4.3.2 *all correspondence written and received by the second respondent concerning Realeka,*

3.4.3.3 *all documents prepared on behalf of Realeka and received by Realeka, including but not limited to site plans, construction diagrams and the like as well as any written contracts entered into since 5 August 2010;*

3.4.3.4 *all documents received by the second respondent on behalf of Realeka;*

3.4.3.5 *any other documents which have come into existence from 5 August 2010;*

3.4.3.6 *minutes of all meetings attended by the second respondent on behalf of Realeka,*

4. *Prayers 1 to 3 (including sub-paragraphs) to operate with immediate effect as interim orders pending the finalisation of one or all of the following legal processes:*

4.1 *Applying to this honourable court for an order setting aside the order appointing the Court appointed JMs; and/or*

4.2 *Applying to this honourable court for an order in terms of section 428(3) of the Companies Act for an order varying the terms of*

the court order to the effect that the second respondent's name is deleted there from; and/or

4.3 Applying to this honourable court for an order removing the second respondent as a judicial manager of Realeka; and/or

4.4 Anticipating the return date and seeking primarily a variation of the order by the deletion of at least paragraph 3 thereof,

5. The first and second respondent jointly and severally are ordered to pay the costs of the application".

[4] The order of the 6 September 2010 stated as "Amended Order" reads as follows:

"1. The second respondent is interdicted from:

1.1 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 ("the court order"). The court order is attached hereto marked "ABC",

1.2 representing himself as the provisional judicial manager of Realeka to any third person,

1.3 acting in terms of the court order or giving effect thereto;

1.4 disposing, alienating or in any way whatsoever encumbering of any of Realeka's assets;

1.5 obstructing the first, second and third applicants bein the provisional judicial managers appointed by the Master,

Pretoria on 19 August 2010 (defined as the Master's JMs") either directly or indirectly from carrying out their duties as joint provincial judicial managers of Realeka;

1.6 *interfering either directly or indirectly in the Master's JMs control of or management of Realeka,*

1.7 *from effecting any debits to the account held by Amber Mountain Investments 183 (PTY) Ltd at the Haartbeespoort branch of Absa Bank, account number 40/6193/1737,*

1.8 *from taking any steps in terms of paragraphs 3 to 6F of the court order,*

2. *Divesting the second respondent of the control and management of Realeka.*

3. *Compelling the second respondent:*

3.1 *to forthwith take all steps necessary to hand over the control and management of Realeka to the Master's JMs,*

3.2 *to forthwith hand over possession of all Realeka's construction sites and all other assets, including the handing over of all keys,*

3.3 *to forthwith fully co-operate with the Master's JMs in any manner that they require and in relation to anything concerning Realeka's business and activities;*

3.4 *to within 3 days of this order report in writing fully (with sufficient particularly so that the Master's JMs are*

apprised of the actions taken by the second respondent and his activities to enable them to investigate the actions and activities) to the Master's JMs on:

3.40.1 all discussions, and meetings held with third parties in relation to and/or concerning Realeka;

3.40.2 all transactions concluded on behalf of Realeka or negotiations conducted on behalf of Realeka,

3.40.3 all payments made on behalf of Realeka;

3.40.3.1 all payment made to Realeka;

3.40.3.2 all correspondence written and received by the second respondent concerning Realeka,

3.40.3.3 all documents prepared on behalf of Realeka and received by Realeka, including but not limited to site plans, construction diagrams and the like as well as any written contracts entered into since 5 August 2010;

3.40.3.4 all documents received by the second respondent on behalf of Realeka;

3.40.3.5 any other documents which have come into existence from 5 August 2010;

3.40.3.6 minutes of all meetings attended by the second respondent on behalf of Realeka,

4 Prayers 1 to 3 (including sub-paragraphs) to operate with immediate effect as interim orders pending the finalisation of one or all of the following legal processes:

4.1 Applying to this honourable court for an order setting aside the order appointing the Court appointed JMs; and/or

4.2 Applying to this honourable court for an order in terms of section 428(3) of the Companies Act for an order varying the terms of the court order to the effect that the second respondent's name is deleted there from; and/or

4.3 Applying to this honourable court for an order removing the second respondent as a judicial manager of Realeka; and/or

4.4 The return date and seeking primarily a variation of the order by the deletion of at least paragraph 3 thereof.

5. The first and second respondent jointly and severally are ordered to pay the costs of the application".

6. That the third respondent be ordered to immediately freeze the account held by Amber Mountain Investments 183 (Pty) Ltd in the books of the 3rd respondent at its Hartebeespoort branch under account no 40/6193/1737 and not to allow any debits entries to be effected against such account"

[5] The second respondent is a director in several Companies. This appears from annexure EMM 5.1 and 5.2 to the founding affidavit.

[6] He is said to be the Managing Director of the first respondent. He is also a director of Amber Mountain (PTY) Ltd.

[7] Although annexure EMM 5.1 and 5.2 has insufficient information, it was relied upon by the applicants, on the 1 September 2010, when the first founding affidavit was deposed to.

[8] On the 8 June 2010, the first respondent and second respondent entered into a joint venture agreement with the fourth applicant, in terms whereof the first and or second respondent was to take control of the management and operations of the fourth applicant.

[9] The said joint venture agreement formed part of the papers in the application for placing the fourth applicant under judicial management.

[10] On the 5 August 2010, the first and second respondents obtained an order placing the fourth applicant under judicial management. In addition, the second respondent and the second applicant, were appointed as joint judicial managers of the fourth applicant. The order reads as follows:

> *"1. THAT the First Respondent,* ***Realeka Investment SA (PTY) LTD*** *(the Company) is hereby placed under provincial judicial management in terms of the provisions of the* ***Companies Act, Act No. 61 of 1973*** *(the Act");*
>
> *2. THAT as from the date of this order any person or persons vested with the management, control and running of the company's affairs, bank accounts, assets or any other aspects of any kind be divested thereof;*
>
> *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;*

4. *THAT the Judicial Managers be empowered with the authority of full control of First Respondent to borrow money with or without security on behalf of the said Company, for the purpose of paying essential running expenditure in and about the business of the said Company, including salaries, wages and rental for business premises, required by the said Company and to pledge the credit of the said Company for any Goods or services so required;*

5. *THAT while the company is under judicial management:*

   (a) *all legal actions now are pending or any other legal proceedings be stayed until date of this order.*

   (b) *All contracts awarded to First Applicant and not complete to stay in effect until the return date of this order.*

   (c) *any proceedings that can effect the financial or any condition of First Respondent in a negative way be stayed until the return date.*

   (d) *all amounts now held in any bank accounts in the name of First Respondent, including any moneys now and in the future due to First Respondent, under all of its contracts with Government or any other company, or anyone else, be deposited into the Joint account of the Judicial Managers of their attorneys trust account, for payment of all of the operations of First Respondent;*

   (e) *all contracts from Government or any other entity that has been awarded to First Respondent in the last five years, and is still ongoing, shall stay in full force and effect, until the return date.*

   (f) *this application and order be served on all parties affected by this order, within ten days;*

6. *THAT the rate of remuneration of the judicial managers be fixed by the Master in accordance with the services rendered and disbursements incurred, or should the Master so request, the said rate of remuneration shall be fixed by the court after the Master has reported thereon.*

7. *THAT a rule nisi with return date of 26 October 2010 are hereby granted and all parties and person that want to oppose this application shall file their documents on or before the 17 September 2010 and served (sic) it on the clerk of this court and on Applicants attorney stating:*

   (a) *Why the judicial management order dated 5th August 2010 should not become final,*
   (b) *that the provisions of paragraph 3, 4 and 5 hereof, should apply mutatis mutandis;*
   (c) *that the judicial managers and their attorneys and council costs of this application should not be costs in the judicial management of First Respondent;*
   (d) *that the judicial managers also obtain the consulting of the Martins Weir-Smith attorneys, located in Sandton, for their legal assistants and planning of operations in the Company and their cost be paid by the Company".*

[11] Mr Ali Komane, a businessman and a sole director of the fourth applicant did not oppose the application placing the fourth applicant under judicial management. He agreed to an order been obtained for judicial management against the company (the fourth applicant), because of the fourth applicant's financial position as well as the undertaking by the second respondent to inject more funds into the fourth applicant.

[12] On the 6 August 2010, the second applicant was furnished with the order of the 5 August 2010 in terms of which he was appointed as provisional joint manager of the fourth applicant with the second respondent.

[13] On the same day, the second applicant proceeded to the office of the Master. He requested the Master to issue him with letters of appointment as judicial manager for the fourth applicant.

[14] The Deputy Master, Ms Christine Rossouw, is said to have told the second applicant that she was prepared to appoint the second applicant, but that she was not prepared to appoint the second respondent because of the following reasons:

14.1 that the second respondent was not an individual on the Master's panel of insolvency practitioners,

14.2 that the second respondent was one of two applicants in the application for judicial management of the fourth applicant,

14.3 that the second respondent is also a managing director of the first respondent.

[15] On the 19 August 2010, the Master issued letter of appointments to the first, second and third applicant. On the 3 September 2010, the applicants obtained an exparte interim order referred to in paragraph 3 of this judgment. The order did not have neither a Rule Nisi nor a return date.

[16] On the 6 September 2010, another order was obtained ex-parte. This order is referred to in the papers as an amended order. The terms of this order have been quoted in paragraph 4 of this judgment.

[17] The second respondent deposed to two opposing affidavits on the 8 and 10 September 2010 respectively. In addition, the first and second respondents withdrew the application for judicial management order, by filing a notice of withdrawal dated the 7 September 2010. This notice was filed by the two respondents' attorneys.

[18] The second respondent apparently having been served with the order of the 6 September 2010, approached the court on an urgent basis, seeking to uplift the restriction in terms of paragraph 6 of the amended order placed in the bank account of Amber Mountain Investment 183 (PTY) Ltd held at ABSA Bank Haartespoort Branch account number 40/6193/1737.

[19] Secondly, in his notice of motion, the second respondent prayed that the remaining orders of the amended court order be stayed pending any of the process under paragraph 4 intended by the applicants.

[20] On the 10 September 2010, Raulinga J stood down the matter until Monday 13 September 2010. The applicants were ordered to deliver replying affidavit by 09h30 on that Monday.

[21] The matter then came before me on the 13 September 2010. On this date, I made an order as follows:

> *"1. The matter is stood down until Thursday 16 September 2010 at 10h00,*
>
> *2. The applicants to ensure that a proper index and pagination is made in respect of the court's file and filed with the registrar of this court not later than Wednesday (15/09/2010).*
>
> *3. The Master of this court is hereby called upon to file an affidavit by not later than Wednesday (15/09/2010) at 12h00 noon, in which affidavit the following must be explained:*

3.1 why he/she should not be found to be in contempt of court order of 05 August 2010, by refusing to issue the second respondent with letters of appointment as judicial manager of the fourth respondent,

3.2 to confirm or deny averments made in the founding papers concerning the Master of the High Court with regard the order made on the 05 August 2010,

3.3 to explain the circumstances under which the letters of appointment as judicial managers were issued to the first and third respondents particularly regard been had to the order of the 05 August 2010,

4. The costs occasioned by the standing down to Thursday 16 September 2010, are hereby reserved".

[22] On the 16 September 2010, I was informed that there was counsel on watching brief for the Master. I suggested to counsel to inform the Master that it might be advisable to instruct counsel to represent the Master and not just be on a watching brief. The matter then stood down until 14h00. When the court resumed, I was informed that counsel was now briefed to represent the Master. More time was requested to enable the Master to file further affidavits.

[23] In the meantime, counsels for the applicants and the second respondent argued the issues relating to their clients' matter on Thursday the 15 September 2010. I reserved judgment with regard to the issued between the applicants and the second respondent .

[24] I indicated that judgment will be handed down after completion of the Rule Nisi issued against the Master. Both counsels were advised to be present when the case of the Master was argued. The Master's case

was argued on Friday the 17 September 2010. This then brings me to deal with the issues raised herein.

ISSUES RAISED

[24] As I said in paragraphs 1 and 2 of this judgment, several issues were argued. The following issues presented themselves:

24.1 Whether the withdrawal of the judicial management application should be accepted? And if so,

24.2 What effect this would have on the judicial managers appointed by the Master?

24.3 Whether the order of the 5 August 2010 deserves to have been ignored and did not have to be set aside on the basis of its alleged nullity for lack of jurisdiction? And if, not

24.4 Whether the Master of this court is in contempt of the court order? And if so,

24.5 Whether the appointments made in breach of the court order are valid appointments?

APPLICABLE PRINCIPLES, CASE LAW AND LEGISLATIONS

[25] Rule 41 (1)(b) of the Uniform Rules provides that a person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court to withdraw such proceedings in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs and the taxing master shall tax such costs on the request of the other party.

[26] Subrule 41 (1)(c) provides that if no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to the court on notice for an order for costs.

[27] The court does have a discretion whether or not to grant such leave to withdraw. The question of injustice is germane to the exercise of the court's discretion. (**See Pearson and Hutton NNO v Hitzeroth 1967 (3) SA 591 (E) at 593 D, 594 H and Karoo Ment Exchange Ltd v Mtwazi 1967 (3) SA 356 (E) at 359 B-G)**.

[28] It is however, not ordinary the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one. (**See Levy v Levy 1991 (3) SA 614 A at 620B**).

[29] The general principle is that, the party withdrawing is liable as an unsuccessful litigant to pay costs of the proceedings. The court retains a discretion to deprive the successful party of his costs. (**See Waste Products Utilisation (PTY) Ltd v Wikes and Another (Biccari Interested Party) 2003 (2) SA 590 SA 590 (W) at 597A**).

[30] Section 428 (1) of the Companies Act provides that the court may on an application under section 427 (2) or (3), grant a provisional judicial management order stating the return day or dismiss the application or make any order that it deems just.

[31] Subsection (3) provides that, the court which has granted a provisional management order may at any time and in any manner on the application of the applicant, a creditor or member of the provisional judicial manager or the Master, vary the terms of such order or discharge it.

[32] The appointment of judicial managers is made by the Master in terms of section 367 of the Companies Act, which apply *mutatis mutandis* in the context of section 431(4) which provides that, the provisions of this Act relating to the proof of claims against a company which is being winded-up and to the nomination and appointment of a liquidator of any such company shall *mutatis mutandis* apply with reference to the proof of claims against a company which has been placed under judicial management and the nomination and appointment of a judicial manager of such a company.

[33] Section 165 (5) of the Constitution provides that, an order or decision issued by a court binds all persons to whom and organs of state it applies. If an applicant, proved that a respondent with the knowledge of a court order, acted in conflict with its terms such an applicant would have proved a breach of such an order. However, the respondent may be able to resist the relief sought if he or she was to prove that he or she was unaware of the court order. The onus rests upon the respondent in this regard that he had not intentionally defied the order or had not acted *mala fide* in doing so. (**See Noel Lancaster sands (Edms) Bpk v Theron en Andere 1974 (3) SA 688 (T**).

[34] The fact that a person against whom an order is issued is acting on an attorney's advice in breach of a court order, does not detract from his having intentionally defied the order. (**See Culverwell v Beira 1992 (4) SA 490 (W) at 493 D – E**). In that case, the court having found that counsel for the respondent was unable to refer to any authority for the proposition that an order which is wrongly granted by a court can be lawfully defied and the court having indicated that it knew of none, concluded by stating that all orders of the court whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. (**See Culverwell's supra at 494 A – B**). It was further stated in Culverwell's case, that acceptance of counsel's argument would in many cases result in respondents being able to defy all orders with

imputing by contending that they believed such orders to be wrong, the resultant of which is not difficult to imagine. (**See at 494 B-C).**

[36] In Klopper NO v Master of the High Court 2010 3 ALL SA 182 WCC (at 184 g-h), it was stated that the Master seems to think that the findings of the court were open for debate and reconsideration in that court. She was found to be mistaken. They were not. The court was said not to be sitting to consider an appeal or review the correctness or otherwise of its earlier judgment and order. (**See also Administration, Cape and Another v Ntshwaqela and others 1990 (1) SA 705 A at 716 B-C**).

[36] The court in Klopper NO's case, having found that it had pronounced itself on that matter, it found that the matter was closed. The time for debate was found to have been long past and that, for that matter it was time for appeal. The Master was found not to have done so. It was further found that, in those circumstances, after the court had given judgment, and made its order, it remained only for the Master to comply with them. In failing to have done so, and indeed, in contravening the order, it would seem calculatedly and deliberately, the Master had acted with gross impropriety and in fact unlawful. The argument that the applicant had in some way waived compliance with the order of 13 June 2008, was found to be risible and that it did not even begin to stand up to the scrutiny not only is no foundation whatsoever laid for it in the papers, but that it was extremely doubtful whether it laid within the applicant's power to afford the Master a dispensation from complying with the order. In the circumstances, it was found that, the Master's latest decision could not be permitted to stand, and like her first decision could not be permitted to stand and was reviewed and set aside as being tainted with illegality. (**See Klpper's matter at 184 h-j and 185 a**).

[37] If our courts do not act swiftly and strictly to stop the willful disregard of court orders, the rule of law will be undermined and South Africa will be

entering the realms of constitutional crisis. The only institution that stands between anarchy and the normal citizen is the courts. The courts have a duty to protect normal, honest citizens and should not hesitate to do so. (**See Thring J's remarks in Klopper NO at 185 b when quoting an article in the matter of H Cilliers v P Masinga**).

[38] There is no room for the extension of jurisdiction of the court by the reason of the so called inherent powers, where the court did not have jurisdiction at all. An order or judgment in such circumstances would be of nullity and could simply be ignored. (**See S v Absalom 1989 (3) SA 154 (A**).

[39] Arbitration is a quasi-judicial proceeding. The precepts which govern judicial proceedings apply to an arbitration. Want of jurisdiction in judicial or quasi judicial proceedings have the effect of nullity without the necessity of a formal order setting the proceedings aside. Lack of jurisdiction in arbitration proceedings renders an award invalid. Absence of proper notice in proceedings has always been treated as a fatal flaw. (**See Vidavskey v Body Corporate of Sunhill Villas 2005 (5) SA 200 SCA at para. 14 at 207 B-F**).

DISCUSSIONS, SUBMISSIONS AND FINDINGS

[40] I find it necessary to start with the most vexing aspect of this judgment. That is, the issue raised in paragraph 24.3 above.

WHETHER THE ORDER OF THE 5 AUGUST 2010 DESERVES TO HAVE BEEN IGNORED AND DID NOT HAVE TO BE SET ASIDE ON THE BASIS OF ITS ALLEGED NULLITY FOR LACK OF JURISDICTION?

[41] The issue of nullity of the court order of the 5 August 2010 and the alleged entitlement to have it ignored, was raised by counsel on behalf of the Master who is the fourth applicant in the present proceedings. In raising this issue, counsel for the Master relied heavily on the decisions in the two case referred to in paragraphs 38 and 39 of this judgment.

[42] Perhaps let me deal first with the facts of the two cases in some detail. In Absalom's case, the respondent in the Appellate Division was an accused who was convicted and sentenced in a Magistrate's court in South West Africa. Ten years after his conviction and sentence, he applied for condonation of the late noting of the appeal. The application for condonation in the court a quo was dismissed. He then applied to the Supreme Court of South West Africa for leave to appeal. Leave was granted and such leave to the full bench of the Supreme Court of South West Africa.

[43] The majority of the full court held that, although there was no statutory provision which conferred jurisdiction on the full bench in respect of such an appeal, it did in fact have jurisdiction to hear the appeal. It found such authority to hear the appeal by virtue of its inherent powers to regulate procedural matters and by virtue of the fact that neither the state nor the respondent had objected to the decision that the appeal should be heard by the Full Court. It found that the legal and factual issues involved in the appeal were not of such a nature that they required the attention of the Appellate Division. The appeal was heard and was upheld by the Full Bench. Thereafter, the state appealed which appeal was upheld by the Appellate Division. The Appellate Division then dealt with the issue of nullity as indicated in paragraph 38 of this judgment

[44] Similarly, in the matter of Vidavskey's case, the court on appeal had to deal with the legal consequences of a wrong direction by an arbitrator in that, the proceedings took place in the absence of a party to the arbitration under Arbitration Act 42 of 1965. The party in whose favour

an award had been made wanted the award to be made an order of court in terms of section 31(1) of the Act.

[46] The appellant was the owner of a sectional title unit in a residential development in the suburb of Bruma, Johannesburg. The respondent was the responsible body corporate. The appellant declared a dispute with the respondent relating to various aspects of the latter's administration of the property which was referred to arbitration. The provisions of the Act applied to the arbitration in section 40 thereof, since the arbitration was one under a law (the sectional Title Act 95 of 1986, which lays down in section 35 (1) and (2) that a scheme should be controlled and managed in *inter alia* by the management rules prescribed by regulation.

[45] The appellant obtained an award in the arbitration proceedings in the absence of the respondent. The respondent failed to adhere to the award. Consequently, the applicant approached the court to make such an award an order of the court. The respondent opposed it on the basis that, it did not receive a notice of the hearing of the dispute between the parties in the arbitration proceedings. The objection was upheld. The court a quo found that the award was tainted by the irregularity, i.e. the hearing of the dispute in the absence of the respondent, and that it was null and void.

[47] On appeal, the decision of the court a quo was confirmed. The court of appeal expressed itself as indicated in paragraph 39 of this judgment.

[48] The facts in Absalom's case and those in Vidavsky's case in my view, should be distinguished from the facts of the present case and those in Klopper NO's case and Culverwell's case referred to earlier in paragraphs 34 to 37 above.

[49] In Culverwell's case, the respondent was required amongst others, to deliver to the applicant all negative films and photographs in the

respondent's possession or under his control. He failed to do so. Amongst others, he advanced as a reason for not complying with the court order that, he was advised by his attorney not to comply with the order. He was found in contempt despite the suggestion that the applicant did not own such films and photographs.

[50] In Klopper NO's case, an order was made against the Master as follows:

> "*1. The decision of the respondent taken on the 18th June 2007, not to tax the applicant's remuneration otherwise than according to Tariff B of the Second Schedule to Insolvency Act, No 24 of 1936, read with form CN 104 of the Companies Act, no 61 of 1973 is set aside.*
>
> *2. The matter is referred back to the respondent for her reconsideration bearing in mind what has been said in this judgment, it being found that in terms of section 384 (2) of the Companies Act, good cause exists for remuneration to be awarded to the applicant in excess of the amount arrived at solely by applying the provisions of the said tariff*".

[51] Instead of complying with the order or judgment of the court, the Master on the 16 October 2005 wrote a letter questioning the appropriateness of the order made against her. She sought to interpret the judgment and the order made. In doing so, she found it fit to disallow, contrary to the court order, the applicant any remuneration in excess of that arrived at by applying the tariff. This was found to have been nothing else than flouting the clear directory terms of the judgment and order. In actual fact, she was bound to reconsider the applicant's remuneration in the light of the court's findings.

[52] In the present case, the Master (the fourth applicant), having been made aware on the 6 August 2010 of the order of the 5 August 2010,

refused to issue the second respondent with letter of appointment as a judicial manager for the fourth applicant. In addition, she appointed two more judicial managers in the face of the order of the 5 August 2010.

[53] In both two cases referred to in paragraphs 34 to 37 above, specific performance was required or specific action was taken in defiance of the court order. The cases relied upon by counsel on behalf of the Master, did not deal with specific performance required in terms of the court order, nor was specific action or actions taken in defiance of a court order. Secondly, the courts in both cases were not confronted with contempt of court. Such an issue was not specifically raised to be dealt with specifically.

[54] Constitutionally, every person is in terms of section 165(5) of the Constitution bound by an order or judgment of a court. I tend to align myself with the following expression in Klopper's case:

"If our courts do not act swiftly, and strictly to stop the willful disregard of court orders, the rule of law will be undermined and South Africa will in my view, be entering the realms of a constitutional crisis..."

[55] Imagine every individual envisaged in section 165(5) of the Constitution being required to perform specific action in terms of a court order, disobeying such an order, on the basis of his or her desire to check on the legality or otherwise of the order first. The issue was eloquently put by Goldstein J, in Culverwell supra, as follows:

"All orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. Counsel relied for his argument on cases concerning regulations which are found to be ultra vires, in such cases conduct in breach of regulations is not unlawful. However, no authority was quoted to me- and I am aware of none – which equates court order with regulations in the manner contended

for. Acceptance of counsel's argument would in many cases result in respondents being able to defy all but Appellate Division orders with impunity that they believed such orders to be wrong, the resultant chaos is not difficult to imagine". (My own emphasis).

[56] Court orders that require there and then or anytime in the future, specific performance, will become a free for all if they are meant to be scrutinized before being complied with. All sorts of defences as the basis for not complying with such orders could flood our courts. In doing so, without following due process of the law to challenge such orders. For example, that the respondent was not satisfied with the legality of the order and therefore did not have to do anything. That the respondent still wanted to check with his or her lawyer whether or not to comply with the order and that, before he or she did so, there was no obligation to comply. That the respondent did not believe that the order was correctly obtained and issued and that before verification the order could not be acted upon. Lastly, that the respondent did not believe in the validity of the order or if the court that made the order had jurisdiction and that he or she was therefore not bound by it.

[57] I think, anything entitling any person or a party who is required in terms of a court order to take a particular action or who performs a specific act in conflict with a court order under the disguise of lack of jurisdiction on the part of the court, would be a receipt for a disaster. For example, those officials like the sheriff, who are tasked with the function of executing court orders, could find themselves at a risk. That is, having executed an order which ultimately found to have been invalid at the first instance, could find themselves been litigated against. If this was to happen, it could have upset and undesired effect. For example, they might want to check the appropriateness of every order before execution takes place.

[58] The cases relied upon by counsel for the Master in the instant case, did not require specific performance. In Vidarsky's case, an award having

been awarded, the person or entity against whom the award was granted, failed or refused to act in terms of the arbitration award. Such an award to be executed was subject to it been made an order of the court. It was the attempt to make it an order of the court that was challenged and not much of the execution thereof.

[59] Similarly, in Absalom's case, the Full Bench of the Supreme Court of South West Africa, heard an appeal and upheld the appeal when it did not have jurisdiction to hear such an appeal. The outcome of the appeal was said to be null. Assuming that, in that case, the state was not granted leave to appeal to the Appellate Division, would the state or prison authorities have been entitled to refuse to release the prisoner without having taken any step that the state might have been entitled to take? Put it differently, would the state or prison authority have been entitled to do nothing and not follow due process of the law, but at the same time refuse to release the prisoner? I do not think so.

[60] I am therefore satisfied that the facts of the present case can be distinguished from the facts of the two cases relied upon by counsel on behalf of the Master. Therefore, the Master was not entitled to ignore the order of the 5 August 2010 or to act contrary thereto. This should then bring me to deal with related issue raised in 24.4 above.

WHETHER THE MASTER OF THIS COURT IS IN CONTEMPT OF THE COURT ORDER OF THE 5 AUGUST 2010?

[61] The order was presented to the Master on the 6 August 2010 by the second applicant. The second applicant was one of the judicial managers appointed by the court on the 5 August 2010. The attitude of the Deputy Master, Ms Christine Roussouw to the court order is described by the second applicant in supporting affidavit to the founding affidavit as follows:

"5. Later that day, I went to the office of Master of the High Court with a request that a certificate of appointment be issued. I was informed by Christine Roussouw, the Deputy Master, that while she was willing to issue a certificate of appointment to me, she was not prepared to appoint the second respondent because he is not an individual on the Master's panel of insolvency practitioners and also because the second respondent was one of the two applicants in the application for judicial management. He is also the managing director of the first applicant as a provisional manager".

61.1 In the order that I made on the 13 September 2010, the Master was required to file an affidavit in terms of which she was to confirm or deny averments made in the founding papers concerning her with regards to the order made on the 5 August 2010.

61.2 The Master sought to file a report prepared by an Assistant Master one W J Cilliers. The report is dated the 14 September 2010. This was meant to be compliance with paragraph 3 of my order dated the 13 September 2010 and quoted in paragraph 21 of this judgment. The Master was accordingly advised that an affidavit and not a report was required. Such an affidavit was deposed to on 15 September 2010, not by deputy Master referred to in the affidavit of the second applicant, but by another assistant Master, Mr Wynard Jacobus Cilliers.

61.3 Before dealing with the contents of the affidavit by Mr Cilliers, it is worth mentioning that in the letter of the 15 September 2010 that I directed to be addressed to the Master, he or she was required to file an affidavit and in addition was required to deal properly with the issues raised in the order. The Master was also given the citation of Klopper NO's case.

61.4 Ms Roussouw referred to in quotation in paragraph 61above, did not file any affidavit to respond to the averments made against her by the

second applicant, neither did she file confirmatory affidavit to Mr Cilliers's affidavit. Therefore allegations made against her by the second applicant remain unchallenged.

61.4.1 On the 17 September 2010, Mr Cilliers further deposed to what is referred to as "supplementary affidavit by the fourth applicant". In this affidavit, Mr Cilliers seeks to explain the conduct of Ms Rossouw and the Acting Master, Ms Ntabiseng Ntsoane. Neither Ms Roussouw nor Ms Ntsoane did file a confirmatory or supporting affidavit. However, what is clear from the affidavit deposed to on the 17 September 2010, is that the certificate of appointment of the first, second and third applicants as judicial managers of the fourth applicant, was signed and issued by the said Ms Roussouw.

61.5 For the purpose of the rule nisi issued against the Master, the events of 5 August 2010 to 19 August 2010 are of importance. The rule was issued as per court order quoted in paragraph 21 of this judgment.

61.6 Inasmuch as Ms Roussouw elected not to deal with the allegations made against her as quoted in paragraph 61 of this judgment, I will deal with this matter on the basis that those allegations are common cause. Secondly, I will deal with explanatory averments as contained in the supplementary affidavit by Mr Cilliers. But such common cause factors should be seen in the light of the actual reason for issuing a letter of appointment. There is only one reason given which is dealt with hereunder in paragraphs 61.25 to 61.27 of this judgment.

61.7 Whilst Mr Cilliers in his supplementary affidavit might wish to suggest that the Master was never served with any copy of the original application in order to submit a report to this court and that the order of the 5 August 2010 with papers were only submitted on the 18 August 2010, this does not mean that the deputy Master, Ms Roussouw only knew of the order on the 18 August 2010. She knew of it on the 6

August 2010. Such knowledge was conveyed to her by the second applicant.

61.8 On the same day, the second applicant then proceeded as indicated in paragraph 61 of this judgment. There can be no doubt that the second applicant would have handed over a copy of the court order to Ms Roussouw.

61.9 Mr Cilliers in his affidavit deposed to on the 15 September 2010 elected not to deal with averments as set out in paragraph 5 of the second applicant's affidavit deposed thereto on the 3 September 2010. It is however, clear what Ms Roussouw on the 6 August 2010 became aware of the order of the 5 August 2010.

61.10 She took it upon herself to decide whom to appoint or issue with certificate of appointment in defiance of the court order of the 5 August 2010. Assuming that she was obliged to issue certificate of appointment to the second applicant in terms of the order of the 5 August 2010, she did not only defy the court order by refusing to issue such certificate to the second respondent, but she also defied the court order by adding two judicial managers, that is, the first and third applicants.

61.10.1 For three reasons she was not prepared to recognize the order of the 5 August 2010, nor did she seem to have felt bound by it. Three reasons were that, the second respondent was not one of the practitioners on her panel of insolvency practitioners, that he was one of two applicants in the judicial management application. Lastly, that the second respondent was a managing director of the first respondent who was the first applicant in the application for judicial management of the fourth applicant. Of course, the three reasons should also be seen in the light of what is stated in paragraphs 61.25 to 61.27 hereunder.

61.11 I do not think that, it was her place to defy the court order on the basis of her averments to decide on the fitness or otherwise of the second respondent to be appointed as a judicial manager for the fourth applicant. Such entitlement had been taken away by the order of the 5 August 2010, whether correctly or wrongly so.

61.12 In fact, if one was to go by what is quoted in paragraph 61 above, or on the only reason dealt in paragraphs 61.25 to 61.27 hereunder, the refusal to issue the second respondent with certificate of appointment would not have been based on entitlement to appoint judicial managers in terms of section 429(b)(i) of the Companies Act, but rather on disqualification.

61.13 Therefore, bringing in the applicability of the provisions of section 429 seems to have been an after thought. This seems to be confirmed by the only reason given in Ms Rousouw's submission to the Acting Master as it appears in paragraph 61.25 hereunder. It is an afterthought imported by Mr Cilliers into the explanation for not having complied with the order of the 5 August 2010. Such entitlement to appoint in terms of section 429(b)(i) cannot be an excuse not to comply with an order requiring specific performance or where specific step had been taken in conflict with an existing order.

61.14 Willfulness or intention to disobey a court order will have to be determined at the time when such an order came to the knowledge, in this case, of Ms Roussouw and or Ms Ntsoane or at the time of positive action being taken in conflict with the court order. For example, when the acting Master, Ms Ntsoane, on the 18 August 2010 approved the appointment of the first, second and third applicants and refusing to include the second respondent and when Ms Roussouw issued the letter of appointment on the 19 August 2010. Also on the 6 August 2010, when the latter made utterances to the second applicant as quoted in paragraph 61 above.

61.15 No one can on his or her own pretend to act as court of appeal or review by ignoring an existing court order, either on the basis of one 's entitlement to act or not to act on the basis of the invalidity of such an order.

61.16 The attack of the order of the 5 August 2010, on the basis that it is of nullity and that it could be ignored should also be seen as an afterthought. It is put as follows in paragraph 15 of the supplementary affidavit deposed to on the 17 September 2010:

> *"I am informed by my attorney and counsel that there is case law supporting an argument that prayer 3 of the order of 5 August 2010 by the Honourable Mr Acting Justice Kruger, can be regarded as a nullity and that it would be ignored".*

61.17 Neither Ms Roussouw nor Ms Ntsoane stated that when a decision was taken on the 18 or 19 August 2010, the order of the 5 August 2010 was regarded as of nullity. I however, understood the purpose of the submission in this regard to be that, none of the officials in the Master's office could be found in contempt because, the order is in any event of nullity and of no force. That is, it is binding on no one. My finding on the earlier issue referred to in paragraph 25.3 of this judgment and dealt with from paragraphs 40 to 60, makes the issue of nullity to have fallen by the wayside. I do not find it necessary to repeat myself.

61.18 On the 18 August 2010, the acting Master was presented with the order of the 5 August 2010 together with founding papers. The submission was apparently made by Ms Roussouw. She prepared a written submission to the Master, Pretoria, with a recommendation as to who should be appointed as a provisional managers. All of these are set out in paragraphs 11 to 15 of Mr Cilliers' two affidavits deposed to on the 15 and 17 September 2010 respectively.

61.19 It however suffices to say, such a submission and recommendation by Ms Roussouw could only have served to promote her view and her attitude with regard to the court order as explained by the second applicant in paragraph 5 of his affidavit quoted in paragraph 61 above.

61.20 Once the existence of an order is proved and that, it was served and that it was not complied with, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was willful and *mala fide*, the offence will be established beyond reasonable doubt. The accused is entitled to remain silent, but, does not exercise the choice without consequences. (**See Osman v A-G Transvaal 1998 (4) SA 1224 CC in para [22], see also Fakie NO v CCII Systems (PTY) Ltd 2006(4) SA 326 para [22]**).

61.21 It should be noted that developing the common law, does not require the prosecution to lead evidence as to accused' state of mind or motive. Once the three requisites continue to have been proved, in the absence of evidence, raising a reasonable doubt as to whether the accused acted wilfully and *mala fide*, all the requisites of the offence will have been established.

61.22 What is changed is that, the accused no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but to avoid conviction he or she needs only to lead evidence that establishes a reasonable doubt. (**See Fanie NO supra para. [23]**)

61.23 There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as a punishment for non-compliance. (**See Fanie NO supra para. [24]**).

61.24 Mr Cilliers, the Assistant Master decided to be a spokesperson for both the Deputy Master (Ms C Roussouw) and acting Master (Ms Ntsoane). No explanation has been given as to why they, themselves, could not

have deposed to some affidavits to deal properly with the allegations not only made by the second applicant with regard to Ms Roussouw, but also with regard to the averments made by Mr Cilliers in the two affidavits deposed to on the 15 and 17 September 2010 respectively. Their intention as on the 6, 18 and 19 August 2010, had not been placed on record. On the other hand, the order has been proved, it came to their knowledge between the period 6 and 19 August 2010 and they failed to comply with it.

61.25 In fact, the submission that was made by Ms Roussouw to the acting Master raised only one reason as a disqualification and as the basis for not complying with the order and such a reason reads as follows:

> *"Mr Van Vuuren is not on our approved panel of liquidators and can therefore not be appointed as provisional judicial manager?*

61.26 This recommendation is despite what is stated by Ms Roussouw in the same submission as follows:

> *"This matter is placed under provisional judicial management. The Judicial Managers appointed in terms of the court is:*
> *1) Mr H A Van Vuuren*
> *2) Mr M Mhlongo"*

61.27 This is stated in the first paragraph of the submission to Ms Ntsoane. In the last paragraph, the first, second and third applicants, are suggested as appointees instead.

61.28 The real issue is, whether the explanation for not recognizing the court order with regard to the second respondent and in appointing the first and third applicants in direct conflict with the order of the 5 August 2010 could be said to be raising a doubt as to the guilty or otherwise of Ms Roussouw and Ms Ntsoane. In my view, it does not.

61.29 In the affidavit deposed to by Mr Cilliers on the 15 September 2010, no reference is made to the provisions of section 428 (3) of the Companies Act. The provisions of subsection 3 thereof were referred to in paragraph 31 of this judgment. In the order of the 5 August 2010, a rule nisi was issued returnable on the 26 October 2010. Inasmuch as the Master suggests that he or she was not informed of the application for judicial management before the order was obtained on the 5 August 2010, when it did so come to his or her attention, the Master could have anticipated the return date in terms of Rule 6(8) and Practice Directive dated the 12 February 2007 read with section 428(3) of the Companies Act. Instead, both Ms Ntsoane and Ms Roussouw, decided to proceed as they did in conflict with the court order.

61.30 Remember, the court order came to the attention of Ms Roussouw on the 6 August 2010 and to Ms Ntsoane on the 18 August 2010. 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.

61.31 Both Ms Roussouw and Ms Ntsoane should be found in contempt of court order by breaching the order of the 5 August 2010. Ms Ntsoane for having approved the suggestion of Ms Roussouw in conflict of the order of the 5 August 2010 and Ms Roussouw for having facilitated the recommendation as set out in her report to Ms Ntsoane and her subsequent signing and issuing letter of appointment on the 19 August 2010, an act that was in conflict with the order of the 5 August 2010.

61.32 The next issue is what sanction should be imposed. I intend suspending the imposition of a sanction or punishment indefinitely. Hopefully, this would serve as a deterrent in the future and would not be seen as weak compassion on the part of the court. This should then bring me to another issue which was not specifically raised as an issue under paragraph 24 of this judgment.

APPROPRIATENESS OF HAVING APPROACHED THE JUDGE IN CHAMBERS.

[62] The Master of the court whilst connected to the court, the office has a distinct and important function to perform. The Master's office serves to ensure smooth execution of orders that are made by the courts in respect of certain specific applications. For example, in sequestrations, liquidations and appointments of curator bonis applications. These functions are performed by the Master as an independent institution which should see itself as such.

[63] Its functions are either specifically legislated or subject to some ancillary orders made by the courts.

[64] When the office of the Master is cited as a party in a particular proceeding, it should see itself as such and not as an extension of the court per se.

[65] 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.

[66] These events have no bearing on the contempt of court order per se. At best, they can serve either to aggravate or mitigate punishment. What happened after the 19 August 2010 appears to have being prompted by an order that was obtained by the second respondent against the Master on the 20 August 2010 in terms of which the latter was interdicted from making further appointments of judicial managers for the fourth applicant.

[67] In paragraph 18 of the affidavit deposed to by Mr Cilliers on the 15 September 2010, he states that, himself and the state attorney Mr P C

Cavanagh, approached the Judge who granted the order of the 5 August 2010 in chambers. They went to the Judge's chambers because they were uncertain about the proper interpretation of the order of the 5 August 2010. They went to visit the judge concerned to clarify the practical effect of the order and to ensure that the Master would not be in contempt.

67.1 In the proceedings of the 5 August 2010, the applicants who are the respondents in the present proceedings, were represented by Attorneys Maluleka. Courtesy and good ethical conduct demand that, you do not see a Judge in chambers in the absence of or without the knowledge and consent of your opponent. It is even worse if you go and see a Judge in chambers about pending proceedings where you are a party.

67.2 From Mr Cilliers' affidavit of the 15 September 2010, the approach to the Judge in chambers was after the 19 August 2010. It would also have been after the Master was interdicted from making further appointments.

67.3 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:

67.3.1 That the urgent court procedure was misused by the applicants and that not all relevant facts were placed before him. I understand this to suggest that, the Judge indicated in chambers that he was misled by the applicants in granting the order of the 5 August 2010,

67.3.2 That the Judge had again listened to the recordings of the proceedings before him and to the submissions that were made to him during the

original application and that reference was made that there was almost an agreement by all parties that an order can be given as it currently stands,

67.3.3 That the Judge was further of the opinion that there is no such thing as "an almost agreement" and that there is either an agreement or no agreement,

67.3.4 That the Judge recommended that the Master must oppose the interdict order on the return date of 26 October 2010,

67.3.5 That the Judge discussed the issues of the misuse of the urgent court with the Deputy Judge President and that the Master's office must prepare a submission to the Judges on the misuse of urgent court encounter.

[68] Going into a Judge' chambers and discuss pending matters in the manner the Master did, is like by default, in the absence of one's opponent seeking an appeal or consideration of review application. This could have been nothing else than a move calculated to embarrass and compromise the Judge concerned. As I said, the Master's office is not an extension of the court to the extent that when the Master is cited in the proceedings, it could discuss such matters in chambers with the Judge, either before or after the making of an order, to seek an advice or clarity on the pending proceedings or outcome thereof.

[69] If this was to happen unabated, it could only serve to diminish the confidence in the judiciary by those excluded from the discussions in Judge's chambers. Secondly, it could serve to undermine the independence of the office of the Master in the execution of functions specifically assigned to it by legislation or by practice.

[70] I do not think that the Master in the present case did not know what it was supposed to do. As I said, it could have anticipated the rule nisi

on a twenty four hours notice in terms of Rule 6(8) read with section 428(3) of the Companies Act. The Master did not have to be told in chambers to oppose the return date on the 26 October 2010 as alleged in paragraph 20.3 of Mr Cilliers affidavit deposed to on the 15 September 2010.

[71] It looks like the visit to the Judge in chambers did not happen once, but rather thrice. According to Mr Cillier's affidavit deposed to on the 17 September 2010, a certain Mr Prigge on behalf of creditor visited the office of the Master and spoke to Ms Roussouw about the status of the judicial management of the fourth applicant. Mr Cilliers with the said Mr Prigge approached the Chief Registrar of this court to make enquiries about the order of the 5 August 2010. The Chief Registrar is said to have taken them to the Judge concerned in chambers. In the judge's chambers, they were told the matter will be investigated and that they will be notified accordingly in due course. All of these would have happened after the 19 August 2010.

[72] On the 27 August 2010, Mr Cilliers is said to have been advised by the Judge' secretary that the Judge wanted to see Mr Cilliers together with his attorney in his chambers. Mr Cilliers then went there with the state attorney Mr P Cavanagh. In chambers, the Judge is said to have expressed himself as follows:

72.1 that the file could not be located,

72.2 that he had listened to the tapes or record,

72.3 that he discussed the matter with most of his colleagues and that two suggestions had been made to him,

72.4 that one school of thought was that he could not deal with the matter as he was *functus officio,*

72.5 that he indicated that the other school of thought was that the Master could have resorted to Rule 42(1),

72.6 that he was of the view that Rule 42(1) had limited applicability and would not be of use to the Master, and

72.7 that he repeated his earlier views that the Master should definitely oppose the return date on the 26 October 2010.

[73] Having said all of these in the affidavit, the Master concludes by saying that there was never a suggestion from the Judge concerned that he felt that the Master and his or her team were in contempt of his order, but that to the contrary the Judge endeavoured to assist the Master to resolve the issue and the problem created by his order.

[74] The Master was mistaken and ill-advised to think that the invitation to the Judge's chambers in the absence of the other parties was an excuse. Secondly, his or her approach of the Judge in chambers was after the events of the 6, 18 and 19 August 2010. By that time the order was already been breached. Approaching the Judge in chambers which approach was prompted by an interdict of the 20 August 2010, cannot be of any help to the Master.

[75] The court order was breached not because of the advice allegedly obtained in chambers, but rather because the second respondent was not on the panel list of insolvency practitioners. These are events of the 18 and 19 August 2010.

[76] What concerns me for now is these approaches in chambers. They were obviously improper. As I said, the Master overstepped the mark and was misguided in this regard. Hopefully it is not something which will be repeated in the future.

[77] Perhaps the Master's attitude throughout should be seen in context. It did not look like he or she ever regarded the conduct as being serious and in contempt. On the 13 September 2010, he or she was ordered to file an affidavit. A rule nisi was also issued against the Master. Apparently, having received the order calling upon the Master to show cause, he or she still did not see the need to deal with the matter seriously. The Master's report was filed in response to the rule nisi instead of an affidavit. Secondly, Mr Cilliers himself brought the report, instead of instructing the State Attorney. Thirdly, on the 15 September 2010, a counsel was sent to court to be on a watching brief. This was despite the fact that the Master was facing a possible verdict on contempt of court order. It did not look like this worried the Master. Either because the Master did not believe that this court was serious with the contempt of court proceedings or he or she just did not care. Of course, he or she was wrong in thinking that way. It was for this reason that I insisted that he or she must properly be represented so that the contempt proceedings could be properly dealt with.

[78] I now turn to deal with the other issue raised in paragraph 24.1 of this judgment. The issue raised in paragraph 24.5 will be dealt later in this judgment when dealing with the issue raised under paragraph 25.2. The two issues in my view, have same effects.

WHETHER LEAVE TO GRANT THE WITHDRAWAL OF JUDICIAL MANAGEMENT ORDER AND RELATED ORDER SHOULD BE GRANTED TO THE RESPONDENTS WHO ARE THE APPLICANTS IN THE JUDICIAL MANAGEMENT PROCEEDINGS?

[79] The first and second respondents had filed an application for withdrawal of the judicial management proceedings and the related orders thereto. This withdrawal was strenuously objected thereto by counsel on behalf of the first, second and third applicants. The basis for the objection as I understood it, could be summed up as follows:

79.1 that the matter cannot be withdrawn unilaterally in terms of Rule 41(1) without the consent of the applicants or leave of the court,

79.2 that leave by the court should not be granted seen in the light of the following:

79.2.1 that the respondents in their application for withdrawal did not tender costs,

79.2.2 that to allow the respondents to withdraw would be prejudicial to the applicants and would be tantamount to circumventing the applicants entitlement to proceed in terms of section 428(3) to set aside part of the judicial management order and to allow the three applicants to remain as judicial managers of the fourth applicant.

[80] Some provisions of Rule 41 were referred to in paragraphs 25 and 26 and of this judgment. Inasmuch as the matter had already being set down and no consent was obtained from the other parties, such withdrawal could only be sanctioned by the court. This will require an exercise of a discretion on the part of the court.

[81] In the exercise of discretion, the court will have regard to the reasons for the withdrawal, the stage at which the application for withdrawal is been brought and the possible prejudice to be caused to any of the parties and other alternative relief to curb any prejudice that might be caused to either party.

[82] In his answering affidavit to the founding affidavit by the four applicants, the second respondent noted the withdrawal accompanied by the filing of notice of withdrawal. Reasons for the withdrawal are summed up as hereunder.

[83] On the 8 June 2010, the fourth applicant represented by the sole Director of the fourth applicant, entered into a Joint Venture Agreement with the first respondent represented by Mr Van Vuuren (the second respondent) in terms of which the first respondent as a Mentor to the fourth applicant, through the second respondent was to:

83.1 offer its services through its employees, agents, workmen, sub-contractors or to assist the fourth applicant in accordance with the plans and specifications,

83.2 carefully calculate and agree upon the completion date for all buildings, roads, structures etc, which has to be rigidly adhered to,

[84] The fourth applicant was awarded a contract by various Government Departments in terms of which certain plans had specifications and in ensuring compliance with its obligations to Government, sought to engage the services of the first respondent through the second respondent.

[85] The second respondent was further in terms of the Joint Venture Agreement, selected to serve as the J V Administrator for the duration of the JV and was in terms of the agreement authorized to perform the day to day operations, management and administration of the awarded contract in accordance with all legal and regulatory requirements.

[86] In the answering affidavit, the second respondent deposed to on the 9 September 2010, explains the whole purpose of him been appointed and the second applicant as judicial managers. It was envisaged to allow the second respondent to exercise control in conjunction with the second applicant and have direct say in how the funds that were to be advanced in terms of the joint venture agreement were handled. Secondly, the second respondent did not want to risk advancing

millions of rands as has already been done without being in a position to ensure the funds were used properly.

[87] I see nothing wrong in the respondents contending that they are the *dominus litis* in the application for judicial management of the fourth applicant. If the second respondent's appointment as a manager is now been challenged by the applicants, there is nothing unto what in withdrawing the entire application for judicial management of the fourth applicant and then revert to the authority of the first respondent and that of the second respondent in managing the fourth applicant in terms of the Joint Venture agreement.

[88] Absence of *mala fide* on the part of the respondents in withdrawing the judicial management proceedings, if the latter has any effect of undoing the appointments by the Master of the first, second and third applicants, cannot serve as a bar to the granting of leave to have judicial management application be withdrawn.

[89] Circumvention referred to on behalf of the applicants should be seen in context. The context being that the aim of the judicial management proceedings was to give more power to the second respondent in addition to the already existing powers in terms of the Joint Venture Agreement. Secondly, the Master having decided not to process the second respondent's appointment as a judicial manager for the fourth applicant, the main idea of having more access and powers in respect of the fourth applicant would have fallen by the wayside.

[90] It looks like Mr Komane who signed the Joint Venture Agreement on behalf of the fourth applicant, decided to change sides by aligning himself with the other applicants. He deposed to a supporting or confirmatory affidavit to the founding affidavit. Remember, the judicial management proceedings of the fourth applicant were instituted with his knowledge and consent. He supported it as the sole director of the fourth applicant. Change of heart on his part, appears to have been

prompted by the alleged mismanagement of the fourth applicant's funds.

[91] Whilst the respondents in their notice of withdrawal did not tender costs during discussion, counsel for the respondents conceded willingness on the part of the respondents to pay costs occasioned by the withdrawal. This willingness or concession should however be seen in context. I think the applicants had unnecessarily and without basis opposed the application for withdrawal. The bulk of time was spent arguing the respondents' entitlement to withdraw the judicial management application. The only motive for opposing the application as I see it, was to avoid the applicants' appointment fall by the wayside.

[92] At the risk of repeating myself, it is ordinarily not the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one. The general rule is that, the party withdrawing is liable as an unsuccessful litigant to pay costs. However, the court retains a discretion to deprive the successful party of his costs.

[93] In the instant case, the applicants should be denied of costs. Their persistent in opposing the application was much more prompted by their desire to retain control over the fourth applicant as judicial managers. They should be found to be unsuccessful in their opposition and for this reason, they should be found liable to pay costs.

[94] I now turn to deal with the two issues raised in paragraphs 25.2 and 25.5 of this judgment.

WHETHER THE APPOINTMENT MADE IN BREACH OF THE COURT ORDER ARE VALID APPOINTMENTS AND WHAT EFFECT WOULD WITHDRAWAL OF JUDICIAL MANAGEMENT PROCEEDINGS HAVE ON THE APPOINTMENTS BY THE MASTER?

[95] Starting with the latter question, appointment of judicial managers by the Master is provided for in terms of section 429. It is a jurisdictional factor that the appointment of a provisional judicial manager would only be made upon the granting of a provisional judicial management order. Such an order is granted by the court in terms of section 428(1) of the Companies Act.

[96] The effect of all of these is that, appointment of judicial managers in terms of section 429, cannot continue to exist in the absence of existing provisional judicial management order under section 428(1). If a judicial management order under section 428 ceases to exist, of necessity appointments of judicial managers appointed under section 429 would also cease to exist. This would mean that such judicial managers cannot continue to perform functions as if they are still judicial managers. The lifespan of the orders obtained on 3 and 7 September 2010, should also cease to exist inasmuch as orders were obtained on the basis of the existence of judicial management order.

[97] Coming back to the other issue relating to the appointment of judicial managers in breach of the court order of the 5 August 2010, it would also mean that such appointments are illegal and cannot be acted upon. The effect of this is that, three judicial managers lack authority to have brought the applications in respect of which the orders of the 3 and 7 September 201 were granted.

[98] The Master has been found to be in breach of the order of the 5 August 2010. The appointment of the first and third applicants should therefore be found to be invalid. The appointment of the second applicant to the exclusion of the second respondent should also be found to have been seriously tainted to the extent that such an appointment should also be found to be invalid.

RESTRICTION ON AMBER MOUNTAIN INVESTMENT 183 (PTY) LTD'S BANK ACCOUNT

[99] The effect of invalidity of the orders of the 3 and 7 September 2010 due to lack of authority in this regard and also factors pronounced in favour of the respondents in this judgment, is that, relief sought in the respondents' notice of motion dated the 9 September 2010 should be granted. In the orders that were obtained on the 3 and 7 September 2010, certain activities on certain bank accounts controlled by the second respondent were restricted. For example, the respondents were interdicted from effecting any debits to the account held by Amber Mountain Investments 183 (PTY) Ltd at the Hartespoort branch of ABSA bank account number 40/6193/1737.

[100] In the notice of motion the respondents in paragraph 2 ask for relief as follows:

> *"2. That the 3rd respondent be ordered to uplift the restriction placed on the Bank Account of Amber Mountain Investment 183 (PTY) Ltd held at ABSA Bank, Haartespoort branch account number 40/6193/1737".*

[101] The second respondent is the sole director of Amber Mountain Investment 183 (PTY) Ltd. I see no reason why such a restriction should continue to exist especially in the light of my earlier findings in this judgment.

CONCLUSION

[102] I therefore conclude by making an order as follows:

102.1 The acting Master of the court, Ms Nthabiseng Ntsoane and the Deputy Master of this court Ms Christine Roussow, are hereby found in contempt of the court order of the 5 August 2010,

102.2 Sanction or punishment in respect of the contempt of court order aforesaid is hereby postponed indefinitely,

102.3 Leave is hereby granted in terms of Rule 41(1) to the withdrawal of the whole of the application for judicial management order granted on the 5 August 2010,

102.4 A relief is hereby granted in terms of paragraph 2 of the respondents' notice of motion dated the 9 September 2010 and quoted in paragraph 100 of this judgment.

102.5 The entire rule granted on the 3 September 2010 and amended on the 7 September 2010 is hereby discharged.

102.6 The fourth applicant is hereby ordered to pay the costs of the application.

M F LEGODI
JUDGE OF THE HIGH COURT

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