



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 5321/2021

In the matter between

**DARREN STEPHEN FADDY N.O.
CHERISE WICKSTROM N.O.
CHERISE WICKSTROM
DARREN STEPHEN FADDY**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT**

and

NEDBANK LIMITED

RESPONDENT

IN RE:

CASE NUMBER: 10832/2015

**CONSTANT WILSNACH N.O.
KURT ROBERT KNOOP N.O.
STHEMBISO KUNENE N.O.**

**FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF**

and

**CHERISE WICKSTROM N.O.
DARREN STEPHEN FADDY N.O.
CHERISE WICKSTROM
DARREN STEPHEN FADDY
THE REGISTRAR OF DEEDS**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT
FIFTH DEFENDANT**

ORDER

1 The application for the joinder of the respondent is dismissed including the ancillary relief claimed with such joinder.

2 The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application, including the costs of two counsel where employed and including the costs of 12 April 2022.

JUDGMENT

GOUNDEN AJ

Introduction

[1] This is an application to join the respondent, as a co-plaintiff in an action instituted by the trustees of an insolvent estate ("main action"). The unique controversy in this case is whether the creditor in an insolvent estate ought to be joined to the main action for the sole purpose of seeking an order for costs from that creditor.

[2] The relationships among the parties are as follows:

- (a) The first and second applicants are the trustees of the Haven Manor Family Trust ("the trust"). They are also cited in their personal capacities as the third and fourth applicants. Collectively, the applicants are the defendants in the main action instituted by the trustees of the insolvent estate.

- (b) The respondent is Nedbank Limited.
- (c) The estate of Stephen and Pauline Faddy ("the insolvents") was sequestrated by the respondent.
- (c) The third and fourth applicants are the children of the insolvents.
- (d) Constant Wilsnach, Kurt Robert Knoop and Sthembiso Kunene NNO are the plaintiffs in the main action. They are the trustees of the insolvent estate. The trustees are not a party to this application.

Background

[3] The trust was created in 2012. The insolvents sold their family home to the trust, less than two years prior to the date of sequestration of their estate. They also sold and transferred an adjacent property held by LTC Developments (Pty) Ltd by way of a sale of shares to the fourth applicant which was subsequently disposed of by way of sale.

[4] In the main action, the trustees claim against the applicants is to set aside collusive dispositions, alternatively dispositions without value, alternatively a fraudulent alienation in terms of the *actio pauliana*. It is alleged that as a result of the dispositions, there are no assets in the insolvent estate. The main action was instituted after an insolvency interrogation had been held.

[5] The applicants defended the main action on the basis that the insolvent estate was not insolvent or rendered insolvent by the dispositions, a denial that no payment was made in respect of the dispositions, and a denial that the dispositions had the effect of prejudicing the insolvent creditors by giving rise to actionable claims against the applicants.

[6] It is common cause, alternatively, not seriously disputed that: (a) the respondent instituted various legal proceedings for the recovery of loans advanced to Stephen Faddy and his company and it has sequestered the insolvents; (b) the respondent was successful in all the litigation; (c) the respondent is the major creditor in the insolvent estate; (d) the respondent provided funding to the trustees; (e) the insolvent estate would have insufficient funds to satisfy an adverse cost order in the event that the applicants are successful in their defence at trial; and (f) the main action is not frivolous or vexatious.

[7] The applicants' case is that the respondent is enjoying the benefit of luxurious litigation without any risk of costs being awarded against it in as much as it is not a party to the main action. The respondent is the actual party seeking to recover money in the litigation and it should be at risk for costs in the event that the applicants are successful in the main action.

[8] The respondent opposes the application on four grounds. First, the entire foundation of the applicants' case is misplaced as they will be entitled to recover their costs because the provisions of the Insolvency Act 24 of 1936 ("the Act") makes provision for cost contribution by creditors. Second, this court has already found that the applicants are not entitled to security for costs and this application is another attempt to obtain security which has already been refused. Third, all the legal authorities that the applicants rely upon relate to champertous agreements or fall under a different factual matrix. Fourth, no case has been made out for the exercise of the Court's discretion in favour of the applicants.

[9] The legal framework within which this decision has to be considered relates to joinder, litigation funding and the Act.

Joinder

[10] The procedure of joinder is regulated by Uniform rule 10 which provides at rule 10(1):

‘Any number of persons, each of whom has a claim, whether jointly, jointly or severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action provided that the right to the relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.’

[11] The test for joinder of a party is whether a party has a ‘direct and substantial interest’ in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by a judgment of the court.¹ A mere financial interest is an indirect interest and may not require joinder of a person having such interest.²

[12] In *Snyders and others v De Jager*,³ the Constitutional Court confirmed ‘that the test for joinder is that a litigant must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned’.⁴

¹ *ABSA Bank Ltd v Naude NO and others* 2016 (6) SA 540 (SCA) at 542I–543C.

² *Standard Bank of South Africa Ltd v Swartland Municipality* 2010 (5) SA 479 (WCC) at 482F–483A.

³ *Snyders and others v De Jager* [2016] ZACC 54.

⁴ *Snyders* para 6.

Litigation funding

[13] Litigation funding is largely novel in South African law. Its history can be traced to the judgment of *Price Waterhouse Coopers Inc and others v IMF (Australia) Ltd and others*⁵ (“PWC1”) where a litigation funder was joined to the litigation. In *PWC1*, the court developed the common law and held that the litigation funder should be joined to the proceedings in order to enable the court to exercise its discretion regarding costs against the funder of the litigation.

[14] *PWC1* was developed against the judiciousness of *Price Waterhouse Coopers Inc and others v National Potato Co-operative Ltd*⁶ where the Supreme Court of Appeal reconsidered the lawfulness of champertous agreements against the changed circumstances, specifically the advent of the Constitution, and stated that the provision of good faith finance to a poor litigant and assistance to prosecute an action in return for a reasonable recompense or interest in the suit, would not be unlawful or void.

[15] *PWC1* was about a champertous agreement. The joinder of the co-owner of the claim was allowed as a measure to prevent possible abuses arising from champertous agreements.

[16] In *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and another, and Four Related Applications*⁷ (“*EP Property Projects*”) the brief facts were that one Naidoo, the litigation funder, had concluded an agreement with one Marais which gave Naidoo a direct and substantial interest in the litigation. Naidoo became the owner of the claim; it was her funding that enabled the continuation of the litigation. She appointed her own legal team on her behalf and on behalf of Marais and she stood to acquire a substantial benefit if Marais was ultimately successful in the litigation. Naidoo had consented to her joinder

⁵ *Price Waterhouse Coopers Inc and others v IMF (Australia) Ltd and others* 2013 (6) SA 216 (GNP).

⁶ *Price Waterhouse Coopers Inc and others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para 27.

⁷ *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and another, and Four Related Applications* 2014 (1) SA 141 (WCC).

to the proceedings and it was not an issue that the Court had to consider. The High Court held that Naidoo was the real party to the litigation as she not only funded the whole litigation but she was also in full control of the litigation and stood to benefit substantially if Marais was successful.

[17] The Court referred to *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others*⁸ ("*Dymocks Franchise Systems*") where the Privy Council, in an appeal from the Court of appeal in New Zealand, set out guidelines derived from English and common law authorities for the exercise of a Court's discretion to make costs orders against a party who was not a litigant. The concepts of 'real funder' and 'pure funder' were raised.

[18] The Court held that Naidoo was the 'real funder' as she held all the rights of a party to the proceedings and she was not a 'pure funder' (namely funders with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course).

[19] In *Naidoo v EP Property Projects (Pty) Ltd*⁹ the Supreme Court of Appeal agreed with the High Court that in the circumstances of the case, namely the critical role that Naidoo played in financing and controlling the litigation to the exclusion of Marais and the substantial benefits she stood to receive, it was just and fair that she should be ordered to pay the costs.

[20] *Scholtz and another v Merryweather and others*¹⁰ ("*Scholtz*") involved a damages claim. Merryweather sought the joinder of Scholtz Senior (Scholtz's father) on the basis that he was funding the litigation for his son. Scholtz senior did not oppose the application for his joinder. The Court referred to the decisions in *EP Property Projects* and *Dymocks Franchise Systems* and ordered that Scholtz senior be jointly and severally liable with his son for the costs of the application on the basis that he funded his son's litigation and had substantially controlled the proceedings.

⁸ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2005] 4 All ER 195 (PC).

⁹ *Naidoo v EP Property Projects (Pty) Ltd* 2014 JDR 1509 (SCA) para 40.

[21] In *Gold Fields Ltd and others v Motely Rice LLC*¹¹ (“*Gold Fields Ltd*”), the Court dealt with an application by Gold Fields Ltd to join Motley Rice LLC in a pending certification application. The Court analysed the cases relating to litigation funding in the context of an application for the joinder of a non-party litigation funder as a party to the application for certification of a class action. The Court held that Gold Fields Ltd had failed to prove that Motely Rice stood to benefit from the certification application or that it substantially controlled the proceedings and on that basis, the joinder application was refused.

[22] Save for *Scholtz’s* judgment, the common theme in all the South African cases is that there existed an agreement between the parties which afforded rights and obligations and that agreement gave the litigation funder substantial control over the litigation.

[23] The present matter is different as the applicants seek to join the majority creditor to the main action.

The trustees’ duties and the legal framework in the Insolvency Act

[24] The functions of trustees are essentially to control and administer the property and affairs of an estate and to liquidate it in accordance with the applicable law.¹² Trustees occupy a position of trust, not only towards the creditors but also towards the insolvents.¹³ They are responsible for doing everything necessary for, or collateral to, the administration and distribution of the insolvent estate.¹⁴

¹⁰ *Scholtz and another v Merryweather and others* 2014 (6) SA 90 (WCC).

¹¹ *Gold Fields Ltd and others v Motely Rice LLC* 2015 (4) SA 299 (GJ).

¹² *Commissioner of South African Revenue Services v Stand Two Nine Nought Wynberg (Pty) Ltd and others* [2006] 4 All SA 11 (SCA).

¹³ *Jacobs v Hessels* 1984 (3) SA 601 (T) at 605G.

¹⁴ *Lamprecht v Lamprecht’s Trustees* 5 CTR 361 at 363.

[25] The trustees act in the interest of creditors and whilst they might take instructions from the creditors of the estate they might also, in certain circumstances, ignore the creditors' instructions.¹⁵ Trustees cannot render the creditors of an estate personally liable as principals to a successful party for the costs of unsuccessful, but duly authorised, litigation instituted by them,¹⁶ save in a case of contribution being levied against the creditors.

[26] In the main action, the trustees are pursuing claims in terms of statutory duties imposed upon them.

[27] The relevant portions of the Act are summarised.

[28] Section 14(3) provides that in the event of a contribution by creditors under s106, the petitioning creditor, whether or not he has proved a claim against the estate, would be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition.

[29] Section 32 affords the trustee(s) the right to recover the value of the property or a right or to set aside any disposition of property or for the recovery of compensation or a penalty. If trustee(s) fail to take proceedings envisioned in subsection (1) the creditor may do so in the name of the trustee(s) upon an indemnification by the creditor. The indemnity is for the trustee(s)'s benefit.

[30] Section 73(1) provides that if the trustees are authorised to institute legal proceedings, all costs incurred by them, including those awarded against the estate, shall be included in this costs of the sequestration of the estate.

[31] Section 73(5) envisages the master exercising a discretion to disallow costs in the event that trustees engage in bad faith, negligent or unreasonable legal proceedings.

¹⁵ *Jankelow v Binder, Gering and Co* 1927 TPD 364.

¹⁶ *Collision Ltd v Castle Wine and Brandy Co* 1907 TS 587 at 609.

[32] Section 106 makes provision for where there is insufficient free residue in an insolvent estate to meet the costs of the sequestration, the creditors shall make good any such deficiency. Only if there were no other proved and concurrent creditors (including the petitioning creditor) able to contribute, would the secured creditors be called upon to pay.¹⁷

Discussion

[33] The fundamental question in this application is whether the respondent (as creditor in an insolvent estate) has a material interest in the outcome of the main action or whether it has an indirect financial interest?

The applicants' submissions

[34] Counsel for the applicants placed reliance on *The Square Grip Reinforcement Co (SA Pty) Limited v Barclays National Bank Ltd and others*¹⁸ ("*Square Grip*"). In *Square Grip*, the trial Court was involved with, inter alia, the interpretation of s 81 of the Bills of Exchange Act 34 of 1964, in circumstances where there was a claim for payment of a cheque drawn on Barclays Bank which did not reach its intended destination and which was paid to the credit of another party. Fannin J decided that Barclays Bank had a real and substantial interest in the matter as one of the issues was whether Barclays Bank was negligent in paying the cheque. The trial Court ruled that it could not proceed until the bank had been joined and adjourned the case. An application for leave to amend to cite Barclays Bank as an interested party in the main action was then instituted.

[35] Counsel for the applicants urged me to follow *Square Grip* and join the respondent as a matter of course thereby allowing it to raise whatever defence it might have at the trial. The facts in *Square Grip* are substantially different

¹⁷ Section 106(a) read with s 89(2) of the Insolvency Act 24 of 1936; *Firststrand Bank Limited v the Master of the High Court, Pretoria and others* 2021 (4) SA 115 (SCA) paras 40–41 and 45–46.

because the trial Court came to the conclusion that Barclays Bank had a real and substantial interest in the litigation because one of the issues was whether it was negligent in paying out the cheque.

[36] Counsel for the applicants also relied on *The Gap, Inc and others v Kingsgate Clothing (Pty) Ltd and others*¹⁹ (“*The Gap*”) for authority that they need only establish a prima facie cause of action, contending that the Court is not called upon to consider the prospects of success in order to join the respondent. *The Gap* concerned the joinder of Stuttafords in the context of uniform rule 24(2). The proposed claim in reconvention disclosed a cause of action for a declaratory order. Both Gap and Stuttafords were interested parties. Arising from the allegations made in the claim in reconvention, Stuttafords had a direct and substantial interest in the proposed declaratory relief apart from the interdictory relief which was also claimed. On this basis, Stuttafords was joined to the proceedings.

[37] *The Gap* is distinguishable as the Court there established, as a matter of fact, that there was prima facie cause of action and that Stuttafords had a direct and substantial interest in the proposed declaratory relief claimed.

[38] Counsel for the applicants submitted that the applicants’ prima facie cause of action was one of costs. I do not believe costs on its own can be a valid cause of action, it is usually awarded to indemnify a litigant for the costs incurred for having been unjustly compelled either to initiate or defend litigation,²⁰ and is accordingly ancillary to an adjudication of the dispute in the main case. However, a right to claim the costs of a legal suit where the institution of the legal suit constitutes a delict after the conclusion of a legal suit, whether theoretically conceivable, does not arise for consideration in this case. The applicants’ submission must be viewed in the context of litigation funding where costs are being claimed against a non-party who is trying to hedge its

¹⁸ *The Square Grip Reinforcement Co (SA Pty) Limited v Barclays National Bank Ltd and others*, unreported judgment, 10 December 1975, NPD, case no: 467/75.

¹⁹ *The Gap, Inc and others v Kingsgate Clothing (Pty) Ltd and others* [2009] JOL 23440 (KZD).

²⁰ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488–489.

bets by, on the one hand, substantively participating as a party but on the other, claiming not to be a party when it comes to costs.²¹

The security for costs application

[39] In 2017, the applicants instituted an application to compel the furnishing of security for costs in the main action. This application was opposed and dismissed with costs.

[40] In the security for costs application²² Sishi J held:

‘[36] What is clear from the documents in this matter is that the claim instituted by the [trustees] and relating to the impeachable dispositions, is a clear and solid claim, particularly in circumstances where given the opportunity to demonstrate that payment had in fact taken place, the defendants have failed to do so or to justify the dispositions made to them. The request for further particulars by the [trustees] was not properly responded to by the defendants. ...

[42] Furthermore, the founding affidavit does not contain allegations supporting the application for security for costs demonstrating that the action lodged by the [trustees] is vexatious and frivolous. It appears clear that the defendants are attempting at all costs to avoid answering the claim put to them.

[43] It was correctly pointed out on behalf of the plaintiffs that in circumstances where valuable properties were disposed of by an insolvent shortly/prior to their sequestration and in the face of a judgment, the above court would be cautious in barring the plaintiffs in their capacities as trustees in the insolvent estate from taking the requisite action to recover the assets so disposed of simply because there are no funds or assets of value in the insolvent estate from which to pay costs. If this were the case, this defence would no doubt be raised by every insolvent who has disposed of his assets and prior to his sequestration.’

²¹ A C Cilliers and C R Cilliers *Law of Costs* 3 ed para 2.02.

²² Case no: 10832/2015, unreported, delivered on 13 November 2017.

[41] Plainly, Sishi J observed that the trustees have a good claim, the main action is not frivolous or vexatious and that the applicants were seeking security for costs as a ploy to avoid the claims in the main action.

[42] Counsel for the applicants submitted that the exercise of the master's discretion in s 73(5) of the Act may impact upon the applicants obtaining their costs, if successful at trial. This submission presupposes that the trustees have acted in bad faith, negligently or are unreasonably incurring costs. In the face of the finding of Sishi J, this point has no merit.

[43] Counsel for the respondent submitted that the security for costs application was launched on the basis that the trustees did not have sufficient funds to pay their costs, which is the same basis for this application.

[44] This application to join the respondent and the application for security for costs are not mutually exclusive and can be used in conjunction.²³ The security for costs application does not impede the bringing of this application.

[45] Counsel for the respondent further submitted that when there is no free residue, or if it is insufficient, the first port of call would therefore be to look to the petitioning creditor, the respondent, to contribute, along with concurrent creditors who have proved their claims, and secured creditors who would have ranked upon the surplus of the free residue.

[46] Section 106 of the Act requires creditors to make good any deficiency in the insolvent estate. This mechanism negates any concern that the applicants may labour under as any deficiency would have to be made good by the respondent and other creditors.

²³ *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) paras 16 and 17.

[47] The respondent is the petitioning creditor and the major creditor in the insolvent estate. By operation of law it would be obliged to contribute for any shortfall occasioned by any cost order granted against the trustees in the main action.

Summary

[48] The respondent is the creditor in the insolvent estate. The main action instituted against the applicants is being pursued by the trustees in terms of their statutory duties. Besides being a creditor and providing funding to the trustees, there is nothing to suggest that the respondent controls the litigation. The litigation is authorised and conducted by the trustees. The only benefit to the respondent is an indirect financial interest, and this is dependent upon the success of the trustees in the main action. In my view, at best, the respondent has an indirect financial or commercial interest.

[49] The applicants' contention that the respondent is engaged in luxurious litigation without any risk of a costs order being awarded against it misconceives the respondent's interest and role in the litigation. It obtained a sequestration order and the trustees of the insolvent estate, in the exercise of their independent judgment, are in control of the litigation and are pursuing the litigation for the benefit of the *concursum creditorum*. The applicants' contention also avoids s106 of the Act which makes provision for a contribution for costs from the creditors in appropriate circumstances.

[50] To allow the joinder of the respondent under these facts would create a chilling effect on trustees and creditors instituting action to set aside impeachable dispositions and the like, which would impact upon the trustees' statutory obligations.

[51] The parties agree that the trial might proceed for ten days. If joined, the respondent would have to participate in a ten-day trial where it would have no active role save to advance an argument for costs at the end of the trial. The prejudice to the respondent is manifest.

[52] Accordingly, the application falls to be dismissed.

Costs

[53] This application was set down on 12 April 2022, but due to the torrential rains in Durban, the Court was unable to operate and did not proceed on the day. The parties agreed at the hearing that the costs for 12 April 2022 would be costs in the cause.

[54] In my view, having considered the submissions and arguments, costs should follow the result in this matter. The costs of senior counsel are justified in the circumstances of this case including the costs of two counsel, where so employed.

Order

[55] In the circumstances, I make the following order:

- 1 The application for the joinder of the respondent is dismissed including the ancillary relief claimed with such joinder.
- 2 The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application, including the costs of two counsel where employed and including the costs of 12 April 2022.

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GOUNDEN AJ

APPEARANCES:

Counsels for the applicants	:	R Ungerer (heads of argument prepared by A Findlay SC and R Ungerer)
Instructed by	:	Zarina Chan & Associates 118 Problem Mkhize Street Suite 102C, Kaliden House Morningside Durban
Counsels for the respondent	:	M Leathern SC A van der Merwe
Instructed by	:	Van Rensburg Koen & Baloyi Attorneys 193 Blackwood Street Arcadia c/o Shepstone & Wylie Attorneys 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks
Date of set down	:	12 April 2022
Date of hearing	:	21 April 2022
Date of judgment	:	6 July 2022