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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: A139/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

DATE: 27 JUNE 2024

SIGNATURE:

In the matter between:

MILILE MPAMBANISO

Appellant

and

JAMES DAVISON

First Respondent

and

SQUIRREL BENEFIT ADMINISTRATORS (PTY) LTD

Second Respondent

Delivery: *This judgment is issued by the Judges whose names appear herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed to be at 10:00 on 27 June 2024.*

Summary: *Appeal - whether court a quo misdirected itself - agreement to invest funds at First Respondent's 'discretion'. Court a quo held appellant failed to prove agreement with First Respondent and abandoned claim against Second*

Respondent.

On appeal majority judgment found court a quo misdirected itself and did not consider the term of the agreement. Appeal upheld and awarded costs on an attorney and client scale.

The dissenting minority judgment held that Appeal should be dismissed with costs.

JUDGMENT

NTLAMA-MAKHANYA AJ (COLLIS J CONCURRING):

[1] This is an appeal to the Full Court of the Gauteng Division, Pretoria, with the leave of the Supreme Court of Appeal (SCA) dated 26 May 2022 against the whole judgment of the court *a quo* granted on 13 December 2021 under case number: 39127/2018.

[2] The appellant's claim was dismissed with costs by the court *a quo* in that:

[2.1] the appellant failed to prove that his agreement was with the First Respondent and that he had abandoned his claim against the second respondent.

[3] The appellant contends that the court *a quo* erred in the aforesaid findings and was entitled to a judgment against the First Respondent alternatively the Second Respondent.

[4] The core content of the argument raised by this appeal is to determine whether the appellant:

[4.1] succeeded in proving his claim against the First Respondent.

[4.2] abandoned his claim against the Second Respondent, and

[4.3] if both issues are in the negative, whether the Second Respondent's obligations were transferred to Squirrel Trust Administrators (Pty) Ltd (STA)?

[5] It is important to place this appeal in its historical context that will inform the determination of the legitimacy of the substance of the appeal.

Brief background facts

[6] In this matter, the appellant entered into an oral agreement with the First Respondent to invest his funds at his discretion with a *proviso* to pay the investment on demand which was confirmed by the email communication between the parties. As correctly captured in the said communication on 01 February 2015 that the Appellant (Mpambaniso wrote to the First Defendant (Davison):

"Hi James

Please find proof of the payment of R2.7 m which I requested you to invest on my behalf This money was paid into my attorney's trust account in turn I instructed them to transfer it to Stemela Lubbe, who are attending to some of my personal matters. In the meantime, invest it at your discretion.

Regards

Milile"

[7] Davison had earlier written on 29 January 2015 to Amanda (who was employed at Mpambaniso attorneys) and stated:

"Afternoon Amanda

As per my discussion with Milile, please could you transfer the funds received for Milile Mpambaniso to Squirrel Benefit Administrators Trust Account

Standard Bank,

Brooklyn,

Account Number: 0[...]

The Funds will be transferred to Caleo for further investment".

[8] It was the appellant's submission that the above communication was a clear demonstration of Davison's directive for the money to be transferred to the *SBA* account in conformity with the mandate to invest it at his discretion.

[9] It was also the appellant's further argument that the First Respondent exercised the discretion bestowed on him and there was no reason to doubt the way in which he played in the investment of the funds and for their transfer into the *SBA* account.

[10] The appellant also took a swipe at the reasons proffered by the court *a quo* in dismissing his application. He contended that the court *a quo*:

[10.1] was misdirected in holding that the appellant had paid his money into the Second Respondent whilst it was that the First Respondent that was informed that the money was paid into his attorney's account for investment at his discretion.

[10.2] did not understand that it was the First Respondent who gave instructions to have the funds transferred to the Second Respondent for investment in *Caleo*.

[10.3] did not give weight and substance to the content of the agreement, given that the appellant had specifically mandated the First Respondent to invest the funds at his discretion, the appellant would not have been concerned with the way the First Respondent exercised his discretion in investing the funds.

[11] The Respondents opposed the appeal and acknowledged that it was common cause that the agreement and its terms were not in dispute. However, the Respondents argued that the court *a quo* judgment could not be faulted in that the contentious issue was whether the appellant contracted with the First Respondent in his personal capacity or *SBA*. The Respondents also held that the appellant abandoned his alternative claim, and it became moot for this adjudication. They advanced their argument by holding that the appellant was to blame in that he introduced the alternative claim as a caution through the advice of his legal representative which meant that there was only one issue for consideration whether he contracted with the First Respondent.

[12] It is not the intention herein to provide an exhaustive background on the content of this dispute and appeal. However, it is imperative that I situate the matter in the context of the agreement entered by the parties to determine whether the court *a quo* was justified in dismissing the appellant's application.

Assessment

[13] I move from an assertion that the court *a quo* did not give a meaning and proper context in which the agreement was entered. It is my view that the foundations of the agreement as to be shown below were in *fact and law*, not contested, which leaves me with the determination of the merits of this application.

[14] The gist of the appeal in this matter was whether the court *a quo* was misdirected in determining the legal question regarding the correct identity of the contracting parties in said agreement. Simple question, did the appellant enter into a binding agreement with the First Respondent or Second Respondent, alternatively abandoned his claim against the latter?

[15] The terms of the agreement in the case *in casu* which were not contested by the Respondents were for the First Respondent to invest the funds at his own discretion with a qualification for the repayment on demand.

[16] At the heart of the First Respondent's objection to the appellant's claim was not based on the content of the agreement itself but the identity of the contractor, which is the First Respondent and the mootness of the appellant's alternative claim on the adjudication of this matter. This was also the foundation of the court's *a quo* reasoning including the dismissal of the application for leave to appeal of its judgment.

[17] It is my considered opinion that the court *a quo* did not give meaning and weight to the founding primary term of the agreement which was for the First Respondent to *invest the funds at his discretion*. The court *a quo* did not consider the directive as *per* the agreement to be the primary source and substance of the appellant's claim. It also misapplied the facts which led to the misdirection of the law in determining the identity of the contracting parties in the dispute.

[18] I am persuaded by the principal term of the agreement which was correctly captured in the e-mail communication carrying a simple obligation for the First Respondent to undertake the duty entrusted upon him which entailed more of a fiduciary responsibility towards the appellant. The Collins English Dictionary defines '*discretion*', which is also applicable in the context of this case, as the '*freedom to make judgments and to act as one sees fit*'. Simply put, the '*discretion*' enables the trusted person with the obligation, to act *bona fide* and independently. Cameron JA in *Land and Agricultural Development Bank of SA v Parker* [2004] 4 All SA 261 (SCA) contextualised the importance of the role of the entrusted person and likened it to an '*independent outsider*', (para 36) as is the case with the First Respondent. to ensure the [(i) *proper investment of the funds*; (ii) *use of his skills and attributes in investing the funds and (iii) avoid breaking the trust relationship in the handling of the invested funds*'], (para 36). As correctly captured by Cameron JA in *Parker*, in this case, the First Respondent was entrusted by the appellant to act diligently and independently in the management of his investment as reasonably expected of him. It was not for the appellant to learn of the insolvency of *SBA* that he would not be paid the portion of his investment on demand. The appellant needed not to be a '*doubting Thomas*' on the ability of the First Respondent, as a specialist in his area of involvement, to make decisions that would be beneficial to him. The significance of

such a trusting relationship was endorsed by Lewis JA in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] 3 All SA 291 (SCA). Lewis JA in that case held:

it is in principle for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being question', (para 16).

[19] Although the *North East Finance* judgment involved the arbitration proceedings, it is my view that the principle developed therein is of direct application in the case *in casu*. Its relevance is with reference to the interpretation of the terms of the agreement that was indicative of the true intentions of the parties in forming a binding agreement between them. In the present matter, it was for the First Respondent performing his specific obligation to act independently of interference by the appellant in the investment of the funds. In turn, it was for the latter to get the *reward of his investment on demand*. It is my opinion that the carriage of the *proviso* for the '*payment on demand*' struck at the core of the 'trust' relationship between the parties to specifically perform in terms of their agreement. Reading the terms of the agreement between the parties 'investing the funds at the discretion of the First Respondent' evidences their commitment which solely bound the First Respondent to perform as is required in terms of the entrusted obligation.

[20] It is my further assertion that the court's *a quo* put a *blind lens* on the fact that the appellant did not have a direct relationship with the Second Respondent. The First Respondent failed to act genuinely in undertaking the aspirations as envisaged in the agreement. The First Respondent did not carry a mere exercise of a discretion in the investment of the funds but owed a fiduciary duty regarding the way in which he managed and administered the appellant's financial affairs. The court *a quo* misdirected itself by endorsing a well-calculated deception which focused on the identity of the contractor instead of the deeper analysis and review of the term of the agreement. The analysis of the term could have identified the contractor if it was given its meaning and substance regarding the obligation entrusted to the First Respondent.

[21] Let me reiterate, it is also evident that the terms of the agreement were *in fact and in law* not disputed, but the contention was based on whether the relationship was between the appellant and the First Respondent. In this instance, the court *a quo* failed to put the legal lens on the obligation of the First Respondent. The court *a quo* did not acknowledge that it was the First Respondent who did not disclose the *SBA's* financial woes to the appellant. The appellant only knew of the *SBA* insolvency on the failure of the First Respondent to fulfill the second leg of the agreement which entailed the '*payment of the funds on demand*'. The court *a quo* in dismissing the leave to appeal, did not have a doubt on its mind in that the appellant, by his conduct, waived his alternative claim whilst it misapplied the facts into law and did not consider the subject matter of the dispute. The court *a quo* became '*legal blind*' to the foundation of the disagreement. The appellant's claim did not entail a mere '*legal blanket*' but carried the substance and weight on the reasons that justify the interference with the court's *a quo* judgment which is grounded on the discretion that was to be exercised by the First Respondent. Therefore, it is reasonable to interfere in the court's *a quo* judgment and determine that it was misdirected in not holding the First Respondent liable for the payment of the appellant's funds. The First Respondent was the one who was entrusted with a primary responsibility in line with the directive and invested the said funds in a collapsed scheme in *SBA*.

[22] The court *a quo* did not consider the substance of the agreement and is to be faulted by the misdirection it took by failing to give a proper interpretation of the term of '*investing at his discretion and for repayment on demand*' which could have provided an insight on the second question regarding the identity of the contractor. The court *a quo* '*limited its legal insight and role*' by the focus on the identity instead of the essential element of the terms of the agreement that could have been the determinant of the contracting parties. On this basis, it is in the interest of justice to interfere with the decision of the court *a quo* and there is no justified reason for not upholding the appeal.

[23] As regards the award of the costs order, I am persuaded by Sachs J in *Biowatch v Trust v Registrar Genetic Resources* 2009 (10) BCLR 1014 (CC) para 17

in that courts '*should be cautious and not to treat litigants disadvantageously in granting such orders simply because they are pursuing commercial interests nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights by the Constitution*'. The *Biowatch* judgment carries the substance of determining the award of the costs order and I am not of the view that the first Respondent engaged in a frivolous exercise in defending the claim against him but instead exercised his right to have the dispute be resolved before an impartial court of law.

[24] Accordingly, I propose the following order be made:

[24.1] The appeal is upheld against the first Respondent with costs including the costs of the application for leave to appeal in the court *a quo* as well as the costs of the application for leave to appeal in the Supreme Court of Appeal. The costs are to include the costs of senior counsel where so employed.

[24.2] The order of the court *a quo* is set aside and replaced with the following order:

- (a) The first Respondent is liable to pay appellant R3 354 996.59 (Three Million Three Hundred and Fifty-Four Thousand Nine Hundred and Ninety-Six Rands and Fifty-Nine Cents);
- (b) Interest on the said amount at the prescribed rate *a tempore morae*; and
- (c) *Costs of suit.*

N NTLAMA-MAKHANYA AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

I concur as proposed:

**Judge of the High Court
Gauteng Division, Pretoria**

RANCHOD J (Dissenting)

Introduction

[24] I have had the benefit of reading the reasoning and conclusion of the judgment of Ntlama-Makhanya AJ in this appeal and regret to say that I have a different view. My reasons follow. However, I deem it necessary to set out the background facts of the matter in greater detail to provide a proper context for the view that I take in the appeal. It also bears mentioning that although the appellant's heads of argument were prepared by Advocate NG Louw, Advocate MP van der Merwe SC argued the appeal before us.

[25] In what follows I shall refer to the appellant as Mr Mpambaniso or Mpambaniso; the First Respondent as Mr Davison or Davison and the Second Respondent as SBA.

[26] Mr Mpambaniso sued Mr Davison personally and, in the alternative, SBA, for an amount of R3,354,996.59. The claim was based on an alleged agreement in terms of which Mpambaniso instructed Davison to invest an amount of R2,771,934.91 on his behalf. The investment was to be made by Davison in his discretion. Mr Mpambaniso alleged that he gave the mandate to invest to Davison in his personal capacity. He relied on an email he sent to Davison dated 1 February 2015, which I deal with in more detail below.

[27] In 2016 Mpambaniso called up the investment which, at that stage, amounted to R3,354,996.59.

[28] Davison informed appellant that after initially investing the funds through SBA the investment was, on advice from the latter's auditors transferred to an entity called Squirrel Trust Administrators (STA) and that the latter entity was unable to refund the investment amount.

[29] Insofar as Mpambaniso sought to hold Davison personally liable, it was the latter's contention that he had at all times acted in his representative capacity as a director of SBA.

[30] The crisp issue before the court *a quo* for determination was: Did Mpambaniso conclude the agreement with Davison in his personal capacity or with Davison in his capacity as a representative of SBA (the alternative claim).

[31] It would be appropriate to deal firstly with the alternative claim against SBA.

The claim against SBA (the second respondent)

[32] The court *a quo* held that the alternative claim "became moot shortly after the commencement of the trial." In this appeal before us, Mr Mpambaniso contends that he did not abandon his alternative claim against SBA and the court *a quo* erred in finding that he did.

[33] When he testified, Mr Mpambaniso expressly disavowed any reliance on his alternative claim against SBA. He explained that the alternative claim was introduced out of caution on the advice of his legal representatives but that it is no longer his case that the agreement was concluded with SBA. At the commencement of his cross-examination, he again confirmed that he no longer asserted (in the alternative) that the agreement was concluded with SBA and that he accepted that he cannot raise an objection should the defendants request the court to dismiss his alternative claim with costs.

[34] The following transpired during the cross-examination of Mpambaniso:

ADVOCATE SWART: ... it's not your case that the first defendant or the second defendant acted negligently, recklessly or fraudulently. Your case is a simple case in contract?

MR MPAMBANISO: Yes.

...

ADVOCATE SWART: And in these proceedings today ... you explained ... why you alleged in the alternative that the contract was concluded with Squirrel Benefit Administrators [SBA] ... that it was only done on the advice of your legal representatives out of caution.

MR MPAMBANISO: That's correct.

ADVOCATE SWART: But as far as you are concerned, ... you never concluded a contract with Squirrel Benefits Administrators.

MR MPAMBANISO: You're right.

ADVOCATE SWART: And that being so I take it you will and can have no objection if the court at the end of these proceedings dismisses your case, your claim against Squirrel Benefits Administrators.

MR MPAMBANISO: That's for the court, yes.

ADVOCATE SWART: Well I put it to you on your own version, your own testimony, you cannot have an objection thereto.

MR MPAMBANISO: Yes.

ADVOCATE SWART: And we will, based on your evidence ask without first dealing with the evidence given when we argue the case ask that the court dismisses the case against Squirrel Benefits Administrators with costs.

MR MPAMBANISO: You will argue:

ADVOCATE SWART: Yes.

MR MPAMBANISO: Okay"

[35] The court *a quo* held that the alternative claim had been abandoned resulting in it no longer being an issue for adjudication.

[36] In my view, given the facts, the court *a quo* cannot be faulted for finding that Mr Mpambaniso had in fact abandoned his alternative claim as against SBA. Mr Mbabaniso was an experienced attorney who apparently had been in practice for many years. Therefore, he must have been fully aware of the implications of the concessions he made at the time of giving his evidence. To thereafter argue, as he does on appeal, that he did not make such a concession, is untenable and falls to be rejected, as the court *a quo* correctly found. This ground of appeal must therefore fail.

[37] That leaves for consideration whether the agreement was concluded with Mr Davison personally.

The claim against the first respondent

[38] *Mr Mpambaniso's* version in the trial was that he had entered into an oral agreement with Davison, in the latter's personal capacity, in terms of which Davison agreed to invest Mpambaniso's funds at Davison's discretion and to repay the investment on demand.

[39] As I said earlier, Mr Mpambaniso relies on an email dated 1st February 2015, that he addressed to Davison. The following is, *inter alia*, stated in the email:

"Hi James,

Please find proof of payment of R2.7 m which I requested you to invest on my behalf. This money was paid to my attorneys (*sic*) trust account in turn I instructed them to transfer it to Stemela Lubbe, who are attending to some of my personal matters. In the meantime, invest it at your discretion.

Regards, Milile"

He asserted that this was an instruction to Davison in his personal capacity.

[40] It is often said that context is everything - rightly so. In my view, the email must be viewed in its proper context.

[41] Mr Mpambaniso confirmed in his evidence that he had acted as an attorney for several claimants in the Eastern Cape who were injured in road accidents and medical negligence cases. Where the successful claimant was a minor, the trial court would invariably order that a trust be created for the sole benefit of the successful minor claimant and payment of the cost of administration of the trust by specified trustees. The funds would be paid into the trust account of the attorney involved, who would then pay the funds, less the fees and legal costs, into the bank account opened by the appointed trustees. The trustees would pass a resolution to invest the trust's funds on an investment platform administered by SBA. SBA was then mandated accordingly.

[42] Mr Mpambaniso was informed of the services that SBA could offer for trusts created for minors in an email dated 4 December 2013. They included services pertaining to the investment of monies. During 2014 investment services were implemented in respect of at least four trusts. Mpambaniso confirmed that he was involved in all these trusts. This means that, to his knowledge, SBA was mandated by the trustees to invest the trusts' money on an investment platform administered by SBA, as recorded in paragraph 5.1.5 and 5.1.8 of the plea¹.

¹ The relevant sub-paragraphs in the amended plea read as follows:

'[5.1.5] the trustees would pass a resolution to invest the trust's funds on an investment platform administered by the second defendant;

Mpambaniso was aware that mandates for these investments were given to SBA, and not to Davison in his personal capacity.

[43] It should also be noted that Mbambaniso had a 25% shareholding in SBA. He would instruct SBA to register the trusts with the Master's office and, as founder of these trusts, would nominate the specified trustees for the trust.

[44] On 20 November 2014 the amount of R2,762,934.91 that was seized by the National Prosecuting Authority during or prior to the commencement of a case of fraud against Mr Mpambaniso was returned to him. Mpambaniso, as owner of the money, wanted to invest it. This gave rise to the agreement under scrutiny in this appeal.

[45] It was not in dispute that up to the time of the conclusion of the agreement, SBA was the only administrator that played a role in the investment of the funds of the various trusts I have referred to. It was also not in dispute that up to the time of the agreement, and to the knowledge of Mpambaniso, Davison at no stage acted in his personal capacity as administrator, and only conducted business through SBA.

The probabilities

[46] Viewed in the context of the aforesaid facts, it seems to me improbable that Mpambaniso would have mandated Davison in his personal capacity to administer his (Mpambaniso's) own investment. Importantly, Mpambaniso had indicated to Davison that he wanted his funds to be administered on the same platform as that of the trusts created for the minor children. SBA, controlled by Davison and one Kevin Jenkins (Jenkins) had by that time been mandated by various trusts to invest money on an investment platform administered by SBA. Differently put, an investment structure was already in place at the time, in terms of which SBA, and not Davison personally, was the investment vehicle. Mpambaniso, through his involvement with the trusts, was intimately involved in this structure. As I

...

[5.1.8] the second defendant would be mandated by the trustees to invest the money on the investment platform to be administered by the second defendant.

said, he was also a twenty-five percent shareholder of SBA.

[47] In an email from Davison in his capacity as a director of SBA, and copied to his co-director, Jenkins, he records an instruction to Mpambaniso's attorney to transfer the latter's funds to the SBA trust account for the purposes of being transferred from there to Caleo (a fund manager) for further investment. There would have been no need for this process, had Davison contracted in his personal capacity. Mpambaniso's funds would either have been paid directly to Davison, and thereafter to Caleo, alternatively directly to Caleo. Virtually all the emails written by Davison to Mbambaniso were on the letterhead of SBA.

[48] In paragraph 5 of the particulars of claim it is asserted that the agreement was concluded with Davison on or about 1 February 2015. Mr Mpambaniso relies on his email of the same date, which I mentioned earlier, and is central to his claim against Davison. In his evidence he relied heavily on the email as proof of his agreement being with Davison in his personal capacity.

[49] SBA's audited financial statements for the year ended 28 February 2015 records Mpambaniso as its creditor in respect of his investment. Davison's explanation in cross-examination that this would not have been the case if SBA was merely used as a conduit, as asserted by Mpambaniso, was left unchallenged. The financial statements were available to SSA's shareholders, including Mpambaniso, who denied knowledge thereof even though he was a twenty five percent shareholder in the company.

[50] Mpambaniso unequivocally confirmed in cross-examination that, should he want to call up his investment he would look to the party with whom he contracted.

[51] Davison, in his testimony, explained the background to and the transfer of the administration of the investments housed in SBA to the entity called STA. He testified that this was done because the auditors of SBA had said this would be better for audit purposes.

[52] It is noteworthy that Mpambaniso had a twenty per cent shareholding in STA

as well.

[53] On 21 February 2018, in response to a request from Mpambaniso for a payment of R95,000.00 from his investment, Davison informed Mpambaniso by email:

"I cannot make any payments from any of the Squirrel Trust Administrators' bank accounts as both the statutory auditor and the forensic auditor have indicated that STA is insolvent, and making any payments would be deemed to be trading recklessly. This is the exact same reason as why STA was not allowed to make the payment of the forensic auditors (*sic*) invoice and all the parties; were required to pay their share."

[54] Mpambaniso's response on the same day by email was:

"Are you saying my investment is STA money?"

[55] Mpambaniso testified that should he wish to call up his investment, he would look to Davison, who told him that a partial repayment of his investment was not possible because of STA's alleged insolvency. On Mpambaniso's evidence, this would have caused him to demand the repayment of his investment from the party with whom he contracted, being Davison in his personal capacity. However, his own evidence was that he demanded payment of his investment from SBA, and not Davison, on 21 February 2018. The letter of demand is headed "M MPAMBANISO INVESTMENT TO SQUIRREL BENEFIT ADMINISTRATORS"; is addressed to the directors of SBA, being Davison and Jenkins; and calls up Mpambaniso's investment made in terms of the email dated 29 January 2015 read together with that of 2 February 2015. In the former email, which is from Davison to one Amanda of Mpambaniso's attorneys at the time, the relevant portion reads:

"As *per my discussion* with Milile, please could you transfer the funds received for Millile Mpambaniso to the Squirrel Benefit Administrator Trust Account....

The funds will be transferred to Caleo for further investment."

[56] The email dated 1 February 2015 (quoted earlier) from Mbambaniso to Davison, tells Davison to invest the funds at his discretion. In my view, interpreted in its proper context, the reference to *you* in the email cannot be anything other than as a reference to Davison in his capacity as representative of SBA. The email must be interpreted in its proper context. The following is relevant in this regard.

[57] During the trial, Mpambaniso explained his conduct in calling up his investment by heading the letter of demand with the words "M MPAMBANISO INVESTMENT TO SQUIRREL BENEFIT ADMINISTRATORS" [SBA] as follows:

" ... What I did, what brought them in as SBA it was because their trust account was used as a conduit. So, I did not know when the money came back, to which account was it deposited, it was more about looking for my money because the money was never going to be deposited directly to me from Caleo because I had no connection with Caleo, so I am saying to you the reason I wrote a letter to the directors is because their trust account was used."

[58] This does not explain the heading to the effect that the investment was made through SBA. The explanation that SBA was used as a trust account flies in the face of Mpambaniso's unequivocal evidence that, if he wanted repayment of his investment, he would look to the party with whom he contracted.

[59] A day after his letter of demand - on 22 February 2018 - Mpambaniso emailed the auditors of SBA and copied it to SBA's directors as well, i.e., Davison and Jenkins. In it he once again records the subject matter as "M MPAMBANISO INVESTMENT TO SQUIRREL BENEFIT ADMINISTRATORS". He then says:

'On 2nd February 2015, an amount of R2,771,934.91 was transferred to Squirrel on the mandate that it be invested and accepted on that instruction. Attached is the instruction correspondence with Mr. Davison (Director).

I now request your advices if the money is in Squirrel's account or anywhere in its books a provision made to pay over the investment now that the company is closing down. For its worth and without moving away from my request, I did request from the directors of Squirrel the paying over of the investment.'

[60] This letter was also debated in cross-examination with Mpambaniso. Like the demand of the previous day, Mpambaniso could not explain the reference in the heading of the email to his investment as being with SBA. He also could not explain why he would enquire about the solvency of SBA, if his investment was with Davison in his personal capacity; why he referred to Davison in his capacity as director of SBA and why he recorded in the letter that he did request from *'the directors of Squirrel the paying over of the investment'*.

[61] Mr Mpambaniso sought to explain why he pursued other avenues to recover his investment if Davison was personally liable. He said he was advised to 'follow the money' by one Advocate Stimela. However, *following the money* would not vest Mpambaniso with contractual rights against any party other than his contractual counter party. It seems improbable that Mr Stimela, an advocate of many years standing, would not have advised Mpambaniso to look to the party with whom he contracted. The gist of Adv Stemela's evidence was that he advised Mpambaniso to contact everyone that was involved with the money. He explained his conduct in cross-examination:

'It was based on the human side of me which was then let's get the money. If the money has touched the Union Building, let's go to Union Building.'

[62] Mpambaniso informed Adv. Stemela after receipt of the email from Davison on 21 February 2018 advising him that payments cannot be made from any of STA's bank accounts. It appears from Adv. Stemela's evidence that he was aware of this correspondence:

"ADVOCATE SWART: Now if that is so then it seems to me that he

[Mpambaniso] would have told you that he got told that the money cannot be paid from STA because this is what he was told in the email.

MR STEMELA: It may well be that but what I recall was that there was a, there was some writing, a document, which then we discussed which reflected that the monies were paid to STA and hence that is my advice, my suggestion that you know, let's speak or go and write a letter and enquire about the money from STA and whenever [sic] it has been."

[63] It seems logical that, on the version that Mpambaniso was told to *follow the money*, he would have addressed a demand to STA as the demand was not concerned with the contracting party, but with where the money had flown to. However, in contradiction to this version, a demand is addressed to SBA, and not STA. In my view, the explanation why a demand was made from SBA on 21 February 2018, and not to Davison personally, falls to be rejected.

[64] In the result there was no acceptable explanation proffered for Mpambaniso's conduct, viewed in the context of his evidence that should he want repayment of his investment he would look to the party with whom he contracted. Significantly, the first recorded assertion of an agreement with Davison in his personal capacity is only months thereafter, in Mpambaniso's attorney's letter of 24 May 2018. The inescapable inference is that Mpambaniso, having realized that he might not successfully recover his investment from SBA, opted to look to Davison in his personal capacity.

[65] It is, under these circumstances, in my view improbable, in the absence of any explicit evidence, that Mpambaniso and Davison would bypass the structures already in existence and conclude an agreement that Davison was mandated in his personal capacity to administer Mpambaniso's investment.

[66] The majority judgment concludes by emphasizing the fact that Davison was told to invest the funds '*at your discretion*' and that repayment was to be made on demand, ergo he was personally liable. A juristic entity acts through its authorized

officials. If a discretion is to be exercised by it, it follows that it does so through its duly authorized officials. Hence the mere fact that Davison was to exercise a discretion cannot, without more, lead to a conclusion that he was instructed to invest the funds in his personal capacity. Likewise, the fact that the investment was to be repaid on demand.

[67] In my view, the appeal against the first respondent should be dismissed.

Costs of the appeal

[68] The majority judgment orders that the respondents pay the costs of the appeal on the attorney and client scale. The issue of a punitive costs order was not raised or debated in the hearing before us. In fact, neither counsel for the parties argued for a punitive costs order. They submitted that the normal costs order should follow the result of the appeal (including costs of senior counsel). It is so that the award of costs is in the discretion of the court. However, the discretion must be judicially exercised. Where a court intends to award a punitive costs order, it is a salutary practice that the litigants be afforded an opportunity to make submissions to the court on that aspect.

[69] In *Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)* at paras 220- 222, Khampepe J, writing for the majority states:

2220 ... While the test for awarding a personal costs order or costs on a punitive scale may overlap, an independent, separate enquiry should be carried out by a court in respect of each order. Both personal and punitive costs orders are extraordinary in nature and should not be awarded "willy-nilly", but rather only in exceptional circumstances.

221... The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this Court in *Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of

expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.

222 The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.' (Footnotes omitted.)

[70] None of the grounds for a punitive costs order arose here. It was a normal dispute regarding the terms of a contract.

[71] I would dismiss the appeal with costs including the costs of the application for leave to appeal in the court *a quo* as well as the costs of the application for leave to appeal in the Supreme Court of Appeal. The costs are to include the costs of senior counsel where so employed.

RANCHOD J
Judge of the High Court
Gauteng Division, Pretoria

Date Heard: 21 November 2023

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