



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 16019/2020

- (1) REPORTABLE: **NO.**
(2) OF INTEREST TO OTHER JUDGES: **NO.**
(3) JUDGMENT : **12 AUGUST 2024**

.....

IN THE MATTER BETWEEN –

MADUNA, PENUELL MPAPA

APPLICANT

And

MADUNA, NOMPUMELELO CHERYL N.O.

FIRST RESPONDENT

ROBINSON, MELISSA ELLEN N.O.

SECOND RESPONDENT

DE KOCK, HAROLD LEE N.O.

THIRD RESPONDENT

JUDGMENT

SNYCKERS AJ:

INTRODUCTION

1. This application concerns the distribution of immovable properties by a trust, the Nompumelelo Maduna Family Trust ('the NM Trust'), of which the respondents are the trustees, to an erstwhile beneficiary of the NM Trust, the applicant ('Maduna').
2. That the properties are to be transferred is not in dispute. What is in dispute relates solely to certain aspects of the costs associated with such transfer.
3. The ultimate dispute between the parties is narrow and relatively simple. The procedural and jurisprudential debates revolving around this narrow and simple dispute are unfortunately more complicated than they need be. Some exposition is required to explain and determine the applications these debates have spawned.
4. The dispute relates to the extent to which Maduna or the NM Trust is liable for additional costs caused by the fact that Maduna altered his election in respect of the transferee of the immovable properties in question: initially, he elected to have the properties transferred into a trust, to which I shall, as the parties did,

refer as the KF Trust, and then he changed his mind and wanted the properties transferred into his name. This alteration may or may not attract duplicated transfer costs, and these run into millions of rands. The NM Trust, accepting that it is liable for “normal or reasonable” transfer costs, contends that it is not liable for such duplicated costs.

THE PROCEDURAL AND JURISPRIDENTIAL ISSUES – AND A BRIEF HISTORY

5. Some exposition is required to understand the complications that attend upon the simple dispute between the parties.
6. In 2017, the trustees of the NM Trust passed two resolutions. Maduna was a beneficiary of the NM Trust. The one resolution resolved to transfer three immovable properties to Maduna, or to a trust of which he was a beneficiary, nominated by him at his election, and gave him fourteen days to accept the benefit. The other resolution did the same with respect to another property, save that it gave seven days.
7. Each resolution contained the following sub-resolution:

“That the TRUST will pay the transfer costs for the property¹ that is distributed to Penuell Mpapa Maduna, on his behalf, in terms of this resolution.”

8. Maduna accepted the benefits and designated the KF Trust.

9. A process was set afoot. It dragged because it took time to establish the KF Trust – specifically to obtain an income tax number. This was something the trustees complained about, as it added considerable delay and attendant costs given that the costs levied by SARS are levied to the date of the relevant transaction, not of the transfers, and it was contended in correspondence with Maduna’s legal representatives that neglect in taking a few simple steps on the part of Maduna was responsible for these increasing costs.

10. In the meantime, several disputes had developed between Maduna, the trustees and various other parties, such that Maduna instituted action on these disputes in June 2017. This action had actually been instituted before the resolutions in question, but this does not matter for present purposes. The summons itself, not the particulars of claim, formed part of the papers before me. It was common cause before me that the details of the action were irrelevant to a proper interpretation of the relevant terms of the settlement agreement for purposes of the matter of interpretation of the resolutions that became the focus of this application. The action was settled by way of a settlement agreement, to which Maduna and the trustees (and the other entities

¹ The first resolution, relating to three properties, used the plural, and the second, relating to one property, the singular.

involved in the action) were party. The settlement agreement was made an order of court on 17 August 2018.

11. The settlement agreement contained a clause 8, in terms of which Maduna agreed to be removed as a beneficiary of the NM Trust. Clause 8.2 recorded that Maduna *“hereby waives and abandons any and all claims and/or rights which he might otherwise have and/or have acquired against and/or in respect of the Trust other than:”*
12. Then follows a listing of claims not waived by clause 8.2, which includes *“as contemplated in [the resolutions] ”*, with the resolutions then being identified and attached to the settlement agreement.
13. I revert to the settlement agreement below.
14. Some two years after the initial election for the properties to be transferred to the KF Trust, Maduna changed his mind. He now wanted the properties to be transferred into his own name.
15. The conveyancers advised that this would probably entail a duplication of transfer costs.
16. The trustees initially adopted the attitude that the resolutions required Maduna to make an election upon acceptance of the benefit within the prescribed period whether he wanted the transfer into his own name or into that of a designated trust, that he had made this election, and that he could not alter this. They would accordingly act on the election, and if the KF Trust renounced the benefit, the properties would be sold on the open market.

17. The trustees' position subsequently became one of not objecting to effecting transfer to Maduna, rather than to the KF Trust, but disavowing liability for any additional costs that this alteration would entail. They also demanded that Maduna indemnify them against any claims the KF Trust may advance as a result of rights it may have acquired out of Maduna's initial election.
18. This is where matters came unstuck. Maduna tendered to pay whatever additional costs would be occasioned by the alteration in transferee, but refused to sign an indemnification, saying the resolutions did not entitle the trustees to any indemnification. By the time the matter came before me, Maduna was no longer offering to assume liability for any part of the transfer costs.
19. The trustees invited Maduna to bring an application to court for declaratory relief, which they said they would not oppose. It was not clear exactly what declaratory relief he was invited to seek.
20. Maduna launched an application in which he sought an order that the trustees take all necessary steps to effect transfer. He also sought the appointment of his own conveyancers as the conveyancers.
21. The trustees brought a counter-application. In it, they sought an order directing transfer of the properties into Maduna's name, an odd order to seek, given that this was the order Maduna was also seeking. They also sought orders in the following terms:

- “3. *The [NM Trust] shall pay, on the applicant’s behalf, the transfer costs in respect of the transfer of the above properties into the name of the applicant.*
4. *The applicant is directed to pay any and all wasted and/or duplicate and/or additional transfer costs and transfer duties, including transfer penalties, which the South African Revenue Service may require or direct to be paid as a result of the change in distribution and transfer of the above properties from the [KF Trust] to the applicant.”*

22. Maduna’s application purported to be an enforcement of clause 8.2 of the settlement agreement (cited above). The trustees in their answer contended that Maduna could not found a cause of action against them on that clause – all the clause did was to make it clear that whatever rights Maduna had under the resolutions were not waived by his agreeing to be removed as a beneficiary; the settlement agreement did not itself in clause 8.2 purport to create any substantive rights for Maduna.

23. For his part, Maduna contended that clause 8.2 incorporated and confirmed his rights under the resolutions and that the trustees had no legal basis for seeking the relief they sought in relation to Maduna’s liability for the additional costs occasioned by the alteration of his election.

ASSESSMENT

24. The debate about Maduna's entitlement to the relief he sought had an air of unreality to it. He sought an order (save for the orders relating to his conveyancers) in the same terms as to transfer as the order the trustees sought in the counter-application. Whether the settlement agreement entitled him to this order or not, both parties sought this order before me.
25. I had directed queries to the parties the week before the matter was to be heard to address me on the logic of the counter-application and opposition to Maduna's application.
26. The trustees' position before me, as advanced by Mr Naidoo, was that, because the basis for Maduna's relief was misconceived (the clause in the settlement agreement created no rights), his application fell to be dismissed, and the counter-relief sought by the trustees with respect to the transfers should really be read as seeking an order that the transfers were to be effected if and only if Maduna paid the additional transfer costs. If there was no basis for either form of relief, then the applications should both be dismissed, and neither party would be the wiser as to the only real dispute between them – whether Maduna should be made to pay some of the transfer costs.
27. I believe the trustees to be correct that clause 8.2 of the settlement agreement does not purport to create any substantive rights. All it does is indicate it does not waive such rights as might otherwise exist, arising from the resolutions it

identifies. Such rights as Maduna may have under the resolutions should be sought in enforcing the resolutions.

28. But Maduna is no longer a beneficiary of the NM Trust. This was what clause 8 brought about. Yet clause 8 clearly intended him still to be able to enforce his rights under the resolutions, and identified these rights by reference to the resolutions. Without clause 8, he may have a standing problem to enforce the resolutions. So his claim to seek to enforce clause 8.2 is in effect a claim to enforce the resolutions.

29. Mr Naidoo submitted that the trustees met a case on the settlement agreement, not one on the resolutions, and were prejudiced in having answered the claim in the manner they did (i.e. purely technically), where they may have answered differently had the claim been brought on the resolutions directly. This is not persuasive. Apart from the legal point that the claim should really have been based directly on the resolutions and not on the exception to the waiver in the settlement agreement, Mr Naidoo could not point to a manner in which a claim based squarely on the resolutions could conceivably have been answered differently to one brought in this way, as the substantive entitlements would be identical. Any claim on the resolutions would in any event have needed to be 'founded' indirectly on the settlement agreement, as, without clause 8.2, Maduna's status as simultaneously not a beneficiary but still entitled to claim under the resolutions could not have been established.

30. In turn, the trustees faced the difficulty that their demand that Maduna bear the "additional costs" was enunciated in the counter-application without seeking to

found this case on a proper interpretation of the terms of the resolutions, but rather on a “requirement” on the part of the trustees of an “indemnification”.

31. It was clear to me that the essence of the trustees’ case was founded on an interpretation of their obligation under the resolutions to bear the costs of transfer, and a contention that this could not extend to the additional costs in question, despite the fact that the counter-application was not clearly built on a proper interpretation of this obligation in the resolutions.

32. Be that as it may, I do not think it overly generous to the trustees² to interpret the following words in paragraph 33.1 of the answering affidavit as seeking to found a case on the extent of the relevant obligation in the resolutions, properly construed:

“First, in terms of the resolutions, the Trust agreed and resolved to pay, on behalf of the applicant, the transfer costs consequent upon the distribution of the properties. The Trust cannot be expected to also pay any wasted transfer costs, duties and penalties as a result of the applicant’s change of mind.”

33. The resolutions envisaged that the Trust would pay the transfer costs entailed by the election made by Maduna. They did not envisage the Trust would pay for more than one election. Acknowledging this as necessarily implicit in the obligation is not quite the same thing as reading a limitation of reasonableness into the obligation, a qualification Mr Gradidge for Maduna submitted could not be read into the words of the obligation in the resolutions.

² at least not more generous than to accept Maduna’s claim as capable of being read as based on the resolutions.

34. It is true that an obligation the scope of which is within the power of the creditor to increase by his actions would tend to be read as implicitly limited by an *arbitrio boni viri* qualification, lest the creditor be placed in a position to determine the extent of the obligation owed to him, something at which the law of contract baulks.³ But there remains a stark distinction between a clause in a contract (or in a resolution) that binds a party to pay all of a certain kind of expense, on the one hand, and a clause that binds a party to pay all of that kind of expense to the extent that it is reasonably incurred, on the other hand.

35. It became clear as the debate unfolded that there were two very different kinds of “additional expenses” contended for by the trustees. First, there was the real prospect that SARS would treat the transaction as entailing two transactions, with two sets of transfer costs, and levy accordingly. This meant that there was a real prospect of duplication of transfer costs directly related to the alteration of Maduna’s election. Second, however, there were “additional costs” associated with Maduna’s alleged laxness in co-operating to see to it that the transfer could occur in time, which caused unnecessary costs associated purely with delay. This second category of “delay costs” was difficult to attribute either to the first or to the second transferee. These different types of costs were set out in two tables attached as A to the replying affidavit.⁴ There were two tables. Each concerned a ‘transfer’ of the relevant properties to the KF Trust and to Maduna, respectively. Each had associated with it the following categories of costs (after in respect of each property, setting out its market value): transfer costs, excluding rates and levies, transfer duty excluding penalties, additional

³ See the discussion in *NBS Boland Bank Ltd v One Berg River Drive CC & Others* 1999 (4) SA 928 (SCA).

⁴ Caselines 1-156.

penalties on transfer duty and total transfer duty including penalties up to 31.10.2023. The total column was not the sum of the preceding three columns, but was in the vicinity of this sum.

36. It seems to me that there is a principled distinction between these two categories of additional costs when it comes to a proper construction of the transfer cost obligation in the resolutions. It does not take much to accept that a business-like interpretation⁵ of the obligation could never include an obligation to pay for two sets of transfer costs – one associated with an election made but abandoned, and another associated with an election made and persisted with. It takes much more to conclude that the term necessarily extended only to all transfer costs “reasonably incurred”, without saying anything of the sort. I revert to this distinction below.

37. I put to Mr Gradidge the proposition that the clause could hardly allow Maduna to cause the transfer costs to accumulate through successive elections to which he then sought to hold the trustees bound, including all associated and wasted costs. Mr Gradidge’s submission in this regard raised an interesting jurisprudential issue. He submitted that the NM Trust was liable for all the transfer costs incurred, without exception, and without regard to Maduna’s having unreasonably increased these costs. But, to the extent that there was a cause of action for a wrong on Maduna’s part for causing such costs, the NM Trust would have a claim against him independent of the obligation in the clause in the resolutions. Such a claim, however, was not before me.

⁵ Mr Naidoo for the trustees urged me to adopt a business-like interpretation of the clause as its proper construction, citing the almost invariably cited authority on interpretation of contracts in this regard, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

38. I have difficulty with this logic. Either the clause entitled Maduna to demand all transfer costs from the trustees, or it did not, and was confined in some way in this entitlement. If it entitled him to all costs, there would be no wrong that he could commit to make that entitlement bigger. If one believes it would be wrong in law for him to make the entitlement bigger, this would be recognition that the contractual entitlement was actually limited to this extent. Put differently, one must find the extent of the trustees' obligation to fund the transfer in the contractual scope of the clause. There is no room for seeing part of what that scope includes as a "wrong" that founds some cause of action outside the scope of the clause.

39. The law is often confronted with cases where a creditor's conduct affects the debtor's contractual obligations – and the solution crafted by the law in such cases is to assess them from the point of view of the discharge of the debtor's obligations, rather than to entertain the creation of causes of action outside the contractual obligation in question. A good example is *Du Plessis v Goldco*.⁶ Here a creditor's frustration of the debtor's ability to discharge an obligation was held to entail the deemed discharge of the obligation. The principle applied in such cases is the foundational principle that no one can take advantage of his own wrong.⁷

40. I don't believe it is necessary to invoke this principle in this case to interpret the trustees' obligation to pay transfer costs as not extending to such transfer costs as are associated with an abandoned election on Maduna's part. I believe such

⁶ *Du Plessis No and Another v Goldco Motor and Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA).

⁷ See paragraph 25 of the judgment.

a limitation of the obligation to pay transfer costs is necessarily implied into the resolution, and is a concomitant of Maduna's obligation to make an election.

41. However, I do not believe the transfer cost obligation clause should be read as applying only to costs "reasonably incurred". This stretches the language of the obligation beyond what is required to give it efficacy. Even if I were wrong in this regard, no case whatsoever was made out on the papers as to where a meaningful dividing line could be drawn between costs reasonably incurred and costs wasted due to conduct on Maduna's part – save as to any costs that would be duplicated as a direct result of the alteration in Maduna's election.

42. I find it very difficult to recognise a basis in law for any indemnification right on the part of the trustees against claims the KF Trust may institute as a result of Maduna's altered election. Crafting some sort of indemnity onto the transfer cost obligation would extend far beyond any proper construction of that clause. It seems to me the trustees were themselves faced with an election, after Maduna purported to alter his election. They could refuse to recognise the alteration and insist on his initial election as binding, as they initially did. Or they could accept the alteration in election, as they then did. Having done so, they must live with the consequences, whatever these may be.

43. I do not believe it would have been appropriate for a court to have granted a declarator, or to have directed the transfer of the properties, in the absence of a dispute about this. But it does seem in the circumstances to be appropriate to seek to be specific, in declaratory form, as to the extent of the trustees' obligation in relation to transfer costs, to avoid further bouts of litigation between the parties on this issue to the extent possible.

44. I agree with the trustees that there is no basis for directing that Maduna be entitled to appoint his own conveyancers. In fact, given that it is common cause that the transfers are to happen, it appears inappropriate to direct this by way of court order, instead of only issuing a declarator on the extent of the respective parties' liability to bear the associated transfer costs.

45. I understand that it is not clear whether SARS would treat the matter as having entailed two transfers and levy duties and costs accordingly, or instead accept that there was one transfer only.

46. In the circumstances, I find that the trustees are obliged to bear the transfer costs associated with the transfer of the properties to Maduna, but not any transfer costs associated with any transfer of the properties to the KF Trust. My order seeks to capture this, including the contingent element attendant upon such costs.

47. The trustees ended up being substantially successful in the relief they sought. It seems appropriate in the circumstances to direct Maduna to pay the costs of the application. It does not appear to me that scale C or B is warranted, adopting the guidance in this regard offered by Wilson J in *Mashavha*.⁸

48. In the circumstances, the following orders are made:

A. It is declared that, in respect of the transfer of the properties listed in paragraph 2 of the applicant's notice of motion, the trustees of the

⁸ *Mashavha v Enaex Africa (Pty) Ltd* Unreported GHCI Case no. 2022/18404 22 April 2024.

Nompumelelo Maduna Family Trust, in their official capacities as trustees, are liable to pay for all and any costs associated with the transfers into the name of the applicant, save for any and all transfer costs, including penalties, that are attributed by SARS to any transfer or deemed or anticipated transfer of such properties to the Kwanokhala Family Trust, in respect of which latter costs the applicant shall be liable.

B. The applicant shall pay the costs of the application on the A scale.

FRANK SNYCKERS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION JOHANNESBURG

This judgment was uploaded onto Caselines and distributed to the parties' legal representatives by email on 12 August 2024; the date of judgment is accordingly deemed to be 12 August 2024

Heard: 31 July 2024

Delivered: 12 August 2024

Counsel for Applicant: B Gradidge

Instructed by: JJ Viljoen Attorneys

Counsel for Respondents: K Naidoo

Instructed by:

David C Feldman Attorneys