IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION-MTHATHA)

CASE NO: 4072/2024

In the matter between:

REBECCA YOLISWA XABA	APPLICANT

And

SHERIFF OF THE HIGH COURT MTHATHA	1ST RESPONDENT
RUTH MARILLER	2ND RESPONDENT
BONGIWE NELANI	3RD RESPONDENT
NOMANDLA MYANDLU	4TH RESPONDENT

JAQUUELINE ANN THURSTON	5TH RESPONDENT
KIM CHANTELLE THURSTON	6TH RESPONDENT

And in the matter between:

NOMANDLA MYANDLU	1ST APPLICANT
RUTH MARILLER	2ND APPLICANT
BONGIWE NELANI	3RD APPLICANT
JACQUELINE ANN THURSTOON	4TH APPLICANT

And

LITHA HYBERT LUDIDI	1ST RESPONDENT
THEMBEKA ELLEN MGUDLWA	2ND RESPONDENT
TABILE MZWAKALI	3 RD RESPONDENT
VIVA YOLANDE MGUDLWA	4TH RESPONDENT
REBECCA YOLISWA XABA	5TH ESPONDENT
VELA SCHOOL	6TH RESPONDENT

JUDGMENT

NKELE AJ:

INTRODUCTION.

[1] The applicant launched urgent application proceedings and obtained a rule nisi as well as an interim order against the respondents. In turn, the respondents instituted a counter application against the applicant.

[2] For the reason that there is a main application and a counter one, in this judgment, for the sake of clarity and to avoid confusion, the parties will be referred to as in the main application. That means Ms. Xaba will be referred to as the applicant, while the respondents in the main application will be described as such, and the respondents in the counter application will be referenced to as the trustees.

[3] On 13 September 2024, the applicant approached this court on an urgent basis seeking an order setting aside a writ of attachment issued under **Case No. 2378/2024** dated 27 August 2024 and the attachment and removal of her movable goods. The applicant also sought consequential relief to the effect that the attached goods be returned to her. The court issued a rule nisi calling upon the

respondents to show cause why the writ of attachment should not be set aside and directed the sheriff to release the applicant's goods under attachment. The main application is being opposed by the 2nd to the 5th respondents.

[4] During the proceedings in the main application, the 2nd to the 5th respondents instituted a counter application against the trustees of the Vela School Trust as well as Vela School. In the counter application the respondents seek an order effectively declaring the trustees to be personally liable for the debt set out in paragraph 1 of the Majiki J order and that they be declared to be personally liable for the costs as set out in paragraph 2 of that order and that they be ordered to pay costs of the counterapplication, jointly and severally, the one paying the other to be absolved. The counter application is being opposed only by the 3rd and 5th trustees, that is, Mr. Mzwakali and Ms. Xaba, while the 6th respondent has filed a Notice to Abide.

[5] It is apposite to mention that during argument parties were directed to file supplementary heads relating to the question whether the respondents' contention that the Majiki J order is clear and explicit, in that the applicant and other trustees are liable to the

respondents in their personal capacities, is inconsistent with the order sought in counter application that seeks a declaratory order against the trustees regarding their liability for the debt and costs. Apparently those supplementary heads of argument were filed as far back as the 7th and 8th of October 2025 but were never brought to my attention either by the Registrar or the parties. They were only brought to me on 12 December 2025 after my secretary made telephonic enquiries with the offices of the parties' legal practitioners.

FACTUAL BACKGROUND

[6] On 31 May 2024, the trustees of the Vela School Trust approached the Makhanda High Court, on an urgent basis, under case number 2241/2024 and obtained an order directing the Standard Bank of Southern Africa to take instructions only from the trustees in relation to who the signatories are or should be for the school's banking account no. 0[...] in the name of Vela P/Primary, held by it.

[7] It is a common cause that on 6 June 2024, the 2nd to 5th respondents approached this court on an urgent basis, seeking an

order for payment of their salaries as the employees of the Vela School. It is also common cause that the non-payment of their salaries was in breach of their contracts of employment. The urgent application was instituted against the five trustees of the Vela School Trust, who were sued in their capacity as persons in control of the school's bank account, and the Vela School. At the time they sued for payment of their salaries, the respondents had been suspended as employees of the Vela School. The court, having found the respondents were still in the employment of the Vela School at the time of their suspension, ordered the trustees as well as the Vela School to pay salaries to the respondents within 48 hours from the date of service of the order.

[8] The respondents' salaries were not paid, in compliance with the order issued by Majiki J, and a writ of attachment was issued against the applicant, and her movable goods were attached and removed as a result. It is the attachment and removal of the applicant's movable goods that triggered the institution of the main application on an urgent basis, which in turn resulted in the order dated 13 September 2024, directing the sheriff to return them. In that application the applicant is challenging the basis on which the writ of attachment was issued against her, in her personal capacity,

when, in the Majiki J judgment, she was sued, together with other trustees, in her official capacity as the trustee of the Vela School Trust. On the other hand, the respondents' main reason for opposing the main application is that they assumed control of the trust's bank account from which the respondents' salaries are paid. In addition, thereto, the respondents argue that on a contextual reading of paragraph 1 of the Majiki J order, the trustees were held liable to pay the debt because they were in possession of the school banking account and not in their official capacities as trustees or representatives of the Vela School Trust. In the counter application, as already stated, the respondents seek a declarator to the effect that on a contextual reading of paragraph 1 of the Majiki J order the trustees were ordered to pay the debt by virtue of their de facto possession of the school banking account and not in their capacities as trustees of the Vela School Trust, that the trustees have acted outside the scope of the trust instrument/ deed of trust, that they failed to act with necessary care, diligence and skill and that they have acted negligently.

[9] As already adumbrated in the preceding paragraphs, the counter application is being opposed by the applicant and the 3rd trustee, while the Vela School has filed a notice to abide by the decision of

the court. In the main the bases for opposing the counter application are that the Majiki J order or judgment does not create personal liability for the trustees, the counter application seeks to unilaterally join other trustees in their personal capacities, the rights of the respondents have already been determined in the Majiki J order or judgment, which relate to payment of their salaries, and the court is not a Legal Advisor and that the counter application seeks, impermissibly so, to vary the Majiki J judgment or order in a manner not contemplated by the Uniform Rules of Court.

COUNTER APPLICATION

[10] I intend to first deal with the counter application before I consider the issues raised in the main application. In this regard, I will first give an exposition of the parties' contentions relating to it, then narrate the applicable legal principles, and then end the discussion with an analysis and an application of the law to the facts as well as a conclusion.

THE RESPONDENTS' CONTENTIONS

[11] One of the main contentions advanced by the respondents is that the trustees, including the applicant, were not acting in an official capacity in the proceedings against Majiki J, and they could not have done so because they acted outside the scope of a valid and applicable trust document, the 2011 trust deed. In support of that argument, they contend that clause 22 of the 2011 trust sets out the powers the trustees have, and those do not include taking control of the school's banking account. By taking control of the banking account, they automatically assumed responsibility for the school's financial obligations, and that the trust estate cannot be held liable outside the provisions of the trust, so the argument goes. They should therefore be held liable by virtue of their de facto possession of the school's bank account, and they should be held liable for both the debt in paragraph 1 of the Majiki J judgment as well as the costs order in paragraph 2 thereof.

[12] The Respondents further assert that the trustees rely on an invalid and inapplicable trust deed to avoid liability. In this regard they state that the only applicable trust deed is the 2011 one, and not the 2024 one, as the latter one is invalid and inapplicable and that was confirmed in paragraph 3 of the Master's report which is

attached to the papers as annexure "**NM3**". Also, in the Majiki J judgment the respondents successfully argued that the 2011 trust is the only valid and applicable one. The validity of the 2011 trust deed was also confirmed in the Mjali J judgment delivered on 6 June 2024. In this regard the respondents contend that Mjali J, aware of the filing of the 2024 trust deed, concluded that the 2011 is the only valid one. To the extent that the trustees rely on an invalid trust instrument, the trustees acted outside the scope of employment and therefore should be held personally liable, so the respondents contend.

[13] Thirdly, the respondents contend that the trustees failed to act with the necessary care, diligence and skill when they took control of the school's banking account. They further contend that even if it were to be found that they acted within the scope of their duties, they should still be found liable for the debt as well as costs that appear in paragraphs 1 and 2 of the Majiki J order for the reason that their conduct clearly demonstrate a failure to act with the necessary care, skill and diligence when they took over control of the banking account. This is so because when they took control of the banking account the school failed to meet its financial obligations and for that reason the trustees should be held

personally liable to pay the respondents' salaries. This should be the case, the respondents further contend, even if they were to be found to have acted in an official capacity.

[14] Fourthly, the respondents contend that the trustees should be found to have acted negligently in that when they took over the bank account, the school failed to meet its financial obligations and as result it attracted litigation and debt and that constituted gross negligence for which they must be held personally liable. This so is because, the respondents contend, the trustees must not be allowed to avoid the drastic consequences of their negligent actions, which they voluntarily incurred through their negligence.

[15] In the end the respondents urge this court to grant a declarator to the effect that the debt incurred as result of the school's failure to pay their salaries is not that of the trust but of the trustees in their personal capacities. Secondly, that they are held personally liable for the reason of their de facto possession of the school's banking account and not because the trust had attracted the debt. In this regard the respondents contend that the necessary jurisdictional requirements have been met for a declarator to be granted and for

that reason the court should exercise its discretion in favour of granting the order sought in the counterapplication.

THE TRUSTEES' CONTENTION

[16] In response to the respondents' case, as set out in the preceding paragraphs, the 3rd trustee contends that as from 6 June 2024 the respondents were dismissed as employees of the Vela School by a resolution of the Board of Trustees and that followed a sustained and concerted unlawful conduct on their part, which conduct included interference with the Trust operations and diversion of the school's income. In this regard reference is made to a dismissal letter attached as annexure "**TM7**" to the papers. Although it is acknowledged that the dismissal aforesaid has been challenged by the respondents and is the subject of litigation under Case Number 2853/2024, as it appears in "**TM8**", it is contended that until that suspension is overturned it remains valid. For that reason, the respondents cannot be heard as if they are still the employees of the school. They therefore have no legal or beneficial interest in the administration of the trust.

[17] He further contends that there is no legal basis that the trustees should be held personally liable based on a contextual reading of the Majiki J order. In this regard it is contended that the order and the whole judgment relied upon does not insinuate that nor can that be inferred therefrom even on a contextual reading thereof. For that reason, the 3rd trustee asserts that such a contextual reading contended for by the respondents were to be followed, it would be contrary to the settled law regulating the liability of trustees in South African law.

[18] A further contention advanced by the 3rd Trustee is to the effect that the trustees, in all their dealings, acted in good faith and in execution of their fiduciary obligations and that the failure to pay salaries was not attributable to their actions but to the respondents' unauthorised diversion of school funds, the locking out of trustees from the school premises by the respondents as well as breakdown in the access to the Bank account and staff information. All that the respondents do is to blame and point fingers at the trustees and, in the process, ignore the devastating effect of their actions which amounted to institutional sabotage. For that reason, he contends that the counter application should be dismissed with costs.

[19] In response to the counter application, the applicant raises various points in *limine*. The first being that the respondents have sought to join the trustees of the Vela School Trust, in their personal capacity, in proceedings in which they were never cited, in contravention of the clear provisions of the Uniform Rules of Court. In this regard the applicant contends that the respondents should have launched an application to intervene in the matter and show cause as to why they should not take part in these proceedings. Instead, the respondents have unilaterally decided to remove parties who were cited in the main application, which is an improper procedure in terms of the Rules.

[20] Secondly, the applicant raises the point that the order sought, which is to the effect that one judge determine the *"contextual meaning*" of an order granted by another is procedurally flawed. The proper and procedurally correct way to do so would have been by way of a variation of the order in question, as provided for in the Rules of Court.

[21] Thirdly, the relief sought by the respondents in the counter application is incompetent and materially defective in that it is not a variation order nor is it an appeal against the Majiki J order. The

effect of the order sought would be to set aside the Majiki J order or change it materially. In any event, the contention goes, the relief sought is that of declarator which is to determine the rights of the parties and not to interpret the court order. In this regard the applicant contends that the rights of the parties have already be determined in the Majiki J order and judgment and that is demonstrably clear from the fact that the court ordered payment of the respondents' salaries while they are on suspension. The effect of this argument is that the order sought would be merely advisory in nature and the court cannot act as a legal advisor to clarify points of law or academic issues. As the respondents' rights to their salaries have already been determined, there is no lis between the parties and the counter application should therefore be dismissed with costs.

[22] On the merits, the applicant joins issue and concurs with the 3rd trustee's contention that paragraph 1 of the Majiki j order makes it very clear that the "*first respondent is Vela School and five trustees of the Vela School Trust, sued in that capacity'*. The effect of that, the applicant contends, is that the trustees, including herself, were cited and sued in their official capacities as trustees and there is no ambiguity about that. In any event, nowhere in the Majiki J

judgment is there a finding that the trustees acted negligently or grossly so as to warrant an order attracting personal liability on their part. Applicant's contention is that with a clear court order in the form of the Majiki J one, there is absolutely no room or scope for any other reasonable interpretation thereof. If the respondents strongly feel that there was a material mistake in the order, they should have approached the court for an appeal or variation or any other suitable remedy. In conclusion the applicant seeks an order dismissing the counter application, with costs.

THE REGULATORY LEGAL FRAMEWORK

[23] Counter applications, generally, are subject to the principles applicable to applications[1]. **In Graham v Law Society of Northern Provinces[2]** Murphy J held that rule 6(7) applies to all applications and rejected arguments, that it applies only to applications initiated under rule 6(1)[3]. There is no impediment in law or in the rules to a litigant that seeks to obtain a remedy in a counter application that is

[1]Erasmus Superior Court Practice Vol 2 DI Rule 6-47, Issue 26, 2025, LAWSA Vol 6 para 219 page 148.
[2] 2016 (1) SA 279 (GP).
[3] 2016 (1) SA 279 (GP) at 189F-290D.

more expansive or even unrelated to the main application[4]. A counterapplication is usually made where the respondent seeks relief which is beyond the mere dismissal of the main application[5].

[24] By definition, a declaratory is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values[6]. It is trite that two requirements must be met before a court can exercise its discretion in favour of granting an order of a declaratory nature. Firstly, there must be interested parties upon whom the declaratory order would be binding and, secondly, that the case is a proper one for the court to exercise its discretion to grant a declaratory relief[7]. In a declarator the applicant wants the court to declare what the law is on a specific issue and, consequently, what the rights of the parties are[8]. Such an order will have the effect of a res judicata and be binding on the persons affected by it[9]. However, such an order is not an appropriate relief if there are other specific statutory or other remedies available to a

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[4] Erasmus ibid page DI Rule 647, LAWSA page 148 para 219

[5] Pete & Hume Civil Procedure a Practical Guide Oxford 4th Edition page 199, LAWSA Vol 6 para 219 page 148

[6] Rail Commuters Action Group and Others v Transnet t/a Metrorail and Others (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 BCLR 301 (CC) (26 November 2004) para 107

[7] Langa and Others v Hlophe (697/08) [2009] ZASCA 36; [2009] 3 All SA 417 (SCA); 2009 (8) BCLR 823 (SCA) (31 March 2009).

[8] Pete & Hume ibid page 545

[9] SZ Tooling Services CC v SA Eagle Insurance co Ltd [1993] 1 All SA 217 (A); 1993 (1) SA 274; Royal Sechaba Holdings (Pty) Ltd v Coote [2014] 3 All SA 431 (SCA). LAWSA vol 6 para 38 page 38.

litigant[10]. A court will not readily grant a declaratory order where an alternative remedy is available such as an appeal[11].

[25] It is trite that in certain circumstances declaratory orders may give rise to mootness and generally courts do not grant orders that will have no practical effect[12]. In **J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others** the apex court had this to say about declaratory orders:

"… a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones".[13]

[26] The general principle of our law is that once a judgment is given it is final and binding and not subject to amendment and

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[10] Director of Public Prosecutions v Mohamed 2003 (5) BCLR 476 (CC); 2003 (4) SA 1 (CC) para 56, LAWSA vol 6 para 38 page 36

[11] Rutherford v Ferguson (2000] 1 All SA 113 (0); 2000 (2) SA 275 (0), Exparte Pretorious 1963 (1) SA 57 (0)

[12] Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited (CCT 195/19) ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4 SA 409 (CC) (2

[13] CCT49/95 [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 (CC) (21 November 19) para 15

supplementation by the court that delivered it and in that regard the court becomes *functus officio*[14]. Once the court has delivered its judgment or order it may not alter or vary it in any manner. A party dissatisfied with the result should either take the matter on appeal or review[15]. That general rule is subject to exceptions in that the court has the power to change matters accessory to the judgment such as costs and interest; and orders in rulings can also be varied, as they are merely preparatory in nature and do not dispose of an issue[16].

[27] It is a well-established principle of our law that a judgment or order may be varied either in terms of the common law or in terms of the provisions of Rule 42 of the Uniform Rules of Court[17]. A court, at common law, has the inherent power to regulate its own proceedings in the interests of justice and that necessarily includes the power to clarify, supplement or correct its own judgments[18].

[28] Rule 42(1) makes provision for the variation and rescission of a judgment and supplements the common law by providing for

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[14] LAWSA Vol 6 para 595 Pete & Hume page 363
[15] Pete & Hulme page 363
[16] Wallach v Lew Geffen Estates CC 1993 (3) SA 258 (A) at 263, Brown v Yebba CC t/a Remax Tricolor 2009 (1) SA 519 (D) para 26.
[17] Pete & Hume ibid page 363, LAWSA Vol 6 para 595 page 338.
[18] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (CC); 2006 (30 BCLR 423 (CC) (29 November 2005) at paras 31-36, Pete & Hume page 363. [19] Pete & Hume page 364, LAWSA Vol 6 para 596 page 340

instances where the court may, mero motu, or upon application by an interested party, set aside or vary one of its judgments or orders[19]. The rule deals specifically with default judgments. On the other hand, Rule 42(1)(b) allows a court to correct obvious mistakes it has made in its judgments or orders and effectively carries an exception under the functus officio rule. Effectively the rule codifies the common law position regulating the variation of an order or judgment[20].

ISSUE TO BE DECIDED/ FOR DETERMINATION

[29] Having regard to the factual matrix as well as the governing legal principles, narrated supra, I am of the firm view that the narrow issue for determination relating to the counter application is whether the respondents have made out a proper case for the declaratory order sought, to the effect that the Majiki J order should be contextually interpreted to mean that payment of the debt and costs should be imposed upon the trustees in their personal capacities.

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[19] Uniform Rules of Court; rule 42(1)

[20] Pete & Hume page 365

DISCUSSION AND ANALYSIS

[30] As already adumbrated above, the respondents seek a relief of a declaratory nature to the effect that the trustees be held personally liable for the debt as well as the costs that appear in paragraphs 1 and 2 of the Majiki J order. In this regard the respondents argue strongly that the declaration is necessary because the issue was not decided in the Majiki J judgment. Therefore, the respondents further argue, the issue of the capacity in which the trustees were held liable in the Majiki J judgment will arise when the costs order is executed and therefore it is necessary to have the issue dealt with at this stage to prevent further litigation. The respondents in their heads of arguments dispute in the strongest terms that the order they seek is a variation of the Majiki J one.

[31] In conclusion, the respondents argue the order they seek is justified. The Majiki J order, read in context, held the trustees liable due to their de facto possession of the school banking account. On the other hand, the trustees in opposition, vehemently argue that there is nothing unclear or ambiguous about the capacity in which they were found liable in the Majiki J judgment and order.

[32] As a starting point, the trustees argue strongly that they were cited in their official capacities as the trustees and that is abundantly clear in paragraph 1 of the Majiki J judgment where it is stated "*The first respondent is Vela School (the school) and five trustees of Vela School (the trustees), sued in that capacity and as persons in control of the school's banking account*..." That on its own, the argument goes, makes it very clear that at no stage in the proceedings before Majiki J were the trustees sued in their personal capacities and the resultant order would not have been otherwise. The trustees, therefore, argue that the contextual reading of the order is not justified by the facts that culminated in the Majiki J judgment and order, which make it clear that they were sued in their official capacities.

[33] The trustees further argue, in opposition to the order sought in the counter application, that the order sought seeks to vary the order granted by Majiki J in an irregular manner that is not contemplated in the provisions of Rule 42 of the Uniform Rules of Court so as to hold them personally liable for the debt and costs when there was no finding of negligence against them, as should have been the case if the order sought were to be justified. In this regard the trustees argue that to order that they be held personally liable when

there has been no finding of negligence against them, would be against the established legal principles regulating the liability of the trustees. They further argue that the declaratory order sought by the respondents is improper in the factual circumstances of this case. This is so because in the Majiki J judgment the respondents' right to payment of their salaries has already been declared and it is not clear what rights they now seek to declare in the counter application.

[34] It is trite that a court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance of the' judgment or order[21] . In **HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd**[22] the Supreme Court of Appeal gave a lucid explanation of the application of the provisions of Rule 42(1)(b) when it stated:

> *"[19] Rule 42(1)(b) of the Uniform Rules of Court provides that the high court may, in addition to any other power it may have on its own initiative or upon the application of any other*

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[21] Erasmus Superior Court Practice Vol 2-page DI Rule 42-25 Issue 27, 2025

[22] HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd (113/2021) [2022] ZASCA 52; 2022 (5) SA 373 (SCA) (12 April 2022)

party affected, rescind or vary an order or judgment in which there is an ambiguity, error or omission. In ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)***[23] *the interpretation of rule 42(1)(b) was placed in its proper context. It was held that the context was the common law before the introduction of the Uniform Rules and that the 'guiding principle of the common law is certainty of judgments', with the effect that generally speaking, when a judgment has been given, it is final and unalterable: the judge becomes functus officio and may not ordinarily vary or rescind his own judgment. There are, however, exceptions that relate to 'correction, alteration, and supplementation of a judgment or order'. it was, the court held, 'against this common law background, which imparts finality to judgments in the interest of certainty, that Rule 42 was introduced', catering for the rectification of the same types of mistakes that the common law had recognised*".

[35] In **Thompson v Soth African Broadcasting Corporation,** the following passage in **S v Well 1990 (1) SA 816 (A) 820C-F**, was quoted with approval. "*The more enlightened approach,*

[23] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) (31 March 2003)

however, permits a judicial officer to change, amend, or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby (tenure substantiate perseverance) **...** *According to Voet a Judge may also, on the same day, after the pronouncement of his judgment add (suppler) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (explicate) what has been obscurely stated in his judgment and thus correct (emanate) the wording of the record provided that the tenor of the judgment is preserved*"[24]. The question for consideration for purposes of the counter application is whether the Majiki J order should be interpreted so widely so as to contextually read it to mean that the trustees are held personally liable for the debt and costs. That exercise necessarily entails the interpretation of the Majiki J judgment which contains the order in question.

[24] Thompson v Soth African Broadcasting Corporation (622/98) [2001] ZASCA 7; 2001 (3) SA 746 (SCA) (8March 2001) para [5]

[36] The basic principles applicable to the construction of judgments have been enunciated in a long line of cases and have been summarised as follows:

"*(a) The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to well-known rules.*

(b) *As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.*

(c) *If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it*"[25].

[37] What is quite apparent from the judgment is that, right from the heading, the trustees are cited in their Nominee Officio capacity and that is confirmed by their description in paragraph 1 of the judgement. It is therefore unfathomable on what factual basis could

[25] Erasmus Superior Practice page DI Rule 42-25 to 26 Service Issue 27, 2025

it be said that they should be held personally liable for the debt and costs in paragraphs 1 and 2 in the Majiki Judgement in circumstances where they were cited in their representative capacities when the proceedings were instituted. I am therefore not persuaded that the Majiki J Judgement can be contextually read to mean that the trustees can be held personally liable for the debt and costs provided thereon. In the light thereof, I am in inclined to agree with the contention advanced by the trustees that, as they were sued in their representative capacities as the trustees, they were not found personally liable for the debt and costs in the Majiki J order. The contextual reading of the judgment and order proposed by the respondents, in my view, will lead to untenable results not intended by the Majiki J judgment and order. I therefore come to that conclusion relying on the reasoning of the Supreme Court of Appeal in **Hulisani Viccel Sithangu v Capricorn District Municipality** where guidance as to the interpretation of a judgment was given as follows:

"[*26] The full court's construction of the order of this Court granting leave to appeal, in therefore flawed. It not only failed to read the language of the court order contextually, but it failed to have regard to its purpose. The full court accordingly misdirected itself in* *approaching the appeal in the manner it did*"[26]. Indeed, it is quite correct that no finding of negligence was made in the judgment against the trustees. A reading of that judgment, in my view, reveals that the court ordered payment of the respondents' salaries on the basis that their suspensions were with full pay and that the failure to pay them was in violation of both the terms of suspension and their contracts of employment[27]. Although mention is made of the fact that the trustees had been in control of the school's banking account in terms of the court order dated 30 May 2024, no finding of negligence or failure of any sort was made against the trustees on that particular aspect. That therefore fortifies me in my finding that any order holding the trustees personally liable for the debt and costs would be improper and unjustified in the present factual matrix.

[38] The order sought would be more improper and unsuitable because the respondents, as is common cause, are the employees of the Vela School and their contracts of employment make this very clear. In other words, the debt that the respondents in the Majiki J judgment were ordered to pay arose out of a contract of

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[26] Hulisani Viccel Sithangu v Capricorn District Municipality (593/2022) [2023] ZASCA 151 (14 November2023) para [26]

[27] paras [4] and [5] of the Majiki J judgment.

employment and it is totally inconceivable in our law that a party who is not part of a contract can be held liable to fulfil contractual obligations, as that would be the effect of the order sought by the respondents. The doctrine of privity of contract is well known in our law and its basic idea is that persons who conclude a contract must be bound by it and that necessarily entails that it would be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected[28]. That being the case there would be no justifiable reason, either in law or logic, to hold the trustees liable for the debt and costs in the Majiki J judgment. In my view the counter application has no merits, and it should be dismissed.

THE MAIN APPLICATION

THE APPLICANT'S CASE

[39] As already stated in the introductory, the applicant brought an urgent application and obtained an interim order directing the respondents to return the attached and removed goods. In that very same order, a rule nisi was issued calling upon the

[28] GB Bradfield Christie's The Law of Contract LexisNexis 8th Ed page 317, Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction [2011] JOL 27763; 2011 (6) SA 331 (GSJ) [Ill, [141

respondents to show cause why the writ of attachment issued under **Case Number 2378/2024** dated 27 August 2024 should not be set aside. The gravamen of the applicant's case is that the Majiki J order and judgment, which directed the respondents in those proceedings to pay the respondents in the present Application, their salaries within 48 hours, did not direct them to do so in their personal capacities, but in their official one as trustees. Consequently, failure to pay the salaries as stipulated in that order and judgment did not result in the trustees being jointly and severally liable to pay them. Nor did it create a contractual nexus with the school. In any event the respondents had concluded employment contracts with the school, and not the trust or the trustees. Those employment contracts were still valid as at the time the Majiki J order and judgment were issued. The order and judgment could not be misconstrued to have done so, especially because even in the heading of that Judgement the trustees were cited in their nominee officio capacity and in paragraph one, they were described as such.

[40] The applicant further contends that even in the aspect of costs, where the school and the trust are held to be jointly and severally liable, the trustees cannot be bound personally liable for the debts

of the trust unless they have made an undertaking to pay them, either as sureties or they have been found to have acted negligently. Explaining further this contention, the applicant asserts that in terms of clause 13 of the deed of trust dated 26 April 2024, the trustees are not liable for the debt of the trust and that clearly endorses the well-known position in our law, that of the trustees' limited liability for the debts and obligations of the trust.

[41] For the above stated reasons, the applicant strongly asserts, there was absolutely no reason to issue a writ, attach and remove her movable goods for the debts of the trust, when it is abundantly clear that in those proceedings she acted in her official capacity as the trustee. Therefore, the writ was issued unlawfully, as there was no logical basis why it was so issued, and it should be set aside. In conclusion, the applicant vehemently argues that it has made out a strong case for the confirmation of the rule nisi obtained on 13 September 2024, relating to the setting aside of the writ issued under Case Number 2378/2024 dated 27 August 2024, and the interim order relating to the release of the goods under attachment. The applicant also prays for a costs order against the respondents.

RESPONDENT’S CASE

[42] In response to the main application, the respondents vehemently dispute that the applicant acted in an official capacity in the proceedings before Majiki J. They strongly contend tha, that could not be the case because they acted outside the scope of a valid trust deed, which is the 2011, and that was confirmed by the judgment of Mjali J dated 6 June 2024. In any event the validity of the trust deed upon which the applicant relies is the subject of litigation in the Makhanda High Court under High Court Case No. 2241/2024. In short, the respondents assert that the applicant relies in an invalid and inapplicable deed of trust. It is for that reason that she should be held personally liable for the debt and costs in the Majiki J order and judgment.

[43] The respondents further contend that the powers that the trustees have are clearly stipulated in clause 22 of the 2011 deed of trust and they do not include taking control of the school's banking account. When she took control of the banking account, the respondents assert, it cannot be said that the applicant was exercising the powers accorded to her in terms of clause 22 of the 2011 trust instrument. Therefore, the respondents contend, there is

nothing wrong with the writ and her movable property was correctly attached and removed by the sheriff. The writ conformed with paragraph 1 of the Majiki J judgment, as it reflects the exact amount of the debt owing in terms of that judgment, and which is the debt for which the applicant is personally liable, which debt is definite, and its causa has not fallen away. In this regard the respondents contend in the strongest terms that the applicant has dismally failed to set out the lawful basis for the setting aside of the writ. In conclusion, it is the respondents' contention that the conduct of the applicant was negligent and for that reason she should not be exempted from liability. In the circumstances the respondents pray for the discharge of the rule nisi and the interim order, with costs.

THE GOVERNING LEGAL PRINCIPLES

[43] It is a well-established principle of our law that execution is a process by which practical effect is given to the terms of the order[29]. Such a process of execution is crucial and inextricably link with the effectiveness of a judgment granted in favour of a party in

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[29] LAWSA para 622 page 622, De Crespigny v De Crespigny 1959 (1) SA 149 (N) at 149, Butchard v Butchard 1997 (4) SA 108 (W).

a legal suit[30]. Execution usually follows in a judgment sounding in money in which a judgment debtor to pay a specific sum of money, which, under normal circumstances, arise out of contract, delict, enrichment or costs.

[44] It is trite that a writ of execution may be set aside if it has not been issued in conformity with the judgment. In **Rand West Local Municipality v Quill Associates (Pty) Ltd)** the Supreme Court of Appeal held that it is clear that a writ will be set aside where it does not accord with the order on which it was purportedly issued, or the facts show that the debt has been satisfied, or the order on which it is premised is itself set aside or where the wrong person is named therein as party[31]. In this regard the court in **A.J.N v W.L.N** held that a writ cannot be sued out against the property of a person against whom there is no judgment or the causa had fallen away or where it is proved that the attachment, in material respects, faulty on formal ground. This may be done by way of an application to the very the court that issued the writ[32]. This may mean that in the end the attachment and the writ will be set aside.

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[30] Pete & Hume page 440, LAWSA para 625 page 354.
[31] Rand West Local Municipality v Quill Associates (Pty) Ltd and Another (497/20) [2021] ZASCA 150 (26 October 2021)
[32] A.J.N v W.L.N [2023] ZAGPPHC 341; 17229/2006 (19 May 2023)

ISSUE FOR DETERMINATION IN THE MAIN APPLICATION

[45] In the main application, in my view, the crisp and limited issue for consideration is whether the applicant has made out a case for the confirmation of the interim order for the returned goods by the sheriff and the rule nisi relating to setting aside of a writ.

DISCUSSION AND ANALYSIS

[46] The applicant, as already stated in the introduction, obtained an interim order directing the sheriff to return the goods under attachment as well as rule nisi calling upon the respondents to show cause why the writ of attachment should not be set aside as irregular. Her main reason for an application of that nature is that the judgment and order, in terms of which the writ was sued out, did not find her personally liable to pay the respondents' salaries. The Majiki Judgment, instead, was directed against the trustees, in their nominee officio capacity, and not against the applicant personally. She further argues that failure to pay the respondents' salaries did not result in a situation where the trustees were jointly and severally liable. The applicant further argues that they acted

within the scope of a valid deed of trust, the 2024 one, and they are therefore indemnified from being held personally liable.

[47] On the other hand, the respondents strongly argue that the trustees did not act in an official capacity in the proceedings before Majiki J and therefore her order and judgment was directed to them in their personal capacities. In support of this contention the respondents argue that this is so because they acted outside the scope of a valid 2011 deed of trust when they took over control of the school's banking account. Consequent upon their taking control of the account, the respondents' salaries were not paid and for that reason they should be held responsible, in their personal capacities, for payment of those salaries.

[48] In my view, two questions arise for consideration out of the divergent parties' contentions. The first one is whether the writ was properly sued out in conformity with the judgment or order of Majiki J, bearing in mind that I have already come to the conclusion that the Majiki J judgment cannot be contextually read to mean that the trustees are personally liable for the debt and costs provided therein.

[49] It is common cause and an indisputable fact that the proceedings before Majiki J the trustees were cited in their representative capacities and that is apparent from annexure "*RX2*" where after the name of each trustee it is followed by an "*N.O”,*"indicating that each trustee is cited on his or her representative capacity. Even in the judgment the heading clearly indicates that the respondents, who are the trustees, are cited therein in their nominee officio capacity. That is reinforced by the fact that also at paragraph one of the Majiki J judgment it is stated in clear and unambiguous terms that "*the first respondent is Vela School (the school) and five trustees of Vela School Trust (the trustees), sued in that capacity and as persons in control of the school's banking account*". In my view, sued and cited in their representative capacity, the trustees were ordered to, "*within 48 hours of service of the order, to pay the salaries of the applicants which were due on 25 May 2024*...”

[50] After a thorough scrutiny of the Majiki J judgment and order no other conclusion could be reached, other than that the trustees, who were cited and sued in their official capacities, were ordered to pay the debt and costs in their capacities, and not otherwise. In my considered view, any other interpretation would lead to disastrous results and an untenable situation, never intended by the judgment

and that is not even supported by its reasoning. In any event, there is no finding in that judgment that the debt or costs should be recovered from the trustees personally or be paid by them in their personal capacities.

[51] Having found that the trustees were sued in their official capacity in the proceedings before Majiki J, the next question to consider is whether the writ executed by the sheriff against the applicant's movable goods was sued out in conformity with the Majiki J judgment. As already stated, execution, by means of a writ, is a means to give effect to a judgment[33]. In my view the judgment that had to be given effect to is, in the present matter, that of Majiki J which directed the trustees, in their representative capacities, to pay the respondents' salaries and costs. It follows that the writ was therefore not in conformity with that judgment, as it was issued against the applicant in her personal capacity and for that reason it had to be set aside as irregular. This principle was affirmed by the Supreme Court of Appeal in **Rand West Local Municipality v Quill Associates (Pty) Ltd** where the court held that a writ will be set aside where it does not accord with the order on which it was purportedly issued. This matter, in my view, is a classic case of writ

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[33] LAWSA Vol 4 para 621 page 352.

that does not accord with or that is not in conformity with the judgment and order on which it is purportedly issued and, no doubt, it is liable to be set aside for that simple reason[34]. That principle was re-emphasised in **A.J.N v W.L.N** when the court held that a writ cannot be issued out against the property of a person whom there is no judgment[35].

[52] As is this case in the present matter, there is no judgment against the applicant, in her personal capacity. There was therefore absolutely no reason for the writ to be issued and executed against her property. There is no justification for such an action and that it cannot survive legal scrutiny and must be set aside.

[53] There was much debate during argument about which trust deed is a valid one. In my view that need not be decided in this matter as it was never placed in issue before Majiki J. In the main application, as already stated, the narrow issue for determination is whether the applicant has made out a case, so convincingly that the court should be inclined to confirm the Rule Nisi and the interim order granted earlier on. That is the issue relevant for consideration in these proceedings.

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[34] Rand West Local Municipality v Quill Associates (Pty) Ltd, Case No. 497/20 [2021 ZASCA 150 (26 October 2021)

[35] A.J.N v W.L.N, [2023] ZASPPHC341; 17229/2006 (19 May 2023)

CONCLUSION

[54] I am of the view that there is no basis whatsoever for holding the applicant personally liable for the debts of the trust, when there is no specific finding in the judgment or order concerned that found her to have acted negligently in breach of her fiduciary duties as a trustee. In my view the writ executed against her movable goods was not in conformity with the Majiki J order and judgment and should not have been issued.

[55] In the circumstances I conclude that the rule nisi calling upon the respondents to show cause why the writ should not be set aside, It should be confirmed. I also conclude that the interim order relating to the return of the applicant's goods should also be made final. This is so because the applicant has demonstrated clearly that in the present factual circumstances it will not be just and proper to hold her personally liable for the debt and costs arising from the Majiki J judgment.

[56] What then remains for consideration is a question of costs. Applicant's counsel argued strongly that costs should be awarded

on a punitive scale. While I am of the view that the applicant is entitled to the costs of suit, I do not find any reason or conduct on the part of the respondents, during the proceedings, to be so reprehensible so as to warrant such a drastic costs order. In the result I make the following order.

(a) The counter application is dismissed with costs, which costs are to be paid jointly and severally by the respondents, the one paying the other to be absolved.

(b) That the rule nisi issued by this court on 13 September 2024 be and is hereby confirmed.

(c) That the interim order granted by this court on 13 September 2024 be and is hereby made final; and

(d) That the respondents be ordered to pay costs of the main application, jointly and severally, the one paying the other to be absolved.

T.A. NKELE

ACTING JUDGE OF THE HIGH COURT

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Heard on:	25 September 2025
Delivered on:	03 February 2026