

SOUTH AFRICA / JUDGMENT

Crowder v ABSA Trust Limited and Others (1301/2020) [2021] ZAGPJHC 888 (10 June 2021) [2021] ZAGPJHC 888

COURT

South Gauteng High Court, Johannesburg

BEFORE

S C Mia

CASE / FILE NUMBER

1301/2020

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 1301/2020

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
10
June 2021
In

the matter between:

KEANO
ALCASTER
CROWDER
1st
Applicant
And
ABSA
TRUST
LIMITED
1st
Respondent
THE
MASTER OF THE HIGH COURT, PRETORIA
2nd
Respondent
MARTHA
MAGDELENA PRINSLOO NO
3RD
Respondent
(This
judgment is handed down electronically by circulation to the parties'
legal representatives by email and by uploading it to
the electronic
file of this matter on CaseLines. The date for hand-down is deemed to
be 10 June 2021.)

JUDGMENT

MIA, J

- [1] On 12 April 2021, I handed down judgment dismissing the applicant's request to terminate the KA Crowder Trust. The first respondent was ordered to pay the costs. The applicant brought an application for leave to appeal against the order which this court dismissed against the applicant that the application did not comply with section 13 of the Trust Property Control Act, 57 of 1988 (The Act), excluding the order for costs. The first respondent brought a counter application opposing the order for costs awarded against it. The applicant only pursued four points which I deal with hereunder.

APPLICANT'S GROUNDS FOR LEAVE TO APPEAL

- [2] Ms Nwaila did not go into the applicant's application for leave submitted and indicated that she intended to proceed on four issues

arising from the judgment. She thus pursued only the four points regarding the application for leave to appeal. She submitted that the judgment was silent on the issues pleaded in the supplementary application. She referred to section 6 of Trust Property Control Act, 57 of 1988 (The Act), which provides that "(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall

act in that capacity only if authorised thereto in writing by the Master". The first point she submitted and which flowed from the supplementary application, related to section 6, was that the deponent knew that he had no authority to defend the application whilst there was no authority from the Master authorising a new Trustee to act. The deponent thus did not have locus standi because he did not have authority.

- [3] The argument she submitted was twofold. ABSA did not have capacity to act. Furthermore, Ms Nwaila submitted that the deponent to the affidavits did not have locus standi to act. She referred to the decision in *Lupacchini NO and Another v Minister of Safety and Security* 2010(6) SA 457 (SCA). In *Lupacchini* the Court stated at paragraph [3]

"Although a trustee's appointment is effected by the trust instrument, the trustee is precluded from acting in that capacity by s 6(1) of the Trust Control Property Act 57 of 1988, until he or she has been authorised to do so by the Master. The section reads:

"Any persons whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act shall act in that capacity only if authorised thereto in writing by the Master."

The Court goes on to state at paragraph [4]:

"It is not controversial in this case that the effect of the section is that an appointed trustee may not commence legal proceedings relating to the affairs of a trust nor may one trustee authorise another to institute proceedings on his or her behalf unless he or she has the relevant authorisation."

- [4] The effect of the above Ms Nwaila argued was that similar principles bound ABSA Trust. She submitted that this court departed from the decision in *Lupacchini* by recognising that ABSA Trust had the authority to act when it did not. This was so as the third respondent had resigned and was no longer employed at ABSA Trust. Furthermore, she referred to the judgment in the case of *Schierhout v Minister of Justice* 1926 AD 99 at 109, where Innes CJ stated:

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.'

Ms Nwaila concluded thus that there was no Trustee authorised by the Master to act, sue, or defend any litigation. The Trust, including the deponent, was thus acting without authorisation. She concluded that another court would conclude that locus standi and capacity regarding ABSA Trust were null and void. The Trust lacked the requisite capacity to act and could not have defended the application. The effect thereof was that the affidavits filed were to be disregarded, and ABSA Trust's opposition in the main application was null and void. Thus, she submitted that another court would come to a different decision to the one this court reached on this aspect.

- [5] The second ground she submitted referred to conflicting judgments of the same court. In terms of section 17(1) of the Superior Courts Act, leave to appeal may only be given where :

"17. Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a)

(i) ..

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

In this matter, another court would determine that without an appeal or an amended order, any evidence in the supplementary affidavit submitted by ABSA Trust that had been dismissed could not have been used against the applicant. She submitted that this aspect alone warranted an exceptional circumstance to correct the conflicting outcome.

[6] The third ground raised by the applicant related to the discretion exercised by this court in the judgment. She submitted that this court did not exercise its discretion correctly by relying on the dismissed report of the occupational therapist. Section 13 of the Act limited the court's discretion to termination of the Trust and the powers of Trustees. She submitted that leave to appeal was therefore sought to reconsider the facts of the case as the issues were not

properly considered. She referred to the case of *Trencon Construction v Industrial Development Corporation of South Africa Ltd* and another [2015] 10 BCLR 1199 CC where the Court said at paragraph [88]:

"When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:

"judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles." (Footnote omitted.)

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court."

[7] The fourth and last ground related to what the outcome of the case effectively translated to. She submitted that in deciding not to terminate the KA Crowder Trust this court essentially changed the purpose of the trust from safeguarding wealth damages for a minor to a curatorship trust. This flowed from the conclusions drawn by this court that the applicant was not able to show he could live independently or that he is employed. He is not in a position to deal with the monies or manage the funds. This view matches ABSA Trust's defence which called for a curator to be appointed because of the lifelong impact the accident had on the applicant. In the absence of an application for a curator, she submitted this constituted an infringement on the applicant's constitutional rights.

- [8] She referred to the decision of *Ferguson v Road Accident Fund*, where the Court held that the appointment of a curator had the effect of impacting the liberty, dignity of an adult to manage his or her affairs. This right should not be lightly infringed upon or be taken away from the individual. In that particular matter, the Court noted that the litigant was not a person described in the Mental Health Act and was not incapable of managing her affairs. The litigant did also not have a serious bodily impairment that prevented her from earning an income. She extrapolated those facts to the present matter. She submitted that another court would have concluded that because the applicant is the sole beneficiary with immediate vested rights in the KA Crowder Trust and is an adult of sound mind, the court had no authority to refuse his request to manage his funds in the absence of a medically supported application. This was even more so after determining that the ABSA Trustee did not adhere to its mandate as emphasised by the founder. For the above reasons, she submitted that another court would reasonably have come to another decision on the facts and the law and for which leave should be granted.

FIRST RESPONDENT'S RESPONSE TO GROUNDS OF APPEAL

- [9] The first respondent appealed the issue of costs only and opposed the applicant's application for leave to appeal. Ms Ellis appearing for the first and third respondent, responded to the applicant's grounds of appeal before addressing costs. She submitted that the court had indeed correctly found that the deponent, Mr Maphosa had locus standi to depose to an affidavit. The deponent, Mr Maphosa, was still employed at ABSA Trust and was not the Trustee who resigned. The applicant's issue was that Mr Maphosa lacked locus standi. The previous Trustee had nominated Mr Maphosa to act and attend to matters related to the Trust. The Trustee at no stage revoked or withdrew this nomination. He was, therefore, still acting within the course of his duties. It was extensively canvassed during

a previous hearing that ABSA Trust had was at fault, having cited the incorrect Trustee on the papers. When it became apparent, ABSA Trust took steps to address the error and to rectify the position. They also tendered the costs in this regard. They approached the applicant well before the day the supplementary application proceedings was to be heard to avoid incurring further costs and informed the applicant that the Master of the High Court had issued letters of authority in respect of a new Trustee. When the matter came before this court, ABSA Trust had a Trustee in place with letters of authority issued by the Master of the High Court.

- [10] Ms Ellis submitted that the applicant raised the lack of citation of the third respondent as a ground for leave to appeal. She submitted that ABSA Trust addressed this issue as soon as it came to their attention and relied on the court order to secure an expedited letter of authority for the new Trustee to be appointed. She submitted that the applicant could Regarding the papers filed and the joinder the applicant ought to have had regard to the order of acting judge Vukeya regarding the identity of the newly appointed Trustee and cited same. The first respondent had already covered the costs of the application for joinder. The applicant failed to do so.

- [11] Ms Ellis submitted that the ground raised that the court erred in its introduction of the applicant as "...Mr Keano Crowder (Mr Crowder), is an adult male residing with his parents in Eldorado Park, Johannesburg" also had no bearing on the outcome of the finding as to whether the KA Crowder Trust should be terminated or not. This application was related to the Trustees conduct rather than the applicant's residence or how he was described.
- [12] On the applicant's third ground that another court could have reasonably found that on the first respondent's version that the monthly administration fee is R2 529.47, Ms Ellis submitted that the Trustee's fees were determined by the Trust Deed and the court order. She referred to the first respondent's answering affidavit and the accompanying annexures TM 16 and TM 17, which reflect that between 2014 to 2019, the KA Crowder Trust generated a combined annual income and dividends of around R345 711 .58. The first respondent was entitled to charge six percent before VAT on the amount. The suggestion that the amount was not in accordance with the Trust Deed was rejected and due to the applicant's incorrect calculations. Ms Ellis submitted that the applicant's attorneys calculations were not clear and that the bank's charges fell within the 6% permitted in terms of the court order.
- [13] In response to the ground of relief that the court erred in finding that the applicant or his parents did not have driver's licenses when it was not clear on the papers, Ms Nwaila submission was that that the applicant's only source of income is the KA Crowder Trust fund. Therefore, any responsibility for the vehicle insurance or damages to the vehicle, as a result, falls squarely with the first respondent. Ms Ellis submitted that neither the applicant nor the applicant's mother, who usually approached the ABSA Trust for any applicant's requirement, requested funds for insurance purposes. She submitted that the R7000 monthly amount ought to have covered insurance as well, and if this was insufficient, then the applicant was at liberty to approach the Trust to cover this amount directly or through an increase of the monthly amount. On the applicant's papers, there was no indication of such a request at all. She submitted that the applicant's mother made all requests to the Trust on his behalf.

Upon reaching the age of majority, he did not approach the Trust to indicate that he would be receiving the funds directly.

- [14] Whilst Ms Ellis conceded there was no curatorship order in place; she also submitted that she was not in a position to address the court further as she was not privy to the initial proceedings when the court order was made. She did point out that at that stage already, the court had in mind that the applicant was a minor with a head injury and epilepsy featured in the injury sequelae. She submitted further that it would be speculative to make any further submissions; however, the applicant's application for termination of the KA Crowder Trust was not complete as he did not provide any report regarding his present state and ability. There were real concerns that were evident and accepted by this court as reflected in the

judgment.

The amount left in KA Crowder Trust was substantial. The applicant was currently only managing R 2000 per month as his mother received and managed the R7000 paid by the Trust. The applicant had not approached the Trust to indicate he wished to receive the funds directly. This, too, reflected his ability to manage administrative and financial issues. Consequently, she submitted that there was no basis for the Trust to be terminated. The submissions that the first respondent had overcharged the applicant were unfounded, and there was no evidence on the application that the first respondent was acting contrary to the purpose for which it was founded or that there were grounds in terms of section 13 of the Trust Control Property Act. She thus submitted that the applicant's application for leave to appeal be dismissed.

[15] Ms Ellis referred to the decision in *Khumalo v Twin City Developers (Pty) Ltd* 2017 JDR 1579 SCA, and submitted while the facts differ significantly to the present matter the Court was asked to decide on an appeal relating to the costs order only. The Court on appeal considered at paragraph [13] that:

"[13] This appeal raises the following issues:

- (a) Whether the fact that the order on the merits is not the subject of the appeal precludes the adjudication of the appeal in relation to the costs order.
- (b) Whether there are exceptional circumstances warranting the hearing of the appeal in terms of s 16(2) (a) of the Superior Courts Act.
- (c) Whether the court a quo's discretion in relation to the award of costs was judicially exercised."

The Court had to consider whether it could consider costs alone and stated:

"Does the fact that the order in respect of the merits has not been attacked on appeal preclude this Court from considering an appeal directed only at costs?

[14] The short answer to that question is 'no'. From the definition, it appears that s 16(2)(a) of the Superior Courts Act does not oblige this Court to dismiss an appeal directed solely at costs. Rather, it grants this Court a discretion to decide whether there are exceptional circumstances that warrant the hearing of such an appeal. Significantly, this Court in *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1302A stated as follows. 'Hoe so 'n appel teen die kostebovel benader word waar die landdros se bevel ten opsigte van die meriete nie appellerbaar is nie, blyk uit die meerderheidsbesslising on hierdie aspek in die Pretoria Garnson saak on 863, naamlik '...the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not.'

[16] Ms Ellis submitted that an appeal in relation to the costs order only is competent to be heard by this court and does not fall within the ambit of Section 16(2)(a) of the Superior Courts Act, 10 of 2013. In relation to the caveat of "exceptional circumstances", she submitted that in

determining which factors amounted to "exceptional circumstances" the court ought to have regard to the decision of *Jazz Spirit (Pty) Limited v Regional Land Claims Commissioner: Western Cape* [2014] ZASCA 127 at paragraph [27] where the Court had occasion to consider the provisions of s 21A(1) and (3) of the Supreme Court Act. She continued that the appeal that served before that court was directed only at the fact that the court a quo had not made any costs order. On appeal, the court considered whether the facts or circumstances of the case constituted 'exceptional

circumstances' for purposes of s 21A(3). Having regard to the decision *MVAIS MAMAS Seatrans Maritime v Owners, MVAIS MAMAS, & another* 2002 (6) SA 150 (C) at 157E-F, the court stated:

"I think that, for the purposes of s 5 (5) (a) (iv) the phrase exceptional circumstances' must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in *Norwich Union Life Insurance Society v Dobbs*, (supra bc cit), be given a narrow rather than a wide interpretation. I conclude to use the phraseology of Comrie J in *S v Mohammed* (supra, bc cit), that, to be exceptional within the meaning of the subparagraph, the circumstances must be "markedly unusual or specially different"; and that, in applying that test, the circumstances must be carefully examined."

[17] In the present matter, the applicant sought the termination of the K.A. Crowder Trust with immediate effect, coupled with a punitive costs order against the first respondent. Ms Ellis submitted that there is a fiduciary duty on the first respondent as well as the duly appointed Trustee and the authorised nominee to give effect to the Court order as well as to the provisions of the Trust Deed, by way of preserving the integrity of the awarded funds for the sole benefit of the beneficiary. Her submission was that the first and third respondents showed to the Court that there was a clear need for the continued protection of the funds. She continued that it would have been negligent on the part of the first respondent and the Trustee not to oppose the relief sought as the applicant failed to furnish sufficient evidence before the court for the termination of the Trust.

[18] Of more significant concern, she argued, was the 'chilling effect' that an adverse costs order could have in the future if it were not set aside. She submitted that in *Hotz & others v University of Cape Town* BCLR 815 (CC) para 29, the Constitutional Court stated that:

"...the starting point when determining an award of costs is to have regard to the nature of the issues. To this end the court emphasised that what is to be taken into account is the 'nature of the issues' rather than the *Hlatshwayo & others v Hein* 1999 (2) SA 834 (LCC) para 24; 1998 (1) BCLR 123 (LCC). 21 *Haakdoornbult Boerdery CC v Mphela & others* 2007 (5) SA 596 (SCA) para 75. 22 *Hotz & others v University of Cape Town* [2017] ZACC 10; 2017 (7). 'characterisation of the parties'. It is thus important for issues to be seen in their proper context."

[19] The impact of the costs order in the present case has effectively created a "chilling effect" on all Trustees, and Trust Administrators in the profession in that the awarding of costs where the opposition was successful and was coupled with an adverse costs order now implied that although the opposition was warranted and where the parties indeed performed their

fiduciary duties to preserve the funds for the sole benefit of the beneficiary they would be penalised with an adverse costs order. She submitted further that this creates a dangerous precedent in that such a costs order is in direct conflict with the powers of the Trustee who rightfully opposes applications of this nature where an applicant has failed to make out a proper case for the relief sought.

- [20] Such an order will have a negative impact where Trustees seek to oppose matters in future. They would be open to risk. They would not be able to effectively attend to the protection and preservation of funds in their care. This would be potentially prejudicial to Trustees and Administrators and the applicants who may be bullied into launching applications of this nature by family members or attorneys looking to gain access to the funds. In the present matter, the first respondent demonstrated that it had preserved the funds and that the funds required protection. It further showed that the applicant is not capable of managing his own affairs. The first respondents showed that the applicant's family does indeed wish to have access to the applicant's funds.
- [21] Ms Ellis submitted that the first respondent demonstrated to this court that the funds were invested for the applicant's benefit. Furthermore, the first respondent has facilitated the monthly maintenance of the applicant whilst maintaining the integrity of the capital balance. In the circumstances, she continued that the Trustees should not fear opposing bogus applications of this nature in the fear that a costs order will be granted. She submitted that there was a reasonable possibility that another court would come to a different finding.
- [22] In exercising its judicial discretion about the costs award, Ms Ellis submitted that the basic principle enunciated in *Norwich Union Fire Insurance Society Ltd v Tutt* was that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence, it is a question of fairness to both sides. She continued that this warranted a cautious approach. In referring to the *Trencon* decision, she argued that the court erred 'in not pertinently considering all the relevant factors which require consideration when an award of costs is made.' The general rule she submitted was that costs follow the event. Thus an adverse costs order could not reasonably follow had this court directed itself to all the relevant facts and principles.
- [23] Given the above, Ms Ellis submitted that considering the evidence, the supporting financial documentation, that there was a reasonable prospect of success that another court may conclude that the first respondent and or the Trustee did, in fact, manage the funds of the applicant as directed by the court order to be read in conjunction with the Trust Deed and that the first respondent or the Trustee will not be liable for any costs.
- [24] In considering the applicant's application for leave to appeal, I have considered section 13 of the Trust Property Control Act, 57 of 1988 and that the applicant has not adequately made out a case for the termination of the KA Crowder Trust as contained in the provisions of the section. In this regard, the KA Crowder Trust was established in compliance with the Court order dated 28 January 2014. I have considered the first respondent's response and their

conduct as required by the order and the Trust Deed. There is a duty on the first respondent in terms of the Court order dated 28 January 2014 to preserve and protect the funds received by the Road Accident Fund for the benefit and interest of the applicant. In assessing whether the

first respondent has preserved the same, I have regard to the evidence presented. The applicant has not disputed this except to

state that it ought to have been invested differently. Without the benefit of a financial advisor stating otherwise, it is not evident that the first respondent's investments were not in the applicant's interests. The statement is thus unsubstantiated and lacks particularity.

[25] I have expressed concern about the lack of insurance on the vehicle and the failure to engage with the applicant once he reached the age of majority, so funds are paid to him directly. These two aspects were the only issues of concern for this Court. The first respondent may be correct in that the application fails to set out the prejudice he suffers as a result of the first respondent continuing to act as Trustee(s) regarding the K.A. Crowder Trust. The first respondent raises the issue of the applicant being unable to manage the funds and indicates that his mother raised the same concerns at some point.

The first applicant also suggests the applicant being bullied into accessing the funds without proper arrangements being made for the management of the funds.

[26] Whilst the applicant has failed to set out how the conduct of the first respondent indeed hampers the achievement of the object of the Founder, being the protection and preservation of the funds, the applicant does not indicate how the funds will be protected and preserved for his benefit if the KA Crowder Trust is terminated. The applicant requests termination of the KA Crowder Trust rather than a substitution of the Trustees or a variation of any provisions as contemplated in section 13 of Act 57 of 1988. Where it is not indicated how the funds will be utilised and what safeguards will be implemented to protect and preserve the funds, this court is not satisfied that the KA Crowder Trust be terminated. Ms Nwaila submitted however that the order did not create a curatorship. I am mindful of this. It is for this reason that I am inclined to grant leave to appeal on the merits.

[27] I move now to the aspect of leave to appeal with regard to the costs order. I have indicated previously that the usual order is departed from under special circumstances. Both Ms Ellis and Ms Nwaila have drawn various cases to my attention. The Trencon decision is common to both parties. Each relies on the same decision for a different reason. It is trite that a court considering an order of costs exercises a discretion and that such discretion must be exercised judicially. There are instances however where costs do not follow the cause. In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A) at 863-864; the Court said:

"A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend upon whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs. Now, discarding for the moment the idea of discretion, in an appeal against an order for costs the Court of appeal does not judge a party's right to his costs in the Court a quo by asking the question was he the successful party in that Court. It asks ought he to have been the successful party in the Court and decides the question of costs accordingly. It may or may not be necessary in such cases to deal with the order which was actually made on the merits; it may even be that no order on the merits was made in the Court a quo because by the time the matter came before that Court the necessity for an order was gone and the sole question was one of costs. This shows that the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not. In deciding whether or not the Court below made the correct order as to costs the reasons which prompted that Court to make its order must be examined and those reasons must be the actual reasons and no others."

[28] It is evident that if another court were to determine the merits differently then the costs order would change. It is for this reason that it is appropriate to grant leave appeal on the merits as well as the costs. Both counsel agreed that leave to appeal be granted to the Full Court of the Division.

ORDER

[29] For the reasons above, I grant leave to appeal to the Full Court of the Gauteng Local Division against the whole of my judgment on the merits as well as the counter appeal against costs.

Costs to be costs in the appeal.

S C MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the applicant

: K Nwaila

Instructed by

: Nwaila Attorneys Inc

On behalf of the respondents : C.B Ellis

Instructed by

: Gildenhuis Malatji Attorneys

Date of hearing

: 17 May 2021

Date of judgment

: 10 June 2021

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