



**REPORTABLE**

CASE NO: SA 75/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**SONJA OLIVIER**

**Appellant**

and

**LOUISE MICHELLE ELLEN OOSTHUIZEN**

**First Respondent**

**EDISON HOUSE, SCHOOL FOR GIFTED AND  
TALENTED CHILDREN**

**Second Respondent**

**Coram:** DAMASEB DCJ, HOFF JA and FRANK AJA

**Heard:** 4 November 2021

**Delivered:** 9 March 2022

**Summary:** The appellant and the first respondent were in a partnership, conducting the business of the second respondent (the school). The first respondent (Mrs Oosthuizen) terminated the partnership on 14 April 2017 by written notice which resulted in the school's closure at the end of the school term. Most of the teachers then also resigned and they, together with most of the pupils, moved to a new school founded by Mrs Oosthuizen. The bank account of the partnership was healthy at the

time of termination and at all relevant times prior to the dispute (the credit balance exceeded N\$150 000). The partnership could operate its bank account on the internet platform of its bank and the system was set up so as to allow one partner to upload envisaged payments to anyone whereafter the other partner had to authorise such payments. In this manner both partners were involved in all payments. Both appellant (Mrs Olivier) and Mrs Oosthuizen's children (ie two children each) were enrolled as pupils at the school and their husbands had paid an enrolment deposit of N\$3750 per child (amounting to N\$7500 for each set of children). Following the closure of the school, Mr Olivier (the husband of Mrs Olivier who is a legal practitioner) sought a refund of the deposit he paid in respect of his two daughters in a letter to Mrs Oosthuizen. Mrs Oosthuizen replied positively and indicated the refund could be done by Mrs Olivier uploading the payment on the internet banking platform of the school whereafter she will authorise the payment. Mrs Olivier never uploaded the transaction and Mr Olivier, regarded Mrs Oosthuizen's response as evasive. Mr Olivier issued summons against Mrs Oosthuizen for the payment of the N\$7500 in the Magistrate's Court. An offer to refund Mr Olivier was again made by Mrs Oosthuizen (ie she would upload the payment), so that Mrs Olivier can authorise the payment by 'push of the button'. In this instance, Mrs Oosthuizen uploaded both Mr Olivier and her husband's refund with respect to her children. Mrs Olivier refused to authorise both payments - reasoning that it was not clear to her that Mr Oosthuizen had to be repaid because of possible claims the partnership have against him. With this turn of events, Mrs Oosthuizen filed a plea where she denied that the amount claimed was due and payable – this plea was premised on delaying a judgment in favour of Mr Olivier against her. Mrs Oosthuizen's plea also relied on two special pleas that were so meritless that she eventually abandoned them.

Realising the futility of the attempts to avoid judgment against her based on the merits of Mr Olivier's case, it was decided that Mrs Oosthuizen must approach the High Court to apply for an order compelling Mrs Olivier to co-operate with her to pay the refund claimed by Mr Olivier from the partnership account – this application was

opposed by Mrs Olivier who filed a counter-application for the appointment of a liquidator for the liquidation of the partnership.

The High Court found that the institution of the action by Mr Olivier in the Magistrate's Court amounted to an abuse of process and that as the money was available in the partnership account, Mrs Olivier was ordered to co-operate with Mrs Oosthuizen to repay the N\$7500 deposit to Mr Olivier. In addition, the High Court appointed a liquidator for the dissolution of the partnership.

This appeal lies against the court *a quo*'s order compelling Mrs Oliver to co-operate with Mrs Oosthuizen to pay the refund to Mr Olivier from the partnership account.

*Held that*, the general rule is that partners are liable jointly and severally for all the obligations of the partnership. The only practical limitation to this principle is that a creditor of a partnership, during the existence of a partnership, cannot sue any one of the partners but must proceed against all of them.

*Held that*, the court *a quo* was correct when it found that the action instituted in the Magistrate's Court was an abuse of process. The reason for obstructing payment from the partnership initially was contrived and without any substance. This meant that if Mr Olivier really wanted his refund urgently he could have gotten it. He however did not want it from the partnership because this would not immediately and directly compel Mrs Oosthuizen to come up with N\$7500 from her own pocket. Mr Olivier decided to subject her to legal proceedings with the concomitant stress and costs - he wanted to victimise and harass her. This was his primary motive rather than the fear that without such action he would not be reimbursed his deposit.

*Held that*, the fabrication of a defence and the raising of defences which one knows to be unmeritorious in a plea is a serious matter that should not simply be accepted as a response to a claim where one is of the view that the institution of such claim constitutes an abuse of process.

*Held that*, the question of abuse of process was raised in the plea when it should have been raised in an application to stay (postpone). Furthermore, the question of an abuse of process where one denies the merits of the claim is quite different from an abuse of process where one cannot dispute the merits of the claim.

*Held that*, the Magistrate's Court has the power to award punitive costs where its process is abused or where a party acts solely with the purpose to delay or deliberately raises a false defence.

*Held that*, the High Court has the inherent jurisdiction to avoid an abuse of its process and not that of the lower courts.

*It is further held that*, courts must deal with abuses of its processes in terms of their powers and if they do not, this may be grounds of appeal or review. Although the abuse of process in the Magistrate's Court might have been relevant background for the application to compel Mrs Olivier to co-operate with Mrs Oosthuizen, it could not be the source of the power exercised by the court *a quo* to compel Mrs Olivier to do so. The source of this power in the High Court must be sought elsewhere.

*Held that*, the court *a quo* exercised a general equitable discretion to grant the relief sought. The High Court does not, as part of its inherent jurisdiction have the power to turn itself into a court of equity. It must act in terms of the law and not in terms of what an individual judge may think is reasonable in the circumstances. This court finds that the law must determine when and in what circumstances the court must have regard to equitable considerations.

*Held that*, the application in the court *a quo* was an abuse of process – it was part of a vendetta between the Oliviers and Mrs Oosthuizen following her notice to dissolve the partnership. Mrs Oosthuizen's decision to approach the court *a quo* to prevent the Oliviers from compelling her to pay, what would in the final reckoning cost her N\$3750 is so nonsensical and unreasonable that it can be attributed to a motive to

raise the vendetta to another level so as to show the Oliviers that she would not personally repay the deposit to Mr Olivier.

*Held*, the Magistrate's Court has wide powers to postpone matters in its discretion and this was an avenue that Mrs Oosthuizen should have explored. The proper course of action for her was to have launched an application in the Magistrate's Court for a temporary stay (postponement) of the action instituted by Mr Olivier on the basis that it was an abuse of the process. The stay should have been in place until the application to compel Mrs Olivier to co-operate with Mrs Oosthuizen to pay the amount claimed by Mr Olivier had been finalised in that court.

This court finds that the judgment of the court *a quo* should stand as this is the judgment that should have been granted on the facts had the correct approach to the matter been taken.

The appeal succeeds in respect of the costs order granted by the court *a quo*. This court orders that the parties each pay their own costs as they chose to conduct their vendetta through litigation in the High Court and on appeal.

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## APPEAL JUDGMENT

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FRANK AJA (DAMASEB DCJ and HOFF JA concurring):

### Introduction

[1] In this matter the appellant (Mrs Olivier) and first respondent (Mrs Oosthuizen) conducted the business of second respondent (the school) in partnership. Mrs Oosthuizen by written notice on 14 April 2017 terminated the partnership. As a result the school closed its door at the end of that school term. Most of the teachers then

also resigned and they, together with most of the pupils, moved to a new school founded by Mrs Oosthuizen.

[2] At the time the partnership was terminated its bank account had a healthy credit balance and at all relevant times, prior to the arising of the dispute in this matter, the credit balance on this account exceeded N\$150 000. The partnership or school could operate its bank account on the internet platform of its bank. The system was set up so as to allow one partner to upload envisaged payments to anyone whereafter the other partner had to authorise such payment. In this manner, both partners were involved in all payments.

[3] Both Mrs Olivier's and Mrs Oosthuizen's children were enrolled at the school. It is common cause that the enrolment deposit in respect of their children amounting to N\$3750 per child were paid by their respective husbands. As the couples had two children each, their respective husbands each paid to the school a deposit of N\$7500.

[4] Subsequent to the closing of the school, Mr Olivier (the husband of Mrs Olivier), who is a legal practitioner, in a letter to Mrs Oosthuizen sought a refund of the deposit he paid in respect of his two daughters. Mrs Oosthuizen responded to this letter within a day and informed him . . . 'that I am happy for you to be reimbursed the N\$7500 paid to the school' and states that this could be done by Mrs Olivier uploading the payment on the internet banking platform of the school whereafter she will authorise the payment.

[5] Mrs Olivier never uploaded the transaction and Mr Olivier, who incomprehensibly states that he regarded the above response by Mrs Oosthuizen as evasive, then issued summons against Mrs Oosthuizen for the payment of the N\$7500 in the Magistrate's Court.

[6] Mrs Oosthuizen's legal practitioner, realising the absurdity of the situation again offered that Mr Olivier be paid out of the partnership account and this time Mrs Oosthuizen uploaded the payment so that Mrs Olivier simply had to authorise payment by the 'push of a button' on her computer or laptop. As the issuing of the summons against her clearly irked her, Mrs Oosthuizen however decided as Mr Olivier would be paid upfront and not in the process of the liquidation of the partnership there was no reason why her husband should not likewise be refunded the deposit he paid in respect of their children. She thus uploaded a payment of N\$7500 to both Mr Olivier and Mr Oosthuizen. As a result of this Mrs Olivier refused to authorise payment as, on the record, she did not have the option to authorise the payment to Mr Olivier only. She had to authorise both payments or neither one. According to Mrs Olivier she could not authorise payment to both as it was not clear to her that Mr Oosthuizen had to be repaid because of other possible claims the partnership have against him.

[7] When the proposal of Mrs Oosthuizen's legal practitioner came to nought she had to file a plea. From this plea it is clear that she denied that the amount was due and payable. She clearly would not let Mr Olivier get away with his strategy to force her to personally pay him the refund and to let her then seek the refund of half the

amount from Mrs Olivier in the process of dissolving or liquidating the partnership. The plea discloses two features, both of them being deplorable and having been frowned upon by the courts and which normally leads to the award of special costs order against such parties. The whole plea is premised on delaying a judgment in favour of Mr Olivier against Mrs Ooshuizen.

[8] It is said that there is nothing that a recalcitrant debtor likes more than an arguable legal point. The plea relies on this principle by raising two special pleas. Firstly, that Mrs Olivier and the school had to be joined as parties. Secondly, that the claim is premature as the partnership had not yet been liquidated. The problem with these two special pleas is that they are not even arguable and are plainly meritless and they were eventually abandoned as they had to be. This is the first feature referred to above.

[9] The plea on the merits, to avoid prompt judgment, had to deny liability on the part of the school to repay the deposit. In the plea there is a mendacious and deliberate attempt to deny liability. This is mixed up with irrelevant considerations relating to dissolution of the partnership. The most breath-taking dishonesty is where allegations are made so as to retract the admission in writing that Mr Olivier is entitled to a refund. This is the second feature referred to above.

[10] Probably realising the futility of the attempts to avoid judgment against her based on the merits of the case of Mr Olivier, it was decided that Mrs Oosthuizen must approach the High Court and apply for an order compelling Mrs Olivier to co-



operate with her to pay the refund claimed by Mr Olivier from the partnership account. This application now became the arena for Mrs Olivier to oppose it, instead of acceding to this request to co-operate to pay Mr Olivier. In opposing the application, Mrs Olivier was obviously advised by Mr Olivier, so as not to bring an end to the action instituted in the Magistrate's Court by Mr Olivier. It is stating the obvious that for Mrs Oosthuizen to claim the relief in the High Court she had to revert to her previous position, and contrary to her plea in the Magistrate's Court, had to admit that Mr Olivier was indeed entitled to the refund claimed.

[11] The High Court held that the institution of the action by Mr Olivier in the Magistrate's Court amounted to an abuse of the process and that as the money was available in the partnership account, Mrs Olivier was ordered to co-operate with Mrs Oosthuizen to repay the N\$7500 deposit to Mr Olivier. In addition, the High Court appointed a liquidator for the partnership which was the subject matter of the counter application brought by Mrs Olivier. The appeal lies against the order compelling Mrs Oliver to co-operate with Mrs Oosthuizen to pay the refund to Mr Olivier from the partnership account.

[12] The effect of the order *a quo* is that Mr Olivier will be paid N\$7500 from the partnership account with the result that there will be no need to proceed with the claim in the Magistrate's Court save for the costs of that action which will have to be determined. On the basis of the finding *a quo* there would no doubt be submissions of a costs order against him on a punitive scale.<sup>1</sup>

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<sup>1</sup> *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T).

### Discussion of stances of parties taken in Magistrate's Court

[13] As is evident from the discussion above, once the partnership dissolved the ex-partners, Mrs Oosthuizen and Mrs Olivier, were each individually responsible for all the debts of the partnership with a right of recourse against the other ex-partner for her share of such debts. These issues are dealt with as between the partners in the process of liquidation of the partnership. This follows from the general rule that partners are liable jointly and severally for all the obligations of the partnership.<sup>2</sup> The only practical limitation to this principle is that a creditor of a partnership, during the existence of a partnership, cannot sue any one of the partners but must proceed against all of them.<sup>3</sup> However after the dissolution of the partnership a creditor of the partnership can choose his victim, so to speak, between the ex-partners if he or she so wishes and need not sue all the ex-partners. The relationship between the partners *inter-se* regulates their positions among one another but this is of no concern to creditors of the partnership who can claim the full indebtedness from any of the ex-partners.

[14] The above legal situation is cited on behalf of Mr Olivier to justify his action in suing Mrs Oosthuizen solely for the refund due to him. This is however not an answer to the stance taken on behalf of Mrs Oosthuizen and accepted by the court that the institution of the action amounted to an abuse of the process.

[15] On the facts, Mr Olivier knew that the partnership had the money to refund the deposit and that Mrs Oosthuizen was prepared to do her part to have his money paid

<sup>2</sup> *Walker v Syfret* NO 1911 AD 141 at 165.

<sup>3</sup> *Du Toit v African Dairies Ltd* 1922 TPD 245 and *Mahomed v Karp Bros* 1938 TPD 112.

to him. He also knew that in law and in fact one half of what he claimed from Mrs Oosthuizen would have to be repaid to him by his wife, Mrs Olivier, in the process of the liquidation of the partnership. In other words, from the perspective of the Olivier family they would, in the end result, in effect get half the deposit, ie N\$3750, from Mrs Oosthuizen and other half from Mrs Olivier. Between the Oliviers' they clearly decided that they will not allow payment from the partnership and will compel Mrs Oosthuizen to not only pay the said amount from her personal resources but in addition thereto also Mr Olivier's legal costs. As pointed out by the judge *a quo* this clearly, by necessary inference, indicates ulterior motives as the only reason that the payment from the partnership was not forthcoming was to allow Mr Olivier to harass and victimise Mrs Oosthuizen so that she would be forced to face legal action at her own personal expense.

[16] The court *a quo* was thus correct that the action instituted in the Magistrate's Court was an abuse. The reason for obstructing payment from the partnership initially was contrived and without any substance. This meant that if Mr Olivier really wanted his refund urgently he could have gotten it. He however did not want it from the partnership because this would not immediately and directly compel Mrs Oosthuizen to come up with N\$7500 from her own pocket. Mr Olivier decided to subject her to legal proceedings with the concomitant stress and costs. In short, he wanted to victimise and harass her. This was his primary motive rather than a fear that without such action he would not be reimbursed his deposit.

[17] As pointed out above, Mrs Oosthuizen took up the challenge and in her own mind clearly decided to make Mr Olivier pay for his spiteful action to seek the refund from her personally. Thus her plea raised baseless defences, including a dishonest one on the merits, and was only filed for the purpose of gaining time to consider her options. The nature of the defences can also lead to submissions that she should be mulcted with punitive costs.<sup>4</sup> The nature of the defences cannot, in my view, simply be viewed as of no consequence, as held by the court *a quo* who simply said as Mr Olivier instituted action which amounted to an abuse it would be unfair to criticise Mrs Oosthuizen as she was entitled 'to collect sufficient supply of gunpower to stand ground' in the face of the abusive process. The fabrication of defences and the raising of a defence which one knows as false in a plea are serious matters that should not simply be accepted as a response to a claim where one is of the view that the institution of such claim constitutes an abuse of process.

[18] As the abuse of process happened in the Magistrate's Court, this aspect should have been raised in that court instead of raising meritless and false defences to the claim. The question of abuse was raised in the plea but it should have been raised in an application and not in a plea and furthermore, the question of an abuse of process where one denies the merits of the claim is quite different from an abuse of process where one cannot dispute the merits of the claim.<sup>5</sup> The result of Mrs Oosthuizen's approach to the action in the Magistrate's Court is that she had probably at that stage already spent more in respect of legal expenses than it would have cost

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<sup>4</sup> *Performing Right Society Ltd v Berman & another* 1966 (2) SA 355 (R), *Buthelezi v Poorter & others* 1975 (4) SA 608 (W).

<sup>5</sup> I deal with this aspect below when I discuss the abuse of process in general terms.

her had she conceded the claim and sought a special cost order against Mr Olivier for the abuse of the process. As is evident from this matter, once the parties decided that the conduct of the other was beyond the pale, they did not mind to throw good money after bad.

[19] I point out in passing that the Magistrate's Court does have the power to award punitive costs where its process is abused or where a party acts solely with the purpose to delay or deliberately raises a false defence as pointed out above.<sup>6</sup> In addition the Magistrate's Court also has wide powers to postpone matters in its discretion and this is also an avenue that Mrs Oosthuizen should have explored.<sup>7</sup>

[20] Mrs Oosthuizen, not being prepared to concede Mr Olivier's claim (albeit with a special order as to costs for his abuse of the process) raised meritless special pleas and a false defence and when this had the effect of delaying the action in the Magistrate's Court she launched an application in the High Court to compel Mrs Olivier to co-operate with her to effect the payment of the refund to Mr Olivier (which she denied owing in her plea in the Magistrate's Court), from the partnership's bank account on the basis that this would be a way to address the abuse of the process in the Magistrate's Court. In short the strategy on behalf of Mrs Oosthuizen resulted in the stay of the action proceedings in the Magistrate's Court pending the finalisation of the abuse application in the High Court.

#### Abuse of process

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<sup>6</sup> *Sass & another v Berman* 1946 WLD 138, *Wooltextiles Manufacturers v Goldberg* 1952 (4) SA 116 (W) and *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T).

<sup>7</sup> Magistrates' Court Rules, rule 31.

[21] Before I deal with the application in the High Court it is apposite that some general comments are made regarding the law relating to the abuse of process.

[22] It has been recognised that the High Court possesses the inherent jurisdiction to avoid or prevent an abuse of its processes. In the exercise of this inherent jurisdiction the High Court can stay proceedings where circumstances warrant this. Needless to say that as the Magistrate's Court is a creature of statute it has no inherent jurisdiction and must act within the four corners of its constituting statute.<sup>8</sup> As its constituting statute does not grant it this power it cannot grant permanent stays.

[23] It is not necessary for the purposes of this judgment to spell out the circumstances in detail that would lead to the High Court granting such stay of proceedings. It is however necessary to refer to three scenarios relating to the abuse of court processes.

[24] Firstly, there is what amounts to a permanent stay, ie an order staying proceedings permanently where, for example the litigation is held to be frivolous or vexatious. The party against whom such order is given cannot proceed with such process and is permanently barred from obtaining such relief against the other party.

[25] Secondly, there is what amounts to a temporary stay. Examples of this are where a litigant is prevented from continuing with the process until the costs of

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<sup>8</sup> *Van Niekerk v Green* 1920 EDL 131 at 135.

previous unsuccessful litigation is paid<sup>9</sup> or where a civil action is stayed until criminal proceedings flowing from the same facts are finalised. These kinds of stays, as pointed out by Solomon JA 'are cases rather in the nature of postponements than of a stay of proceedings, and there can of course be no question of the jurisdiction of a Court of Justice to postpone the hearing of a suit on the application of either party'.<sup>10</sup>

[26] Thirdly, there is the situation where a court, only after full consideration of the matter before it comes to the conclusion that one of the parties to such litigation was guilty of an abuse in either asserting a case or a defence. In such cases the abuse of the process only features in the decision as to the appropriate costs order.<sup>11</sup>

[27] It goes without saying that a permanent stay is a power that will be exercised sparingly, with great caution and only in clear cases as it is a drastic step to close the doors to a person wishing to institute legal proceedings. The litigation instituted or defended by the process must be clearly without merit and it will not suffice to establish that such litigation is based on highly improbable facts or that the court must grant such stay in the exercise of its inherent discretion merely to avoid injustice and inequity.<sup>12</sup> Thus in *Kent v Transvaalsche Bank* 1907 TS 765 at 774 Innes CJ stated the position as follows:<sup>13</sup>

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<sup>9</sup> It should be pointed out that rule 32(3) of the Magistrate's Court makes provision for a stay in such circumstances.

<sup>10</sup> *Western Assurance Co. v Caldwell's Trustee* 1918 AD 262 at 275.

<sup>11</sup> *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 270C-F as qualified in *Fisheries Development Corporation of SA Ltd v Jorgensen & another* 1979 (3) SA 1331 (W) at 1339G-1340A.

<sup>12</sup> *Western Assurance Co.* at 273-274.

<sup>13</sup> As quoted in *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & others* 1979 (3) SA 1331 (W) at 1340C-D.

‘(The appellant) also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the Insolvency Law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word “equity” in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch Law. If we cannot do so in accordance with those principles, we cannot do so at all.’

[28] Similarly our courts do not administer a system of equity. To paraphrase the last sentence quoted above in the current Namibian context:

‘Using the word “equity” in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the [Namibian Constitution, the common law or where enjoined to do so by statute]. If we cannot do so in accordance with those principles, we cannot do so at all.’

[29] With regard to temporary stays the situation is somewhat different. Where temporary stay is applied for, the court exercises the same jurisdiction as it would when a postponement is sought and it goes without saying that in such circumstances such temporary stays or postponements can be granted in the exercise of a judicial discretion which does make provision for an equitable decision in the broad sense referred to by Innes CJ. To put it simply the same discretion afforded to a court when granting or refusing postponements is afforded to the court when temporary stays are sought. This is the reason why one can get, what appears on the face thereof an anomaly, a stay against a party who is entitled to the relief that he or she seeks. An example of this appears from the facts in *Premium & Claims Administrators (Pty) Ltd*



*v Sheriff for the Districts of Stellenbosch and Kuils River South & another*.<sup>14</sup> The applicant in that matter was an agent for a large and profitable assurance company. The company cancelled the agency agreement and applicant who maintained that the cancellation was wrongful instituted a damages claim for R57 million against the company. The applicant had no assets and ceased to trade as a result of the cancellation of the agency agreement. When the matter was ready for trial the court postponed the matter and made a punitive costs order against the applicant inclusive of the costs of two counsel. The bill in respect of the costs award was taxed at R632 024,86. As the applicant could not pay this amount a warrant of execution was issued in this amount against the applicant by the company.

[30] On the facts the court found that the purpose of the execution was to attach the claim and put it up for sale in execution. The idea was that the company would purchase it at the sale in execution at a substantial discount and then withdraw the action and in so doing the company would neutralise the risk of a judgment against it in the damages claim. The court stayed the writ 'pending a date not less than 14 days after the final determination' of the damages claim.

[31] After finding that the execution process was '*mala fide* and a manifest abuse of process' the court concluded as follows:

'In my view the applicant is entitled to have its right to bring its claim to finality protected, particularly in the circumstances where there is a possibility (as alluded to by Mr Visser in the replying affidavit) that the repudiation of the agency contract was

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<sup>14</sup> *Premium & Claims Administrators (Pty) Ltd v Sheriff for the Districts of Stellenbosch and Kuils River South & another* (10391/2016) [2016] ZAWCHC 176 (29 November 2016).

intentional and designed to bring the applicant to its knees. Unless the second respondent can attach other assets belonging to the applicant, the right to recover its taxed costs will necessarily have to be held in abeyance pending the trial. This will not operate unduly harshly against a company with the sort of resources to which Mr Visser has referred and, at the end of the day, if the applicant is successful in the main claim the second respondent will be able to apply a set-off of the costs award against any damages that are proved against it.<sup>15</sup>

[32] Where the question of the abuse of process only arises after the litigation has been finalised the only issue in this context is how this will affect the costs order of the court. In such instance the court will be entitled to in the ordinary exercise of its discretion as to the costs, make any order, including a punitive order or even an order that the successful party is to pay the costs, which it deems fair and equitable in the circumstances.<sup>16</sup>

[33] Lastly, in respect of approaches to a court to stay proceedings either permanently or temporary it is important to restate that such relief must be sought by way of application and that to raise it in a special plea is wholly irregular. The facts underpinning the relief and the grounds for the stay must appear from a substantive application to which the other party will be able to respond so that the full picture is put before the court for determination'.<sup>17</sup>

### Application in the High Court

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<sup>15</sup> *Ibid* para 20.

<sup>16</sup> *Fisheries Development Corporation* case above 1339G-1340A.

<sup>17</sup> *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517 and *Fisheries Development Corporation* at 1338H.

[34] If regard is had to the fact that even if Mrs Oosthuizen was compelled to pay Mr Olivier the full N\$7500 initially from her own pocket she would have been effectively refunded half that amount in the liquidation of the partnership, then it is clear that this matter had by now become a personal vendetta between the parties. Why else would one launch an application in the High Court, the costs whereof would exceed the indebtedness probably by tenfold, to simply ensure that the indebtedness must be dealt with in the final account of the partnership rather than by immediate payment. This in circumstances where N\$3750 is really the final amount involved. Where parties abuse the legal process to conduct their personal vendettas the court should not, in the words of the judge *a quo* 'join this melee'.

[35] In the application to the High Court, the whole background to what led to the action being instituted by Mr Olivier is spelt out and an order is then sought to compel Mrs Olivier to co-operate with Mrs Oosthuizen to repay the deposit from the partnership account to Mr Olivier. As mentioned, this relief is sought on the basis of the inherent jurisdiction of the High Court to prevent the abuse – not of its own process – but of an abuse happening in the Magistrate's Court.

[36] Mrs Olivier must now, of course, justify her totally unreasonable behaviour not to have co-operated with Mrs Oosthuizen in this regard and also attempt to distance her from the abuse of process being perpetrated by Mr Olivier in the Magistrate's Court. On her version, certain parents agreed that the deposits paid in respect of their children would not be refundable. She was informed of this fact by Mrs Oosthuizen who had a meeting with these parents. Although Mr Olivier was not at the meeting,

she did not know whether he might also have agreed to this at some other stage. Why he would then insist on a refund and why Mrs Oosthuizen would agree to such refund she simply does not deal with save that according to her, Mrs Oosthuizen, when agreeing to the repayment of the deposit did not expressly admit that it was due. This is simply absurd. Why would Mrs Oosthuizen agree to a refund if she did not admit it was payable. The admission is implicit in the agreement to repay the deposit.

[37] The legal practitioner for Mrs Olivier submitted in the High Court as he does in this court that there was no basis for the relief sought as there is no basis in law for a person to compel a former partner to make payment of debts from the partnership funds. Payment of partnership debts are to be paid by a liquidator in the winding-up process and that Mrs Olivier rightly refused to allow such payment.

[38] The court *a quo* rejected the proposition by counsel for Mrs Olivier as follows:

[48] Mr. Barnard also argued and strenuously too, that the relief sought by the applicant has no legal basis or precedent. I do not agree. We live in a day and age where substantial amounts of money are released on the click of a button. If a case is made to the satisfaction of the court that a party, who is under a duty or obligation to pay a debtor and has to press the release button to do so, but unreasonably refuses to act accordingly, should the court throw its hands in despair and send that litigant away thus opening the door to resort to self-help thereby? I think not.

[49] Courts, particularly this court, has been adorned by the law-giver, with a power which is residual in nature and which may be summoned in cases where the interests of justice demand. To send litigants away merely because the matter is the first of its

kind, would amount to irresponsible and unwanted abdication of responsibility by the court. In this regard, the court should not shirk from extending the reach of the hands of justice to such deserving candidates and this is the applicant's lot in my view.

[50] The court cannot, in the circumstances, join in this melee and deny the applicant relief that will settle the fictitious dispute once and for all, avoiding in the process, the need to continue with the abuse of court processes that the respondent and her husband are busy perpetrating in the Magistrate's Court. As was said by one jurist, Mr. Justice Desmond, 'When the ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge, is to pass through them undeterred'. That is what will be done in this case. The law would not have developed had new precedent not been created.'

[39] Whereas it is correct that the High Court has the inherent jurisdiction to avoid an abuse of process, it is an abuse of its process and not an abuse of process in the lower courts. Those courts must deal with abuses of its processes in terms of their powers and if they do not, this may be grounds for appeal or review in the High Court. The abuse of process in the Magistrate's Court might have been relevant background for an application to compel Mrs Olivier to co-operate with Mrs Oosthuizen to make payment from the partnership funds to Mr Olivier but it could not be the source of the power to compel to do so. The source of this power in the High Court must be sought elsewhere.

[40] For the High Court to exercise such power to address what it considered as an inherent jurisdiction to prevent unreasonable behaviour (unreasonable refusal to press a button) where the interest of justice demands it and to suggest that this power would even extend to areas where the ruling go against settled precedent ('ghosts of

the past . . . clanking their medieval chains<sup>18</sup>) is hugely problematic. Relevant precedent cannot be ignored. It may, of course, be developed or extended to cater for modern exigencies or even be dismantled when obsolete but there is no basis for an inherent jurisdiction to do what an individual judge thinks is reasonable or in the interest of justice in certain circumstances irrespective of the legal position applicable to such circumstances. The High Court does not, as part of its inherent jurisdiction have the power to turn itself into a court of equity as pointed out above. It must act in terms of the law and not in terms of what an individual judge may think is reasonable in the circumstances. The law must determine when and in what circumstances the court must have regard to equitable considerations.

[41] The submission made by counsel for Mrs Olivier that there is no basis in law for the relief sought by Mrs Oosthuizen is not correct. At the time the application was instituted, the partnership was dissolved but not yet liquidated (terminated). No liquidator had been appointed yet. Thus, although the dissolution has certain effects in law, eg that the parties no longer had implied authority to act on behalf of the partnership and creditors could sue the individual partners for their debts, the partnership continued for the purpose of liquidation and distribution of its assets.<sup>19</sup>

[42] Most partnerships are dissolved by agreement and if the ex-partners agree to the dissolution and liquidation process to distribute the assets there is no need for the appointment of a liquidator. Where such agreements are in place, the ex-partners can

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<sup>18</sup> *Oosthuizen v Olivier* (HC-MD-CIV-MOT-GEN-2018/00210) [2019] NAHCMD 440 (25 October 2019) para 50.

<sup>19</sup> 19 *Lawsa* first reissue para 321 and case there cited in footnote 3.

sue each other to compel compliance with such agreements pursuant to the *actio pro socio*.<sup>20</sup> In addition to this, the partners of the erstwhile partnership still have a duty to act towards to one another in good faith:

'The obligation of perfect fairness and good faith is, moreover, not confined to persons who are actually partners. It extends . . . also to persons who have dissolved partnership but who have not yet completely wound-up and settled the partnership affairs.'<sup>21</sup>

[43] It is clear that the partnership had sufficient funds to refund the deposits paid by the parents that did not agree that these deposits would not be refundable. It is also clear that Mrs Olivier had to accept Mrs Oosthuizen's word as to who those parents were and that they had to be refunded. Despite her protestation to the contrary she knew Mr Olivier was one of those parents. She refused to co-operate with Mrs Oosthuizen to support the ulterior motives of her husband as pointed out above. In other words, she acted in bad faith towards Mrs Oosthuizen. The order to compel her to co-operate to have the deposits refunded to Mr Olivier could thus be premised on her agreement that certain payments could be refunded from the partnership account coupled with the fact that she had a duty to act in good faith towards her erstwhile partner in respect of the dissolution of the partnership. I should again emphasise that this was the position as no liquidator had yet been appointed so that the erstwhile partners could by agreement proceed with the distribution of the assets of the partnership.

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<sup>20</sup> *Van der Post & others v Voortman* 1913 AD 236 and *Robson v Theron* 1978 (1) SA 841 at 856 (A).

<sup>21</sup> *Sempff v Neubauer* 1903 TH 202 at 216.

[44] As Mrs Olivier agreed that the deposits could be refunded from the partnership account and she had the duty to act in good faith to her erstwhile partner, Mrs Oosthuizen, the *actio pro socio* could be used to compel her to co-operate with Mrs Oosthuizen to pay the refund to Mr Olivier from the partnership funds. This approach was not advanced in the court *a quo* and nor did that court base its order on this approach. As pointed out above the court *a quo* sought to exercise a general equitable discretion to grant the relief sought and this was not the correct approach.

[45] It follows from what is stated above that the proper course of action for Mrs Oosthuizen was as follows: she should have launched an application in the Magistrate's Court for a temporary stay (postponement) of the action instituted by Mr Olivier on the basis that it was an abuse of the process in that court. The stay should have been sought until, say, 14 days, subsequent to a judgment in an application or action (already instituted or to be instituted within a specified time period) seeking to compel Mrs Olivier to co-operate with Mrs Oosthuizen to pay the refund to Mr Olivier.

[46] I am *prima facie* of the view that the application in the High Court was an abuse of the process. It was clearly simply part of the vendetta between the Oliviers and Mrs Oosthuizen following her notice to dissolve the partnership. Whereas it is correct that Mr Olivier initiated the matter by the summons issued against Mrs Oosthuizen in the Magistrate's Court, she did not hesitate to enter the fray and to give as good as she got and even upped the ante by the bringing of the application in the High Court. Whereas her reaction to the summons in the Magistrate's Court, may to some extent, be explained by her disgust at the unreasonable and spiteful conduct of



the Oliviers, her decision to approach the High Court to prevent the Oliviers from compelling her to pay, what would in the final reckoning costs her N\$3750 is so nonsensical and unreasonable that it can be attributed to a motive to raise the vendetta to another level so as to show the Oliviers that she would not, virtually at any cost, concede that she should personally repay the deposit of Mr Olivier. For this purpose she was prepared to incur legal costs that would probably be between tenfold and twentyfold the N\$3750 that she would effectively have to pay eventually.

[47] On behalf of Mr Olivier it was contended that there was no basis in law for the relief sought as he, as creditor of the partnership, could sue either of the partners and there was no basis to deprive him of this right in the exercise of an equitable discretion based on the view that an abuse was taking place in the Magistrate's Court. This is especially so if regard is had to the fact that the merits of his claim could not be contested.

[48] The question of an abuse of process in the High Court thus did not arise in the context I sketch above. I will thus refrain from making a finding in this regard save to forewarn legal practitioners that future conduct of this sort may well be held, depending on the circumstances of any particular case, to constitute an abuse of process.

[49] In view of the comments I make about the manner in which Mrs Oosthuizen's case was conducted in the Magistrate's Court and court *a quo* it is apposite that I

point out that the legal practitioner who appeared for her in this court did not appear for her in the Magistrate's Court or in the court *a quo*.

### Conclusion

[50] One cannot prevent persons from raising their personal vendettas through the courts by the misuse of legal principles and procedures but this should be discouraged instead of encouraged where possible. The fact that parties do not hesitate to throw good money after bad in their vendettas should be their own business and the courts should not encourage or sanction such behaviour by granting cost orders in their favour.

[51] Whereas counsel for Mr Olivier is correct that the application in the High Court was premised on an untenable principle, the facts in the matter were such that the court *a quo* was entitled to grant the relief sought.<sup>22</sup> As far as I am concerned, had Mrs Oosthuizen brought her application in the Magistrate's Court for a temporary stay (postponement) pending an application to compel Mrs Olivier to co-operate so that Mr Oliver could be repaid his refund, that application would have been granted and she may even have been awarded a costs order on a punitive scale against Mr Olivier. So as not to protract this unsavoury matter any further it is in my view appropriate that the judgment of the court *a quo* should stand as this is the judgment that, in my view, should have been granted on the facts had the correct approach to the matter been taken.

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<sup>22</sup> *Black Range Mining (Pty) Ltd v Minister of Mines and Energy & another* 2009 (1) NR 140 (HC) paras 10 and 19 and *Bruni & others NNO v Minister of Finance & others* 2021 (2) NR 552 (SC) para 51.

[52] To sum up I am thus of the view that the court *a quo* erred to give a special costs order in favour of Mrs Oosthuizen essentially based on the fact that the action in the Magistrate's Court was an abuse of the process although the obtuse persistence of Mrs Olivier to attempt to justify her action not to co-operate with Mrs Oosthuizen was also a factor. The abuse of the process in the Magistrate's Court needs to be addressed in that court when it comes to the costs of that action that now will fall by the way side. As far as the High Court is concerned, the conduct of Mrs Oosthuizen in bringing an inept application in the High Court balanced with the totally obstructive manner in which it was defended, indicates that both parties had no qualm to carry on with their vendetta irrespective of the costs. In these circumstances I am of the view that they should each pay for their own costs as this is the way they chose to conduct their vendetta. No order as to costs should have been made.

[53] The appeal thus succeeds only in respect of the costs order granted in the High Court. As far as the costs on appeal are concerned, I bear in mind that this judgment in upholding the order of the court *a quo* is based on an approach that was not advanced on behalf of the parties in the application before the High Court. I am also of the view that as this vendetta between the parties led to an undisputed indebtedness becoming litigated to the highest court and to discourage this approach to the law and to litigation no order as to costs should be granted on appeal either.

[54] In the result the following order is made:

- (a) The costs order in the High Court is deleted and substituted with the following order:

'Each party is to pay their own costs.'

- (b) There shall be no order as to the costs of this appeal.

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**FRANK AJA**

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**DAMASEB DCJ**

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**HOFF JA**

APPEARANCES

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