IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 30/2023**

In the matter between

ZACHARIAH MSONGELWA NHLEKO	**1ST APPELLANT**
JABULANI ELTON MNGOMETULU N.O.	**2ND APPELLANT**

AND

NANDI NHLANHLA MANYATSI N.O.	**1ST RESPONDENT**
BAHLEBENGUNI MANYATSI N.O.	**2ND RESPONDENT**
THE MASTER OF THE HIGH COURT OF ESWATINI	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral Citation: *ZACHARIA MSONGELWA NHLEKO & ANOTHER v NANDI NHLANHLA MANYATSI AND 3 OTHERS (30/2023) [2025] SZSC 130 (31 JANUARY, 2025).*

Coram: S.P. DLAMINI, M. D. MAMBA et J.M. VAN DER WALT JJA

Heard: 04 JUNE, 2024

Delivered: 31 JANUARY, 2025

[1] *Civil law- Law of Contract- Agreement of Sale of Shares in a company. Arbitration clause to refer dispute or difference arising from or in connection with agreement between the parties to arbitration. Submission irrevocable- Section 3 of Arbitration Act 24 of 1904.*

[2] *Civil law- Arbitration Clause- Generally jurisdiction of Court not ousted. When application for stay or referral to arbitration to be made- Section 6 (1) of Act- before pleadings.*

[3] *Civil law and procedure- Costs- punitive costs- unfettered discretion of trial Court. Awarded against party adjudged to have misconducted itself in connection with the litigation. Appeal Court may only intervene or interfere with trial Court's decision if such Court is found to have not exercised its judicial discretion properly.*

[4] *Civil law- Contract of Sale of Shares- breach of contract by buyer and innocent party cancelling contract- party in breach claiming for refund or restitution of part of purchase price already paid. Money paid by defaulter through a third party.*
Held: On death of defaulter- executors of estate have standing to claim.

[5] *Civil law and procedure- Application for final interdict- three requirements thereof restated- clear right, violation or threat thereto and no alternative remedy.*

MAMBA JA.

[1] The facts in this appeal are largely common cause and are as follows:

1.1 On or about 15 July, 2019 Messrs David Manyatsi, Mlungisi Mamba and Zacharia Msongelwa Nhleko formed and registered a company known as Manyatsi Nhleko Capital (hereinafter referred to as MN Capital) in terms of the company laws of Eswatini. MN Capital was licensed by the Financial Services Regulatory Authority and was accordingly required to have at least a sum of One Million Emalangeni in its reserve at any given time.

1.2 Prior to the registration of MN Capital, another company known as Manyatsi Nhleko Quantity Surveyors (Pty) Ltd had been registered in terms of the company laws of Eswatini. Both Mr. Manyatsi and Mr. Nhleko held 50% each of the shares in this company.

1.3 On or about 24 December, 2019 Mr. Manyatsi and Mr. Nhleko concluded an agreement whereby Mr. Nhleko sold his 50% shareholding in Manyatsi Nhleko Quantity Surveyors (Pty) Ltd to Mr. Manyatsi for a sum of E7,043,103.84. The purchase price it was agreed was to be paid within a period of six months from date of signing of the Contract of Sale. Again, the benefits accruing from the shares sold, were to pass on to Mr. Manyatsi upon the date of signing of the agreement.

1.3.1 It was a further term of the agreement that upon full payment of the purchase price, Mr. Nhleko would provide Mr. Manyatsi with the relevant share certificate and the transfer thereof into the name of Mr. Manyatsi.

1.3.2 Another term of the Agreement of Sale was that Mr. Nhleko would cease to be a shareholder in the said company upon signature of the Deed of Sale.

1.3.3 The parties also agreed that Mr. Manyatsi would pay the purchase price for the shares within a period of 6 months in instalments of E1,173,850.64 per month with effect from 07 February, 2020. The other monthly instalments were to be paid on or before the first Friday of each month.

1.4 Mr. Manyatsi died on 1 August, 2020 and by this time he was in arrears with his instalments. He had paid only a sum of E4,695,405.56. Mr. Manyatsi died testate. The 1st and 2nd Respondents were duly appointed executors of his estate and they appear in these proceedings in that capacity. Mr. Jabulani Elton Mngomezulu, 2nd Appellant, was also appointed as one of the executors.

1.5 On 25 September, 2020 just over a month after the death of Mr. Manyatsi, Mr. Nhleko wrote to the said Executors informing them that he was cancelling the sale of shares agreement. He explained that he was doing so because the deceased had failed to pay the monthly instalments agreed upon. The executors accepted the cancellation and demanded the refund of the money already paid by the deceased, that is, E4,695,402.56.

This demand was made on 25 November, 2021. Mr. Nhleko refused or neglected to make this refund.

1.6 It is not insignificant to note at this stage that the payment of E4,695,402.56 made by Mr. Manyatsi to Mr. Nhleko was made through electronic finance transfers issued by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. After the death of Mr. Manyatsi, some of the shares in question were taken over by Mr. Mngomezulu who subsequently refused to join the other executors in pursuing the estate claim against Mr. Nhleko. He cited a conflict of interest.

1.7 Following amongst other things, the refusal by Mr. Nhleko to refund the said money to the estate of the deceased, the Respondents herein filed an application before the Court *a quo* for, *inter alia*:

> '(a) Removing Mr. Jabulani Elton Mngomezulu as executor of the estate of the late Sihlangu Manyatsi. . . .
>
> (b) Declaring that the Letters of Administration granted to [Mr. Mngomezulu] on 17th September, 2020 . . . be revoked.
>
> . . .

(d) Declaring all benefits, commission, fees and disbursements due to [Mr. Mngomezulu] in his capacity as executor, forfeit.

(e) Alternatively to prayers (a) to (c) above, declaring that the [1st and 2nd Respondents], constituting a majority of the executors of the estate of the late David Sihlangu Manyatsi . . . were duly authorised to institute proceedings on behalf of the estate for recovery of monies owed to the estate.

(f) Ordering the 1st [Appellant] to pay to the estate of the late David Sihlangu Manyatsi the sum of E4,695,402.56 . . . and

(g) Ordering the 1st Respondent to pay to the estate of the late David Sihlangu Manyatsi interest on the sum in (f) above at the prescribed rate of interest from date of demand to date of payment.

(h) Ordering the 1st and 2nd [Appellants] to pay the applicants' legal costs, including the costs of two Counsel where employed, jointly and severally.

1.8 Both Appellants unsuccessfully opposed this application. Judgment in this case was handed down by the Court *a quo* on 03 April, 2023. But before this case was concluded, an application for an interdict was filed by the two Executors. This case bears the same case number save that a capital B was added

to it and it was thus referred to as Claim B before the Court *a quo.* Additionally, further Respondents were cited under this claim.

1.8.1 The main prayer in this application was to interdict STANLIB Swaziland, (3rd Respondent) from transferring any portion of the investment held by it to Mr. Nhleko and that 25% of the investment held by STANLIB be paid by STANLIB into the estate account of the deceased (Mr. Manyatsi). Initially, an interim order was sought and granted. The Order was confirmed at the end of the proceedings.

[2] One of the reasons put forth by the Appellants as a defence to the first claim was that the deceased had a loan granted by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd and the sum of money claimed by the estate from Mr. Nhleko had been repaid by the latter to the said company. In dealing with the issue the Court *a quo* had this to say:

> '[111] The proposition by the Respondents of repayment by Nhleko of the sums he received to Manyatsi Nhleko Quantity Surveyors (Pty) Ltd via a loan transaction is at best obscure. With it the Respondents suggest the inter-positioning of a loan transaction through the device of some accounting entry and some 'deduction of value of shares.'

> [112] The loan phenomenon is not explained. In any case without the foundational facts as to the constitution of these loan arrangements the allegations become even more incongruous. Even more vague is Mngomezulu's statement that: 'the late David Sihlangu Manyatsi had a loan of E2,571,560.00 and the 1st Respondent had a loan of E5,374,282.00. May I place on record that the amount of E5,374,282.00 also included E4,695,402.56. These amounts were deducted and were received by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd.'

The Court held that Mngomezulu did not disclose the source of such information and he had failed to give the details on these allegations or conclusions. Further, there was no evidence to show that indeed these monies were credited to the account of Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. After assessing or evaluating the defence proffered by the Appellants, the Learned Judge *a quo* came to the conclusion that:

> '[118]. . .Quite apart from the fact that legally the Respondents' defence as framed in their affidavits does not disclose a viable competent legal defence to the Applicants' claim as I have determined in this opinion, the additional difficulty is that version is also inherently improbable. It is premised on a supposed construct of loan transactions the factual evidence of which has not been established by objective factual evidence. Neither the 1st nor 2nd Respondent have placed any evidence regarding these transactions or their terms as

alleged. Instead, they rely on the construct of the loan device and its repayment as an accounting entry.'

. . .

[120] . . . All there is are bare allegations intended to be padded by an attempt to introduce uncreditworthy hearsay evidence and makeshift documents without laying down the financial and contractual state of affairs the Respondents alleged, either in relation to Manyatsi Nhleko Quantity Surveyors (Pty) Ltd or the so-called group of companies allegedly associated with the said Manyatsi Nhleko Holdings (Pty) Ltd. For these reasons, I am inclined to dismiss the version as inherently implausible on the face of the papers.

[121] On the whole one is left with an abiding impression that Messrs Mngomezulu and Nhleko have set about to put forth this version in a bid to advance an untenable defence to the Applicants' *prima facie* case which is supported by the agreed common cause and otherwise incontrovertible facts. These facts are: the late Mr Manyatsi entered into a sale of shares agreement with Mr. Nhleko during his lifetime pursuant to which he paid or caused to be paid on his behalf the sums claimed in this application. After the demise of Manyatsi, Nhleko cancelled the agreement and contended for the reversion of his 50% shareholding in the company concerned. He did so on the principle of restitution but without tendering or actually paying back the sums he received to the estate of the late Mr. Manyatsi. By this account restitution as a remedy upon rescission of the contract must avail him and not his counterpart to the contract. Nhleko's position is legally

untenable and his defence must fail. For these reasons the claim succeeds with costs.'

[3] On the question of the punitive order for costs against Mr. Mngomezulu, it is relevant to note and record that Mr. Mngomezulu was an Executor Dative, but he stated that he did not uplift his Letters of Administration or executorship from the office of the Master of the High Court. It is not in dispute that he did not cooperate with his co-executors in the execution of their duties. Infact he was, as the Court *a quo* found, 'a formidable opponent . . . as they endeavoured to prosecute the estate's interests in the matter.' He was hostile to the estate's claim against Mr. Nhleko. Infact he made common cause with Mr. Nhleko and was the main opponent to the estate's claim against Mr. Nhleko. He later admitted that he was now a shareholder in the company, having acquired some of the shares sold by Nhleko to the late Mr. Manyatsi. He was thus conflicted and such was contrary to his fiduciary duties as co-executor in the estate. To crown it all, he opposed the motion for his removal as such executor and he maintained this stance until very late in the proceedings. Mr. Mngomezulu did not only oppose his removal but also supported Mr. Nhleko's refusal to repay the monies he had received from the late Mr. Manyatsi. The Court *a*

quo found that his 'conduct and obvious breach of his fiduciary duties to the estate are beyond the pale and egregious especially in that he persisted in this antipathy to the estate and the Applicants to the brink of the hearing of the application only to concede at the eleventh hour. . . . By then he had mulched the Applicants in unnecessary costs particularly in connection to the motion concerning his status as co-executor.'

The Court concluded by saying that Mr. Mngomezulu's conduct was 'dishonourable, vexatious and unethical and was unnecessary. Once he was determined and settled in his mind to pin his colours to the 1st Respondent's mast, the honourable thing to have done was to renounce and withdraw his position as executor as it had become untenable. To have persisted in his conduct to insist on retaining this position whilst at the same time locking horns with the estate in litigation is deplorable conduct warranting this Court's disapproval.'(Per paragraph 56 of the judgment). Thus, punitive costs were awarded as prayed.

[4] The Appellants have also argued that the injunctive relief should not have been granted inasmuch as there was no proof that the late Mr. Manyatsi had made the contribution to the funds at STANLIB from his

personal account. Additionally, the Appellants argued that Manyatsi Nhleko Quantity Surveyors (Pty) Ltd ought to have been joined as a party in the proceedings because the monies paid to Manyatsi Nhleko Capital Account in fulfilment of its obligations under the Financial Services Regulatory Authority was a loan being granted to Manyatsi and Nhleko by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. The money was a sum of E500,000,000.00. There was also an allegation that the loan was granted to Manyatsi Nhleko Capital by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. One half of the money was paid as a contribution by the late Mr. Manyatsi. The other half was for Mr. Nhleko whilst Mr. Mlungisi Mamba's contribution was a sum of E500,000,000.00. This information was primarily sourced from the correspondence Mr. Mamba sent to the CEO of the Financial Services Regulatory Authority (FSRA) reclaiming his personal capital contribution. Manyatsi Nhleko Capital was cited as the 6th Respondent in this application for an interdict. The Court came to the conclusion that because the Appellants had raised the issue of non-joinder they ought to have taken the legal steps to join Manyatsi Nhleko Quantity Surveyors (Pty) Ltd but because there was no evidence that the money had been invested by the said company on behalf of the late Mr.

Manyatsi, there was no evidence that the said company had a direct and substantial interest in the outcome of the application. The same was true of Manyatsi Nhleko Capital, the Court found.

[5] On the question of a clear right that is being threatened or violated, the Court held that the 1st Respondent had stated in her affidavit and demonstrated, through evidence, that there was a 'clandestine scheme to spirit away her late husband's interest in the share equity, that is, the money held by STANLIB'. As the executor of the estate she had a clear right to prevent this from taking place.

[6] This appeal pertains to the judgment of the Court *a quo* on the two applications. The whole judgment is appealed against in respect of the judgment in the first case. I must say that the original grounds of appeal filed and served on 04 May 2023, list quite a number of challenges. Some of these are, however, argumentative to the extent that there is reference to case law and excerpts from such cases. This, I think, is not in order.

[7] Mr. Bester, Counsel for the Appellants amplified the Appellants' Grounds of Appeal in his Heads of Argument where he stated that:

> '23 The Appellants only appeal against a portion of the judgment or order in respect of paragraphs 22.5, 22.6, 22.7 and 22.8 above.'

These paragraphs are to the following effect:

> '22.5 Mr. Mngomezulu personally bear the costs of the application for [his] removal and ancillary relief which costs included the certified costs of retaining two Counsel in terms of Rule 68 of the Rules of the High Court as at a scale between attorney and client;
>
> 22.6 Mr. Nhleko pay to the estate of the late Mr. Manyatsi the sum of E4,695, 402.56 [plus interest thereon].
>
> 22.8 Messrs Nhleko & Mngomezulu to pay the executors' costs including the costs of two Counsel jointly and severally.'

There are 3 challenges, as I understand them on the second claim. First, that the Court was in error in relying on secondary evidence to come to the conclusion that Mr. Manyatsi, the deceased, had personally made contributions in respect of the funds or monies held by STANLIB. Secondly, that Manyatsi Nhleko Quantity Surveyors (Pty) Ltd, had a direct and substantial interest in the matter and ought to have been joined as a party in the proceedings. Thirdly, the Respondents failed to establish the three

requirements for a final interdict. I deal with the grounds of appeal in the next segment of this judgment. I will start with the issue of jurisdiction which is based on the arbitration clause.

[8] The Appellants have submitted that the Court *a quo* was in error in coming to the conclusion that it had jurisdiction to hear the matter despite the arbitration clause in the sale of shares agreement. This clause is in the following terms;

> '8.1 Any dispute between the parties in regard to this contract or any issue arising from it in connection thereto or in connection with the interpretation of this contract the protection of the rights and obligations of the parties in terms of this contract or the cancellation thereof or any other aspects in regard to this contract will be referred to arbitration.'

The Appellants have submitted further that this clause must be read together with Section 3 of the Arbitration Act 24 of 1904 which provides that;

> 'Unless a contrary intention is expressed therein, a submission shall be irrevocable except by leave of the Court or a Judge, or by consent of all parties thereto and shall have the same effect in all respects as if it had been an Order of Court.'

Based on these two provisions, the Appellants submitted that the Court had no jurisdiction to hear the matter by virtue of the fact that by signing the

agreement the parties had made an undertaking that any dispute or difference between them arising from or in connection with the contract shall be referred to an arbitrator. This undertaking was irrevocable as decreed by Section 3 of the Act. Because it was irrevocable, they argued, the Court had no jurisdiction to hear the matter.

[9] The question of the arbitration clause was not actually pleaded by the Appellants but was only raised during argument. Counsel for the Appellants contended that the Respondents ought to have first sought and obtained leave of Court to file their application and it was not the duty of the Appellants to raise this issue of jurisdiction in their opposing papers. On the contrary, it was argued by the Respondents that an arbitration clause such as the one under the spotlight in this case does not oust the inherent jurisdiction of the High Court. It was submitted further that it was irregular for the Appellants to raise this issue from the bar, but it ought to have been raised at the commencement of the proceedings as an application to stay the proceedings and refer the dispute to arbitration.

[10] The Court *a quo* dismissed the jurisdictional objection by the Appellants. The Court held that in terms of both the common law and the Arbitration Act, an arbitration clause does not oust the jurisdiction of the Court and where an application is made to stay the proceedings and refer the dispute or difference to arbitration, it should be done from the outset. The application, one might add, has to be motivated in the supporting affidavit. Once such an application is made, the Court has a discretion either to grant or refuse it. It is this ruling that is being challenged by the Appellants in their first ground of appeal.

[11] The general rule of the common law on the effects of arbitration clauses is well settled in this jurisdiction and it is that an arbitration clause in an agreement does not oust the jurisdiction of the Court to hear a dispute or difference arising from or in connection with the said agreement. (See *Shell Oil Swaziland (Pty) Ltd v Motorworld (Pty) Ltd t/a Sir Motors (23/2006) [2006] SZSC 11 (21 June 2006), Construction Associates (Pty) Ltd v CS Group of Companies (Pty) Ltd (3026/2006) [2008] SZHC (13 June, 2008) and Crompton Street Motors cc t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels 2022 (1) SA 317 (CC))*.

[12] The Appellants have submitted that it was incumbent on the Respondents to respect the arbitration clause and refer the dispute to arbitration in compliance with the undertaking in the agreement. It was argued further that the submission was irrevocable and therefore the Respondents had to seek and obtain leave of Court to have their application adjudicated upon in Court. The Court was referred to various excerpts wherein the Courts have emphasized the need to respect the election of parties to have their contractual differences settled through arbitration and not by the Courts. These cases, however, dealt with instances where the Court had been approached to review an arbitrator's award. This is not the issue in this case.

[13] Section 6 (1) of the Act is similarly worded to Section 6 (1) of the Arbitration Act 42 of 1965 of the Republic of South Africa. Commenting on this section, **P.A. Ramsden, McKenzie's Law of Building and Engineering Contracts and Arbitration (Juta & Co) 7th Ed.** at 241 says the following:

> 'In terms of the Act, if any party to an arbitration agreement commences any legal proceedings in any Court (including an inferior Court) against any other party to the agreement in

respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance, but before delivering any pleadings or taking any other steps in the proceedings, apply to that Court for a stay of such proceedings or raise a special (dilatory) plea for stay of proceedings. In this connection 'party' means party to the arbitration agreement, not any party to the proceedings which it is sought to stay.

The Act further provides that if on any such application the Court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the Court may make an Order staying such proceedings subject to such terms and conditions as it may consider just. . . . These provisions of the Act are permissive, and instead of applying to Court a party may raise the defence that there has been an agreement to submit to arbitration by way of a special plea under the common law, but not by way of exception nor by way of a point in *limine.* However, see *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa 2003 (2) SA 278,* where it was held that the provision of a statutory remedy in

> Section 6 of the Arbitration Act was not intended to deprive the Defendant of a plea under the common law, and a plea in *limine* was accordingly a valid procedure. Application under the Act must be made before delivering any pleadings. Furthermore, if a party to an arbitration agreement is sued by another party in the Courts and does not raise the arbitration agreement as a defence but pleads on the merits, it has been held that he has waived his rights to claim arbitration. A party who has entered into an agreement of settling after the commencement of legal proceedings precludes himself from claiming the right to refer the matter to arbitration. Generally, therefore, the defence of an agreement to refer to arbitration must be raised before plea and only in exceptional circumstances as, for instance, where the arbitration agreement was concluded only after Court proceedings had commenced, can it be raised at a later stage.' (I have omitted all footnotes). Vide also *Crompton* (Supra).

This was essentially the ruling of the Court *a quo.* Not only was the arbitration defence raised after the close of pleadings, but there was no application filed and served on the Respondents for the stay. It would appear to me though that where the arbitration clause is the "Scott v Avery" type,

a litigant would be entitled to raise it as a point in *limine.* I with respect, align myself with the decision in *De Sousa (supra).* Unless specifically renounced or waived, an agreement to refer a dispute or difference to arbitration may not be treated as a waiver of one's defence to a claim arising from or in connection with an agreement.

[14] I should of course emphasize that it is not every arbitration clause that would require an application for a stay of proceedings. Ultimately, it depends on the wording thereof. Thus, in *Construction Associates (Supra)* the Court quoted with approval what is generally called a Scott v Avery clause, 'that is to say, the contract expressly provides that the obtaining of an award of an arbitrator shall be a condition precedent to bringing an action.' The arbitration clause in this case is plainly not such a clause.

[15] Therefore, there having been no ouster of the jurisdiction of the Court and there being no timeous and proper application for a stay of the proceedings, the Court was correct in its dismissal of this challenge. The fact that the submission is irrevocable is not an ouster of the jurisdiction of the Court. Going to Court rather than arbitration is an

option available to the litigant. It is not a revocation of the right to arbitration. Irrevocability is not synonymous with exclusivity. This ground of appeal is hereby dismissed.

[15.1] The substance or essence of the objection was that the Court had no jurisdiction to hear the matter because of the arbitration clause. Viewing the matter from this point, it is perhaps understandable and logical that the Appellants did not apply for a stay of the matter pending a referral to arbitration. If the Court had no jurisdiction a stay would have been pointless and incompetent.

[16] It is common cause that Manyatsi Nhleko Capital (Pty) Ltd was founded by the late Mr. David Sihlangu Manyatsi, the 1st Appellant and Mr. Mlungisi Thabiso Mamba. The company was incorporated as an investment Adviser and was also to provide financial services on retirement and allied services. Mr. Manyatsi and Mr. Nhleko each held 25% shares in the said company whilst Mr. Mamba held the other 50%.

[17] Due to the nature of the services that were to be rendered by the said company, the company was obliged to register and be licensed by the Financial Services Regulatory Authority (hereinafter referred to as FSRA). In addition, it was required to hold at least a sum of One Million Emalangeni as its base capital. The three shareholders of the company contributed in proportion to their shareholding. Thus Mr. Mamba contributed 50% of this amount and the other shareholders also contributed their respective *pro rata* shares to this fund which was held at STANLIB. Mr Mamba personally made the said contribution. The Respondents averred that the contributions by both Mr. Nhleko and the late Mr. Manyatsi were made by them through Manyatsi Nhleko Quantity Surveyors (Pty) Ltd.

[18] For some reason not stated and perhaps not relevant in this case, Manyatsi Nhleko Capital (Pty) Ltd never traded. After the death of Mr. Manyatsi in 2020, the Executors of his estate received information that his 25% shares in Manyatsi Nhleko Capital (Pty) Ltd had been transferred to the 1st Appellant. It also transpired that FSRA intended to cancel the company's licence as an investment and financial adviser. This information, amongst others, prompted Mr. Mamba to apply for

the release to him, of his E500,000.00 contribution to the security or base capital held by the company with STANLIB. Again, based on this information the Executors then launched the interdict application. Basically, the interdict sought an Order interdicting the Bank from transferring 25% of the investment held by it in respect of Manyatsi Nhleko Capital (Pty) Ltd to either the 1st Appellant or Manyatsi Nhleko Capital (Pty) Ltd. They also prayed for a final Order transferring it to the Estate of the late David Manyatsi.

[19] The Executors alleged that the transfer of the late Mr. Manyatsi's shares in Manyatsi Nhleko Capital (Pty) Ltd to the 1st Appellant was done fraudulently and because of this they feared that his pro rata contribution in the investment funds held by STANLIB would, in like manner, be transferred to the 1st Appellant and this would be prejudicial to the beneficiaries of the estate. They sought to prevent this from happening.

[20] In opposition to the injunction, the 1st Appellant stated that:

'5.1 . . . The amount belongs to Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. . . . The 8th Respondent contributed a sum of E500,000.00

> . . . and the shareholders of the other 50% sourced a loan from Manyatsi Nhleko Quantity Surveyors (Pty) Ltd amounting to E500,000.00.'

The shareholders referred to in this excerpt are, obviously Manyatsi and Nhleko. They are the persons who, as shareholders in Manyatsi Nhleko Capital (Pty) Ltd, applied for and were granted the said loan amount. This assertion is amplified later where the 1st Appellant states that:

> '5.2 On the 7th February, 2020 [Manyatsi Nhleko Capital (Pty) Ltd] received E500,000.00 . . . from Manyatsi Nhleko Quantity Surveyors (Pty) Ltd as a loan'. I again, attach such proof and mark it ZMN2'.

This is repeated in paragraph 11 of the Answering Affidavit at page 173 of the Record of Appeal. However, the 1st Appellant stated later that 'it was incorrect that we personally contributed the amount . . . in equal shares'.

[21] It is, I think, not insignificant to note from the outset that it is common cause that the three shareholders of Manyatsi Nhleko Capital (Pty) Ltd decided that they were to make these individual contributions to the security or capital reserve required by the FSRA in accordance or in proportion to their individual shareholding. Thus, Mr. Mamba who held 50% of the shares was required to pay 50% of the One Million Emalangeni, whilst the other 50% was to be paid by the other two

shareholders equally. The source of Mr. Mamba's contribution is not in issue in these proceedings. What is clear, however, is that E500,000.00 was transferred through Manyatsi Nhleko Quantity Surveyors (Pty) Ltd to the relevant account held at STANLIB. This was on 07 February, 2020. Mr. Mamba had already deposited his share three days earlier.

[22] It is also noted and recorded that there were only three shareholders in Manyatsi Nhleko Capital (Pty) Ltd, as stated above. Manyatsi Nhleko Quantity Surveyors (Pty) Ltd was not one of these shareholders. The 1st Appellant does not deny this fact and merely states that the said E500,000.00 paid by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd was a loan granted to Manyatsi and Nhleko. The underlying cause or premise is that the money was being paid into the bank account on behalf of Messrs Manyatsi and Nhleko. It was their individual and *pro rata* investments to the fund, in the same manner that Mr. Mamba had been required to do and had done. In essence, this money, that is, One Million Emalangeni, did not belong to Manyatsi Nhleko Capital (Pty) Ltd but belonged to the shareholders in accordance with their individual contributions. It was the security

or surety that was required by the FSRA in order to sustain the licensing status of Manyatsi Nhleko Capital (Pty) Ltd.

[23] In dismissing the defence raised by the 1st Appellant, the Court *a quo* stated as follows:

> '[46] These contentions are unsupportable partly on account of Mr. Nhleko's inconsistent statements on the facts particularly in regard to the loan proposition. In particular it conflicts with his recurring statement in the Answering Affidavit that the alleged loan from Manyatsi Nhleko Quantity Surveyors (Pty) Ltd was given to Manyatsi Nhleko Capital (Pty) Ltd (the 6th Respondent) its factual truthfulness is questionable because that version cannot be reconciled with the scenario of a loan to Manyatsi Nhleko Capital (Pty) Ltd. Either the loan was granted to Messrs Manyatsi and Nhleko or directly to Manyatsi Nhleko Capital (Pty) Ltd (that is from one company to another). Its premise is also legally incompetent because, for the reasons I have stated, the correct legal position is that Manyatsi Nhleko Quantity Surveyors (Pty) Ltd's claim for the recovery of any loaned capital lies primarily against the estate of the late Mr. Manyatsi

and Mr. Nhleko. Even on Mr. Nhleko's act alternative scenario involving a loan to Manyatsi Nhleko Capital (Pty) Ltd, likewise Manyatsi Nhleko Quantity Surveyors (Pty) Ltd's claim would lie against that company'.

With due respect, I cannot fault this reasoning by the Court *a quo*. I must of course note that the Court *a quo* did not hold that the money in question had been granted as a loan to Manyatsi Nhleko Capital (Pty) Ltd. It rejected this assertion and said it was not supported by the common cause facts in the application. In conclusion, the Learned Judge summarised his findings by saying that '[73] . . . the 1st Respondent's version of the circumstances regarding the capital fund is far-fetched and so implausible that it ought to be rejected. It has no bearing on the real facts that I sketch above'.

[24] The above summation by the Court *a quo* also captures the finding by the Court that there are no real or genuine disputes of fact in the issues raised by the 1st Appellant. The reference to "real facts" is, I understand, such reference. As stated in *National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009(2) SA 277(SCA)* at 26;

'Motion proceedings unless concerned with interim relief, are all about the resolution of legal issues based on common cause

facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final Order can be granted only if the facts averred in the applicant's (Mr. Zuma's) affidavits, which have been omitted by the Respondents (NDPP) together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raised fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers'.

[25] The findings by the Court as stated in paragraph 23 above also provides the answer to the 1st Appellant's challenge based on non-joinder. Even if one were to accept that the loan was granted by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd to the late Mr. Manyatsi and Mr. Nhleko, such would ground a general claim by the said company against the said borrowers or their estates. The refrain by the 1st Appellant that the money which is the subject of this

interdict belongs to Manyatsi Nhleko Quantity Surveyors (Pty) Ltd is false and legally untenable. In fact the Appellants do concede that Manyatsi Nhleko Quantity Surveyors (Pty) Ltd made the deposit for and on behalf of Manyatsi and Nhleko.

[26] The requirements for a final interdict are well known in this jurisdiction. There are three such requirements; namely (a) a clear right, (b) a reasonable apprehension that such a right is being or about to be violated and (c) that the Applicant has no alternative remedy other than the injunction sought. As the Learned judge in the Court *a quo* observed, although the Executors in their Founding Affidavit refer to an interlocutory or interim interdict, such interim interdict was to prevent the release of the money by the bank, to the Appellants, pending the finalisation of the Court proceedings. On completion of such proceedings, the money was to be released to the Estate of the late David Manyatsi. Thus, in reality the application was for final interdict; to have the money released to the Respondents in their capacities as Executors of the said estate. I have already referred to the right which the Executors claim over the money in question; namely that such money was deposited by Manyatsi Nhleko Quantity

Surveyors (Pty) Ltd on behalf of the late Mr. Manyatsi and Mr. Nhleko. In short, the averment is that this money forms part of the property of the estate of the deceased. Regarding the existence of the threat or apprehension of harm or violation of the said right, the Respondents stated that the shares held by the deceased in Manyatsi Nhleko Capital (Pty) Ltd had been fraudulently transferred by Mr. Nhleko to himself and the Executors feared that Mr. Nhleko might do the same in respect of the reserve funds held at STANLIB and this would be to the prejudice of the estate. Again, one notes that there was no suggestion or averment by the 1st Appellant that those fears were unreasonable or that the Respondents had an alternative remedy in this dispute or controversy. The 1st Appellant contented himself by saying that the funds in question belonged to Manyatsi Nhleko Quantity Surveyors (Pty) Ltd or at least that the said company was an interested party in the dispute.

[27] The interdict was in respect of the actual amount deposited at STANLIB plus the accrued interest thereon. At the material time the amount in question was a sum of E299,753.00.

[28] Based on the analysis of the facts and the law or legal principles above, I have no hesitation that the late David Manyatsi deposited a sum of E250,000.00 into the Capital Reserve account held by Manyatsi Nhleko Capital (Pty) Ltd at STANLIB. He did so through Manyatsi Nhleko Quantity Surveyors (Pty) Ltd and therefore the estate of the deceased is entitled to take possession of such deposit and the interest thereto. It follows, I think, that because of this conclusion, the Respondents had proven that they had a clear right to the funds and that there was a reasonable likelihood that this money would be furtively withdrawn by the 1st Appellant. Such withdrawal would be to the prejudice of the relevant estate. For these reasons, I would dismiss the appeal in respect of this Claim (B) and confirm the judgment of the Court *a quo*.

[29] The 1st Appellant has also appealed against the order for costs. The Notice of Appeal is, however, silent on the reason or reasons why this specific order for costs is being challenged. The said Notice merely states that:

> '(2) the whole of the judgment or order of his Lordship . . . dated 3 April, 2023 in case Number 1174/22B is being appealed

against'. This is repeated in the Appellants' Heads of Argument. This is, with respect, meaningless and does not deserve any further elaboration or attention by the Court. As a general rule, the issue of costs is a matter that falls without the judicial discretion of the trial Court. Ordinarily, costs follow the event; meaning that the successful party would be granted its costs of the proceedings. This was the case in the Court *a quo*. The 1st Appellant has chosen not to specify his complaint or argue this issue and therefore this Court cannot disturb the Order of the Court *a quo* in this regard.

[30] I now examine the appeal on claim A or the main matter. This is the application for the removal of Mr. Mngomezulu (2nd Appellant) as one of the Executors of the estate of late David Sihlangu Manyatsi and the payment of E4,695,402.56 and other ancillary relief.

[31] As already stated hereinabove, the sale of shares agreement was concluded between the late Mr. Manyatsi and the 1st Appellant on 24 December, 2019. In terms of this agreement, the 1st Appellant agreed to sell all his shares in Manyatsi Nhleko Quantity Surveyors (Pty) Ltd

to the late David Manyatsi. The 1st Appellant held 50% of the shares in the said company. The purchase price for the shares was agreed at E7,403,103.84 and had to be paid in six monthly instalments, with effect from February 2020. The final instalment was to be made in July 2020. The benefits on the shares were, however, to pass or accrue to the buyer upon the date of signing of the agreement of sale. It was a further term of the agreement that upon full payment of the purchase price, the 1st Appellant would provide to the purchaser, all the necessary documents confirming that the 1st Appellant had sold his shares to the purchaser and that the 1st Appellant had relinquished his directorship in the company.

[32] It is common cause that the deceased, during his lifetime, failed to abide by the terms of the agreement regarding the payment of the instalments such that when the last instalment was made on 7 July, 2020 a sum of E2,347,701.28 was outstanding. The sum of E4,695,402.56 had been paid to the 1st Appellant in six monthly instalments and it is this amount that is the subject of this claim by the Respondents against the 1st Appellant.

[33] There is no dispute or controversy that the said payments were made by the deceased to the 1st Appellant through Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. It is based on this common cause fact that the 1st Appellant denies that the Estate of the deceased is entitled to this money. His argument or defence is that because the money came through the said company, it is this company and not the estate that has the legal right to it. He states further that he 'paid this money back' to the company. As clearly stated above, this defence was rejected by the Court *a quo;* and for the reasons stated.

[34] On appeal, the 1st Appellant contends that the Respondents failed to set out or plead facts which establish that they have a right to claim the money in question from the 1st Appellant. Mr. Bester, Counsel for the Appellants submitted as follows in his Heads of Argument:

> '53 . . . it was incumbent on the Executors to plead the precise basis upon which the executors were entitled to claim repayment of the funds where they had their genesis in Manyatsi Nhleko Quantity Surveyors (Pty) Ltd and without the funds having come from the late Mr. Manyatsi.
>
> 54 . . . as a rule, a person who claims relief must establish a direct interest in the matter in order to acquire standing to seek

> relief. It was therefore incumbent on the executors to plead facts to show that despite the payments made by Manyatsi Nhleko Quantity Surveyors (Pty) Ltd, they were entitled to those funds.'

With respect, these submissions ignore the alleged facts, which are common cause, that the Respondents clearly stated that the money in question was paid by Manyatsi to the 1st Appellant through Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. Additionally, this money had been received by the 1st Respondent as part payment for the shares in question. It was also indicated in the monthly payments that these were in respect of the "purchase price". The Respondents annexed the bank statements (NMM14-19, at 53-65) in support of their averment that these payments were made by the late Mr. Manyatsi to the 1st Respondent. The 1st Respondent, it is common cause, received this money without any demur. Of course, he says that he later on paid it back to Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. This, however, does not detract from the central and incontrovertible fact that when he received these several payments he knew that these were payments being made to him by the deceased and that this was in respect of the sale of shares agreement between them.

[35] It is also significant to record that both Applicants tacitly admitted that the relevant money was paid by the deceased through Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. They characterised this as a loan granted by the company to the deceased and they treated it as such in the company's Books of account. The bottom line though is that this did not excuse or release the 1st Appellant from honouring his debt or liability towards the estate of the deceased, upon cancellation of the contract by him. The alleged Lender-Borrower relationship between the company and the estate was a matter entirely between the two parties. Again, as to how the borrower utilised those funds was entirely his prerogative or sole discretion. For these reasons, the dispute is between the 1st Appellant as the seller of the shares and receiver of part of the purchase price and the estate of the deceased as the purchaser and payer of those monies. The company, that is Manyatsi Nhleko Quantity Surveyors (Pty) Ltd, has absolutely no direct interest in this issue. Had the cancellation of the contract been done during Mr. Manyatsi's lifetime, he would no doubt have had the legal standing to reclaim the amount paid from the 1st Appellant. The Respondents are doing no more than that which Mr. Manyatsi would have been entitled to do.

[36] Again, it is observed that the Respondents' claim is on behalf of the estate and not on behalf of Manyatsi Nhleko Quantity Surveyors (Pty) Ltd. Indeed, the said company is distinct from its shareholders and the representatives of the late Manyatsi as a shareholder in the said company are irrelevant in this case, because the assets of the said company are not in issue in these proceedings. Likewise, whether the estate owes Manyatsi Nhleko Quantity Surveyors (Pty) Ltd is irrelevant in this case. (See the judgment of the Court *a quo* at paragraph 99). For these reasons, the provisions of Section 228 of the Companies Act 8 of 2009 which govern initiation of legal proceedings by a member on behalf of a company that has suffered prejudice or loss committed by a director or officer of the said company, are inapplicable herein. But more importantly, the alleged non-compliance with the Companies Act was never raised before the High Court and that Court never dealt with it.

[37] The Appellants seem to argue that Manyatsi Nhleko Quantity Surveyors (Pty) Ltd ought to have been joined as a party to these proceedings simply because the money in question was paid to the 1st Appellant from the company's business account. Manyatsi Nhleko

Quantity Surveyors (Pty) Ltd was of course not a party to the sale of shares contract and it only acted as the conduit through which the late Manyatsi discharged his own indebtedness towards the 1st Appellant and this arrangement was solely between these parties.

[38] For the above reasons, I am of the considered view that there is no merit whatsoever in the said Grounds of Appeal and I would accordingly dismiss the appeal.

[39] The Appellants have also noted an appeal against the Order of the Court whereby they were ordered to personally pay the Respondents' costs of the application and that such costs are to include the certified costs of retaining two Counsel in terms of the applicable rule of the High Court Rules. This is in respect of Claim A; the main application.

[40] In the Notice of Appeal filed and served on 04 May, 2023, the Appellants stated that the appeal is against;

> '1. A portion of the judgment and order . . .dated 3 April, 2023 comprising paragraphs 5 to 8 of the judgment in Case Number 1174/2022A'.

The said Orders are in the following terms:

> '5. That 2nd Respondent shall personally especially bear the Applicants' costs of the application for his removal and ancillary relief; such costs to include the certified costs of retaining two Counsel in terms of Rule 68 of the Rules of the High Court as at a scale as between attorney and client.
>
> . . .
>
> 8. Ordering the 1st and 2nd Respondents to pay the Applicants' legal costs for the restitution application including the costs of two Counsel jointly and severally.'

The third ground of appeal concerns the 2nd Appellant wherein he states that the Court *a quo* 'erred in awarding punitive costs against the 2nd Appellant in his personal capacity given that he tendered his resignation as executor before the hearing of the application with the result that insofar as an order of costs was justified, the Court *a quo* ought to have awarded same on the ordinary scale which costs should have be borne by the estate of the late Mr. Manyatsi.'

In his Heads of Argument, Counsel for the Appellants submitted that 'the appropriate order would have been one that acknowledged that the decision to withdraw had been made before the hearing of the matter with the result

that it was no longer necessary for the executors to make submission in support of the point. The only appropriate order in the circumstances was one based on party and party costs which the estate had to carry.'

[41] As stated above, the general rule is that the trial Court has a judicial discretion on the issue of costs. An Appeal Court may only interfere with the exercise of such discretion if it is satisfied that the trial Court failed to exercise such discretion properly.

[42] The above general principle on the issue of costs was restated by O'Connor LJ. in *Smiths Ltd & Another v Middleton (No.2) [1986] 2 ALL ER539* at 544 quoting Viscount Cave LC. *in [1927] AC 732* at 811-812, *[1927] ALL ER Rep1* at 41; as follows:

> 'A successful Defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the Plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the Judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if – to

> put a hypothesis which in our Courts would never in fact be realized – a Judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a Judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.'

[43] An Appeal Court may only intervene in or interfere with a decision of the trial Judge on the issue of costs if it is satisfied that the Judge failed to exercise his discretion properly. In short, the Appeal Court must be satisfied that the Judge failed to act judicially. For instance, this may be in instances where the Judge based his decision on irrelevant or extraneous issues. A judicial discretion is one that is exercised solely based on the relevant facts or circumstances of the litigation at hand and must be based on the underlying legal principles or precepts. 'This

may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further.' Lord Halsbury in *Sharp v Wakefield [1891] AC173* said 'discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion . . . according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.'

(Vide *Silence Gamedze & 2 Others v Thabiso Fakudze (14/2012) [2012] SZCS 52 (30 November, 2012).*

[44] As a rule, punitive costs are awarded against a litigant or party who has been adjudged to have misconducted himself or herself in relation to the conduct of the litigation at hand. In *Van Der Merwe N.O. v MEC for Health, Gauteng, In re: Steenkamp v MEC for Health Gauteng (15360/2009) [2014]ZAGPPHC 1045 (11 December, 2014)* the Court stated:

> '52 . . . Costs on attorney and client scale is normally made in circumstances that the Applicant has been guilty of dishonesty or fraud or had vexatious, reckless or malicious or frivolous

motives or committed a grave misconduct, either in the transaction under enquiry or in the conduct of the case.

53, The Courts' discretion to order the payment of attorney and client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct. It includes cases in which special circumstances or considerations justify the granting of such an order. Attorney and client costs have been awarded where the defence was frivolous and was taken for the sole purpose of gaining time and where the Defendant produced a plethora of unmerited defences and where the Defendant was in default and it seemed to the Court that the defence was dilatory and not *bona fide*, as set out in *Suzman v Pather & Sons 1957(4) SA 690 (D).'*

(See *Swazi MTN Limited & 2 Others v Swaziland Posts and Telecommunications Corporation & Another (98/2013) [2013] SZSC 46 (29 November, 2013) at Para 33* and the judgment of the Court *a quo* at paragraph 55).

[45] In this appeal, the 2nd Appellant was adjudged to have misconducted himself in connection with this litigation; both before and during the course thereof. The Learned Judge in the Court *a quo* had these to say about his conduct:

'[47] In all this Mr. Mngometulu has in denying his conflicted position has maintained his assertion of neutrality. His answer

to the allegation of the said conflict he insisted that he was 'neutral in all this'. This is evident in paragraph 11 of his answering affidavit (Page 80 in the Book of Pleadings).

[48] In the pre-litigation events and meetings alleged to have been held between the Applicants and one Mr. Bediako to discuss the Applicants' concerns and claims – he openly placed himself in a position of conflict by contesting the claims. There is no question that since the inception of the matter wherein his removal was sought on account of the obvious conflict he did not duly reflect and recant his position.

[49] I am in full agreement with the Applicant's contentions as expressed by their learned Counsel that Mngometulu actually took active steps to frustrate and defeat the estate's interests and favoured those of Mr. Nhleko and his own by advancing the latter's case and making common cause with him in doing so not only did he fail the estate in the dereliction of his fiduciary duties but he also sought to prevent the Applicants from fulfilling theirs by supporting the version that denied Manyatsi had paid Nhleko for the shares sold to him.

[50] The 2nd Respondent's conduct and obvious breach of his fiduciary duties to the estate are beyond the pale and egregious especially in that he has persisted in this antipathy to the estate and the Applicants to the brink of the hearing of the application only to concede at the eleventh hour to the motion for his removal as an executor. By then he had mulched the Applicants

in unnecessary costs particularly in connection to the motion concerning his status as co-executor.

[51] It should have been eminently apparent to Mngometulu especially in light of Section 84 of the Administration of Estates Act of 1902 that his was a hopeless cause as regards the motion for his removal. This is so on account of the threshold test for the removal of an unsuited or compromised executor. The relevant provision in the section prescribes the test to include a cause that justify such removal for the furtherance of an estate's interests. That test is benign in light of the objective character of the criteria but more so in context of Mngometulu's robust and strident position that is inimical to the estate herein. It goes beyond a passive stance to an aggressive and active role in a concerted bid by the Respondents to defeat the estate's claim.

[52] It is trite that an executor's fiduciary duty entails a high standard of care. This standard is of utmost diligence (*uberima fides)* to protect and promote the interest of an estate in his charge. Anything less fails the legal standard. I would venture to say that in that context an adversarial position in opposition to the estate's interests is therefore egregious. It warrants censure and a mark of disapproval. The 2nd Respondent has been one of open hostility if not contempt without mitigation.

[53] But there is another angle to the woeful tale. It concerns the obscure circumstances to which Mr. Mngometulu admits on oath to do with his posthumous acquisition of shares in the company Manyatsi Nhleko Quantity Surveyors (Pty) Ltd after

> Mr. Manyatsi's passing. Whilst it is not a consideration directly relevant to the inquiry presently, it is an aggravating factor insofar as it should have provided a clear signal as to why Mngometulu's continuation as an executor was untenable. I note also that he does not deny that he refused to assist the Applicants in his capacity as co-executor in their efforts to investigate the estate claims. Despite his self-proclaimed neutrality in the proceedings he has, as I have pointed out aligned himself with the main adversary in the matter between the Applicants and the 1st Respondent.'

The 2nd Appellant has not argued that this is not an accurate account and description of his conduct in this litigation. But more importantly, he has failed to show that the trial Court failed to exercise its discretion judicially. Counsel only argued that the 2nd Appellant did not wait for the Court to order his removal as one of the executors, but did so on his own. This may be correct but this was rather too late. The pleadings had already been closed and the estate had already been put out of pocket because of his malicious conduct. This Court also notes that, on his own showing, the 2nd Appellant realized long before the filing of the application for his removal, that he was conflicted. He ought to have immediately and voluntarily removed himself as an executor. He says he then took á back seat'. He is of course not being truthful that he took á back seat'. He actually opposed all efforts by the

Respondents to recover the money paid to his co-Appellant. Their submission that the estate should fund their opposition to it in this case in unmeritorious. Their actions against the estate were motivated by greed and dishonesty bordering on criminality. I have read the judgment in *Vallabhjee N.O. v Vallabhjee & Another (12501/2008) [2014] ZAKZDHC 64 (25 November, 2014)* in which the estate was ordered to bear the costs of the litigation. The removed co-executor was, however, not shown to have misconducted himself in connection with the estate. This is not such a case.

[46] Both Appellants have not pointed out any circumstance or legal principle that would prove to this Court that the Learned Judge in the Court *a quo* failed to exercise his judicial discretion in granting the Costs Orders that he did.

[47] For the above reasons, I would dismiss the appeal in its entirety and make the following Orders:

47.1 The appeal is dismissed.

47.2 The judgment of the Court *a quo* granted on 04 April, 2023 under both Case Number 1174/22A and 1174/22B are hereby confirmed.

47.3 The Appellants are ordered to pay the costs of this appeal, jointly and severally and such costs are to include the costs of two Counsel, to be certified in terms of the applicable Rule of Court.

M. D. MAMBA
JUSTICE OF APPEAL

I AGREE.

S.P.DLAMINI
JUSTICE OF APPEAL

I ALSO AGREE.

J.M. VAN DER WALT
JUSTICE OF APPEAL

FOR THE APPELLANTS: MR. C. BESTER

FOR THE 1ST & 2ND RESPONDENTS: MR. G. MARCUS, SC
(With him Ms. E. Webber).