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

CASE NO: 48084/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....29/01/2021..... Gavin Rome .....
DATE SIGNATURE

In the matter between:

VAN DEN HEEVER, THEODOR WILHELM N.O First Applicant

JOHANNES, CLINTON ARTHUR N.O Second Applicant

and

ALLY, DHANESHA First Respondent

THE LIBERTY GROUP LIMITED Second Respondent

JUDGMENT

ROME, AJ:

INTRODUCTION

1. This judgment is in respect of an application for postponement.

2. The postponement is sought by the applicants. It is necessary to provide some procedural context.

3. The applicants are the trustees of the insolvent estate of the late Mr Moodley. The first respondent is Mr Moodley's daughter.

4. Mr Moodley passed away in February 2016. His estate was shortly thereafter placed in provisional and then final sequestration.

5. Prior to his death, Mr Moodley had taken out certain insurance policies with the second respondent (Liberty).

6. It is the first respondent's case that these policies have been lawfully ceded to her. The applicants disputed the alleged cession and so litigation has ensued.

7. This court and on 4 July 2016, Matojane J provisionally interdicted and restrained Liberty from paying any benefits in respect of any policy, annuity and/or similar interest in respect of with which Mr Moodley was the owner, to any person. Matojane J further directed that payment in respect of the

said policies was to be made upon written authorisations or instructions of the applicants.

8. On 26 July 2016 Weiner J confirmed and made final the order granted by Matojane J ("the Matojane order") on 4 July 2016.

9. Thereafter, and in April 2017, the applicants gave written instructions to Liberty to make payment of the policies to them as trustees of the insolvent estate. This led to the first respondent launching an urgent application on 15 May 2017. The urgent application was heard before Nicolls J on 27 May 2017. The outcome of the urgent application was that it was as per the relevant court order "*dismissed*" with costs. As is so often the case in urgent court, the judgment and order ("the Nicolls judgment") were delivered on an *ex tempore* basis.

10. The above is prelude to the present (main) application. In the main application (I use the term '*main application'* simply to distinguish between the main case and the present interlocutory application for postponement), the applicants contend that prior to the date of the Matojane order, an amount of some R100,000.00 (one hundred thousand Rand) was already paid out by Liberty to the first respondent. According to the applicants, this amount was paid out of the policies at a time when the first respondent was aware alternatively should have been aware of the fact of the provisional sequestration. The applicants thus contend that the payment of this amount ought to have been made to the estate and not to the first respondent.

11. The main application was issued in December 2017. The answering affidavit in the main application was served during April 2018. In the answering affidavit, the first respondent admitted that the urgent application had been dismissed with costs. In somewhat contradictory fashion, the first respondent also alleged that the reason for the dismissal was the finding by the court that the application was not urgent. I do not (save for the one aspect addressed in the paragraph below) comment further on the contents of the answering affidavit in the main application as it is not necessary to do so for purposes of this interlocutory judgment.

12. I note that in the answering affidavit, the first respondent alleged that she ought to be entitled to the relief in respect of her notice of counterapplication "*filed herewith*". Nonetheless no notice of counterapplication was filed simultaneously or together with the answering affidavit. Instead in June 2018 some three months subsequent to her answering affidavit the first respondent served her notice of counterapplication. The counterapplication is for declaratory relief to the effect that certain payments (in respect of the relevant polices) were unlawfully paid to the applicants and such payments should accordingly now "be paid over" (for want of a better expression) by the applicants to the first respondent. As I understand the amount claimed by the first respondent now totals approximately R1,1 million.

13. The matter was set down for hearing during October 2018, both parties having filed heads of argument. In respect of the October 2018 hearing, and before the matter was adjudicated upon, the first respondent presented the

applicants with an application to introduce a further answering affidavit (as an answer to the main application) and which would also serve as a founding affidavit in the counterapplication. As a result, the entire matter was postponed *sine die*.

14. This matter was then set down for hearing during January 2021. Shortly before the present hearing, the first respondent served supplementary heads of argument. These supplementary heads of argument are dated 15 December 2020 but according to the applicants, they were served on 5 January 2021. A comparison between her two sets of heads of argument indicates that in the later heads of argument the nature of the first respondent's contentions has shifted substantially. The later heads of argument put the interpretation and effect of the Matojane order at the centre of this matter. What is further apparent from the later heads of argument is that the first respondent no longer persists with her application to introduce her further answering/founding affidavit,

15. As referred to above the first respondent's new arguments bring into sharp focus the correct construction of the Matojane order and what effect the order has on the counterapplication and the main application. It is thus clear that facts bearing on the correct interpretation of the Matojane order are relevant to the adjudication of this matter. The applicants in argument stated that the purpose of the postponement is directed at procuring the transcript of the Nicolls Judgment. The applicants in their application for postponement (dated 20 January 2021) state that they are now taking

urgent steps to procure the transcript of the Nicolls judgment. The question is thus why is this judgment relevant.

16. The applicants annexed to their founding affidavit in the postponement application, a contemporaneous memorandum prepared by counsel who was tasked with noting the oral judgment. In this document, it is recorded that in her judgment, Nicolls J *inter alia* stated that:

> "*The applicant* [i.e. the present first respondent] *argues that the Matojane J order only allows the second and third respondents* [i.e. the present applicants] *to dictate when payment should be made. The argument is that on a proper interpretation of the order, once the second and third respondents have provided the written authorisation to Liberty, Liberty must then make payment not to the trustees but in terms of the policies – that is to say the applicant herself. In my view this is a disingenuous interpretation of the order, which if properly interpreted allows the first respondent (Liberty) to make payment to the insolvent estate upon written authorisation of the trustees.*"

17. The first respondent in her later heads of argument submitted that even if the Matojane order is to be interpreted as empowering the trustees to elect who should be paid, it could never have been the intention of the Matojane order that the trustees could do so regardless of what the law dictates as to who the rightful payee should be.

18. As I am dealing with a postponement application, I do not comment on the correct construction or effect of the Matojane order or the merits of the

above submission. I simply note that the contents of the above memorandum indicate that the Nicolls judgment may have some bearing on the correct construction of the Matojane order and the question of whether that order dictates who the rightful payee, of the polices ought to have been.

19. In the circumstances, it cannot in my view be seriously contended that any court adjudicating on the main application and counterapplication should not ideally be in possession of a transcript of the Nicolls judgment. Indeed, at the hearing of this postponement application, the applicants' counsel (Mr Aucamp) made it clear that the sole purpose of the postponement application was to obtain the transcript of Nicolls J judgment as, according to the applicants, this would assist in meeting the first respondent's "*new contentions*" (as they appear from the later first respondent's later heeds of argument), with the plea of *res judicata*.

20. To this contention, Mr Sawma SC, who appeared for the first respondent, asserted that if the applicants wished to raise a defence of *res judicata*, to the counterapplication they should have done so from the outset (i.e. from 2018 and from the time that the counterapplication was brought to their attention).

21. The first respondent's argument is that the applicants were thus entirely remiss in failing to apprehend the need to procure the transcript of the Nicolls judgment. However, having regard to the procedural history of this matter, the now abortive attempt of the first respondent to introduce a further

answering affidavit/founding affidavit in the counterapplication and comparing the contents of the first respondent's previous heads of argument with her later heads of argument, I do not agree that the applicants were so remiss. Had the arguments now advanced by the first respondent been raised or disclosed at the proper time i.e. when her first set of heads of argument were filed, no doubt the applicants would have then taken steps to ensure that the transcript of the judgment was before this court when the matter was argued.

22. I am accordingly of the view that the applicants ought to be granted the postponement so as to enable them to ensure that the transcript of the judgment of Nicolls J is filed and is available to the court hearing the main application and the counterapplication.

23. The above brings me to the issue of costs. It is correct that ordinarily the party applying for a postponement is seeking an indulgence and is required to pay the costs thereof. However, in considering the issue of costs, I have taken account of the complex and unusual set of circumstances in this matter, the counterapplication's strange procedural history (including the very recent aborting of the first respondent's application to introduce a further affidavit in support of her counterapplication) and the relative lateness of the first respondent's second set of heads of argument. In these circumstances, I am of the view that the costs of the postponement fall to be reserved. In the circumstances, I make the following order:

23.1. the application for postponement is granted;

23.2. the matter is postponed *sine die*;

23.3. the costs of the postponement application are reserved.

Gavin Rome

G ROME
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

For the applicants:	Adv. S. Aucamp
Instructed by:	Lanham – Love Attorneys
For the first respondent:	A Sawma SC
	AB Omar
Instructed by:	Zehir Omar Attorneys
Date of hearing:	26 January 2021