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

CASE NO: 16715/18

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
19 February 2021

In the matter between:

SUKOLUHLE THANDO NKALA	First Applicant
HERBERT NKALA	Second Applicant
and	
MOLEFE RUFARO MTHULISI DLODLO	Respondent

In re:

MOLEFE RUFARO MTHULISI DLODLO	Applicant
and	
SUKOLUHLE THANDO NKALA	First Respondent
HERBERT NKALA	Second Respondent

JUDGMENT

ROME, AJ:

INTRODUCTION

[1] The present interlocutory matter concerns an application to stay the respondent, Mr Dlodlo, from taking further steps in the litigation until such time as he satisfies various past interlocutory costs awards made in favour of the applicants to the present stay application, Ms and Mr Nkala respectively.

[2] The record is encumbered by numerous interlocutory applications, both in this matter and in a related trial action. In order to give some context and to assist in a comprehension of how the present application comes before the Court, it is necessary to give a brief chronological narrative.

[3] The backdrop to the dispute arises out the division of immovable property situated in Johannesburg at [....] C[....] Hills Private Estate, C[....] Road ("the Property"). The Property was jointly owned by the first applicant and the respondent in the present application, Ms Nkala and Mr Dlodlo respectively. Given that depending on the context, in the record at times the roles of the parties are reversed, for convenience I shall hereafter refer to the parties by their surnames. Accordingly, the first applicant in this interlocutory application is referred as "Ms Nkala," the second applicant in this interlocutory application is referred to as "Mr Nkala" and the respondent in this interlocutory application is referred to as "Mr Dlodlo".

MATERIAL BACKGROUND

[4] The background is the following. Mr Dlodlo and the Nkalas are all Zimbabweans. Ms Nkala and Mr Dlodlo were once married. Their marriage was terminated pursuant to a decreed of divorce in the High Court of Zimbabwe (Bulawayo) dated 17 January 2019. The divorce judgment provides inter alia for the following order:

> "*The Immovable Property shall be sold to best advantage with the proceeds thereof first going to the legitimate creditors of the parties in respect of the said immovable property and the balance if any be shared between the parties equally, the question as to who is a legitimate creditor and the*

modality of the sale and distribution of the proceeds if not agreed between the parties being determined by the outcome of the pending application before the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 16715/18 in which both Plaintiff and Defendant are parties."

[5] The curious aspect of the above order is that there has already been an *actio communi dividundo* and judgment of this Court in respect of the Immovably Property which order was given under the very case number cited in the matter (namely case number 16715/2018) to which this stay application relates. The *communi dividundo* order was given pursuant to a judgment of Cowen AJ dated 22 January 2019 ("the Cowen AJ Order").

[6] The Cowen AJ order provides as follows:

"2. The joint ownership of the immovable property held by the Applicant[1] *and the First Respondent under Deed of Transfer No ST 77044/2009 ('the Property') is terminated.*

3. The Property shall be sold by private treaty in the following manner.

3.1. The Applicant and the First Respondent may on or before 2 February 2019, each appoint an estate agent and shall immediately inform the other of such appointment.

3.2. The estate agents so appointed are mandated, on or before 15 February 2019, to:

3.2.1. Determine the market value of the Property; and

3.2.2. Agree in writing with the other estate agent, if possible, what the market value of the Property is; and

3.2.3. To inform both the Applicant (through her attorney) and the First Respondent… of the value so determined via a joint communication.

[1] The references in the order to the Applicant are to Ms Nkala, the references to the First Respondent in the Cowen JA order are to Mr Dlodlo.

3.3. Each party will be liable for any fees and disbursements of the estate.

3.4. If the estate agents so appointed are unable to reach agreement as contemplated in 3.2.2 above, the value of the Property shall be determined as the average of the values as determined by the appointed estate agents.

3.5. If either party fails to appoint an estate agent as contemplated in 3.1, the estate agent appointed by the other party may determine a market value of the Property alone.

3.6. Upon receipt of the valuation of the Property as above, the Applicant's Attorney shall forthwith inform the Third Respondent of the valuation of the Property and request its approval of the valuation, which approval shall be given promptly and shall not be unreasonably withheld but may be subject to an upward adjustment determined by the Third Respondent.

3.7. The Third Respondent shall communicate its approval and any upward adjustment of the value of the Property in writing in a joint communication to the Applicant through her attorney and to the First Respondent via e-mail.

3.8. Upon receipt of the approval of the Third Respondent[2] *and subject to any Upward adjustment it makes, the Applicant and the First Respondent shall give an open mandate to sell the Property to the estate agents appointed by each of them and one additional estate agent as the Second Respondent may wish to nominate. The appointments shall be made no later than seven calendar days after receipt of the communication from the Third Respondent referred to in 3.7 above.*

3.9. The appointed agents may not sell the Property at a price lower than the value approved or adjusted by the Third Respondent pursuant to 3.6 and 3.7 above save in the event that the Applicant, the First Respondent and the Third Respondents each agree thereto.

3.10. In the event that the Property is not sold within 45 calendar days from the date on which the last mandate was given as contemplated in paragraph

[2] Being Standard Bank, who had/have a bondholder's interest in the Property.

3.8 and 3.9 above, then and in that event, the Third Respondent may at its election … but after giving due consideration to the desirability in the interests of the Applicant, the First Respondent and the Second Respondent of obtaining a high price for the Property:

3.10.1 Elect to extend the mandate of one or more of the agents appointed for a further period not exceeding 30 days before proceeding in terms of 3.10.2 or 3.10.3 below; or

3.10.2. Sell the property through its Easy Sell programme; or

3.10.3. Inform the First Respondent and the Applicant's Attorney that in its assessment, the property should be sold at public auction at a recommended reserve price, which shall be the reserve price.

4. [the] decision by this Court on the distribution of the remaining proceeds, to the Applicant and First Respondent including making provision for any payment using the remaining proceedings to discharge any debt to the Second Respondent, is postponed sine die.

5. The Applicant's Attorneys shall hold the remaining proceeds in Trust without any deduction on behalf of both the Applicant and the First Respondent pending the grant of an order of Court confirming a final distribution:

5.1. as may be agreed by the Applicant and the First Respondent; or

5.2. made on application by the Applicant or the First Respondent.

6. The parties may approach the Court on the papers exchanged in the proceedings to date supplemented where necessary for an order as contemplated in paragraph 5.

7. Subject to 8 below, no party may set down an application for an order as contemplated by paragraph 5.2 above until the finalization of case number 2017/25271 or satisfactory alternative provision has been made for the discharge of any debt to the second respondent without recourse to the

remaining proceeds and/or that will prevent such discharge from resulting in a disparity of contribution to the joint property as between the Applicant and the First Respondent.

8. Should either party be aggrieved that in all the circumstances there is an unreasonable delay in the finalization of case number 2017/25271 (including any appeal) such party may approach the Court on the same papers supplemented where necessary, to request the immediate distribution of the remaining proceeds on a just and equitable basis but neither party may so approach the Court for a period of 15 months from the date of this order.

9. Should any party to these proceedings encounter any practical impediment implementing this order or a change in circumstances warrant it, such party may approach the Court for further directions or a variation of the order…"

[7] Unfortunately, neither the Cowan AJ order nor the decree of divorce has ended the litigation between the parties.

[8] During September 2019 and utilising that part of the Cowen AJ order which enabled the parties to approach the Court for a variation (I make no finding on whether there has been an unreasonable delay as result of the Cowen AJ order and whether the variation application falls within the ambit of that order) Mr Dlodlo brought what he describes as a "variation application".

[9] In his variation application, Mr Dlodlo seeks the following relief: that paragraphs 7 and 8 of the Cowen AJ order be "disposed with" (whatever that may mean) and that the order be varied so as to provide that paragraph 3.10.3 will as amended provide that the "*After collection of conveyancing fees, the remaining proceeds shall be immediately distributed, in equal proportion between Mr Dlodlo and Ms Nkala*". Needless to say, the Nkalas oppose the variation application.

[10] Post the launch of the variation application, the Nkalas have racked up several costs orders as against Mr Dlodlo. In order to give some context to these orders, it is necessary to fill in more piece of the narrative background. The Cowen

AJ order links the release of the sale proceeds to the finalisation of case number 2017/252717. This case number pertains to a trial action between Mr Nkala and Mr Dlodlo. Mr Nkala is Ms Nkala's father and Mr Dlodlo's ex-father-in-law.

[11] In the trial action, Mr Nkala seeks the recovery of a loan which he alleges he advanced to his daughter and his then son-in-law to enable them to purchase the Property. The impact of the dispute on the proceeds accruing from the sale of the Property is reflected in the judgment of Cowen AJ and paragraph 8 of the Cowen AJ order. Cowen AJ summarised the nature and effect of the trial action as follows:

> "*Mr Nkala's claim for payment of R1,883,351.13 is a claim for payment of the capital sum of a loan of R959,000.00 he alleges he advanced to enable them to purchase the Property plus agreed interest. Ms Nkala is not opposing the action and regards it as her legal and moral obligation to use the proceeds to repay her father. Mr Dlodlo wants the remaining proceeds to be distributed equally between him and the applicant. He submitted that should Mr Nkala succeed in his claim, which he is opposing, he must pursue payment of any monies to which he may become entitled in the ordinary course. In the meantime, he wishes to utilize the proceeds of the sale as he deems fit. Mr Dlodlo is aggrieved that there have been multiple costly and onerous proceedings against him in which the second respondent's disputed claim arises and protracted delays in their finalization.*"

[12] The trial action is still pending. As noted above the variation application was launched in September 2010. Since then, various interlocutory applications appear to have clogged the finalisation of both the trial and the variation application. I do not traverse these interlocutory applications in any detail but instead focus on certain costs orders awarded in the course thereof.

[13] Prior to his launching the variation application and in August 2019, Mr Dlodlo made an application to vary the order on an urgent basis. That application was dismissed with costs per an order of Windell J dated [date missing]. It is not necessary to consider any *res judicata* consequences which may flow from this dismissal.

[14] On 15 January 2020 Strydom AJ ordered that an urgent application brought

by Mr Dlodlo be struck from the roll with attorney client costs. I note that the copy of this order as contained in the record is not clear nor legible, but its effect was summarised in the Nkalas' founding affidavit and was not seriously in dispute.

[15] On 28 April 2020 Liebenberg AJ in the action proceedings made an order which (save in one minor respect) dismissed Mr Dlodlo's Rule 35(3) application with costs.

[16] In an order dated 15 June 2020, Mahalelo J removed an interlocutory matter that Mr Nkala had set down for hearing with costs.

[17] The number of costs order made against him in and of itself serve to indicate that Mr Dlodlo has conducted the litigation in an irregular manner. This is further apparent inter alia from the judgments of Cowan AJ and Liebenberg AJ.

[18] In her judgment after commenting on Mr Dlodlo's conduct in this matter and whilst noting that he had some success in opposing certain of the relief sought by Ms Nkala, Cowen AJ stated as follows:

> "*Mr Dlodlo has muddied these proceedings by liberally advancing accusations against the applicant and her legal representatives and their good faith, which are in my view prima facie ungrounded but which cannot be finally resolved on the affidavits*."

[19] In the course of her judgment, Liebenberg AJ stated inter alia that:

> "*I am of the view that the first defendant's [Mr Dlodlo] insistence on proceeding with his application to strike out, in the absence of prejudice bears the hallmark of an abusive process. I am however not prepared to burden the first defendant with a punitive costs order… there is various evidence before me that the first defendant is no stranger to inciting skirmishes between the parties which tend to delay the expeditious and cost-effective disposal of the action. This application and the Rule 35(3) notice are yet another skirmish that could have been avoided. There may very well be merit in Ms Blumenthal's argument that the first defendant's Rule 35(3) notice was designed to harass the plaintiff [Mr Nkala]; and that, had the first*

defendant laid a basis for his assertions regarding the relevance of the documents he requested in his founding affidavit this application could have been circumvented."

[20] Mrs Dlodlo's above sort of conduct continued during the course of the hearing of the present stay application. In this regard Mr Dlodlo insisted that an application he had brought to compel the delivery of heads of argument (in the variation application) by the Nkalas was properly set down before me. That insistence led him to applying in a somewhat ad hoc manner for an order by me that the stay application could not be heard before the determination of his compelling application.

[21] On 26 January 2021 I gave an *ex tempore* judgment dismissing such ad hoc application with costs. However, the very bringing of such an unnecessary and meritless application caused delay and inconvenience to the Court and to the Nkalas and resulted in the stay application not being heard on the day that had originally been allocated for its hearing.

THE PRESENT APPLICATION

[22] I turn now to the substance of the stay application. In the notice of application, the Nkalas seek the following relief. That all current and future proceedings launched by Mr Dlodlo under the above case number (16715/18) and case number 35371/2017 be stayed pending the payment by Mr Dlodlo of all cost orders made against him pursuant to such case numbers.

[23] Ms Blumenthal who appeared for the Nkalas (Mr Dlodlo, as has been case throughout, represented himself) referred to the following principles and case law.

[24] The general rule is that the unsuccessful party in court proceedings will not be permitted to harass the opposing party by commencing fresh, new or further proceedings pertaining to the same cause, without having first paid the costs of the unsuccessful proceedings. *Michaelson v Kent* 1913 TPD 48 at 50.

[25] A court, subject to its general discretion pertaining to costs and the regulation of its own proceedings, generally order a stay of proceedings in circumstances where the previously unsuccessful party has not yet paid the costs previously

awarded against it. *Meyer v Meyer* 1945 TPD 118.

[26] The above precepts apply however to so called new “fresh proceedings”. With regard to unpaid amounts that pertain to the costs of interlocutory proceedings incurred during the course of a particular action or application, there is a more restrictive approach. The principle being that a court will not exercise its discretion to order a stay where to do so would bar a litigant from pursuing a remedy for the infringement of her rights, unless she has done something in the course of the interlocutory proceedings which invites the court’s disapproval. Thus, where there are unpaid interlocutory costs and there are also elements of vexatiousness in the conduct of the relevant litigant, a court may in the exercise of its discretion issue an order to stay that litigant from proceeding with further steps in the main matter until such time as the outstanding costs have been paid. (See *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 (at 271, 272 and 274); *De Jong v Sliom* 1930 TPD 570. See however the qualifying dicta to this principle as set out in *Potchefstroom Town Council v Botes 1939 TPD* 4 at 6).

[27] More recently, the law on a stay for unpaid costs orders was summarised as follows in *Enhanced Innovations Projects (Pty) Ltd v Quantibuild (Pty) Ltd* (M19/16) [2017] ZANWHC 15) para 12:

> “The law that governs the stay of proceedings is settled and has been succinctly summarised in the case of *Smit v Venter* (2080/2009) ZANWHC 8 (20 February 2014), a case of this Division, Case No. 2080/2009 by Hendricks J delivered on the 20 February 2014 in paragraphs 8,9,10.11 and 12 wherein it was stated:-
>
> ‘The Law:-
>
> [8] The principles which underlies the intervention of the courts where the cost of the previous proceedings have remained unpaid is the court’s inherent right to prevent vexatious litigation. The basis of the stay of proceedings in such circumstances has also been stated to be prevention of abuse of the process of the court.

[9] The court has a discretion in deciding whether or not a stay of proceedings should be granted because of unpaid costs. Three criteria have been enunciated in this regard:-

[9.1] whether that party has been ordered to pay costs incurred then by reason of some abuse of the process of the court;

[9.2] whether that party has either deliberate or through carelessness occasioned unnecessary costs; and

[9.3] whether that party has contumaciously refused to pay the costs awarded against him/her or is efficaciously withholding payment.

See:-

- *Argus Printing & Publishing Co Ltd v Rutland* 1953 (3) SA 446 (C);
- *Howff (PDT) Ltd v Prompts Engineering (Bpk) Ltd* 1977 (2) SA 267 (RHODESIA);
- *Rheeder v Sperns* 1978 (1) SA 1041 (RHODESIA).

[10] There is no hard and fast rule as to when costs incurred in earlier proceedings in a case must be paid before the litigant will be allowed to proceed further. The matter is entirely in the discretion of the court. However, it is only in exceptional cases that the court will depart from the general rule requiring payment of costs before the continuation of litigation."

[28] The above exposition of the case law does not however assist the Nkalas. As the above quoted dicta indicate the stays of proceedings were based on non-payment of a costs award. None of the judgments referred to indicates that a stay can be granted on the assumption that when the amount of the costs payable has been determined through taxation, it will likely not be paid. In this matter there has been no such failure. It is common cause that none of the several adverse costs awards have yet been subject to a finalised process of taxation. Thus, Mr Dlodlo is not in default of his obligation to pay an amount due in respect of the adverse costs

orders against him. This is simply because as at the present time there is no determined amount which is due, owing and payable in respect of these various adverse costs orders. Ms Blumenthal however submitted that because Mr Nkala is clearly impecunious (which fact appears common cause), he will be unable to pay the several costs orders he has incurred.

[29] It is thus correct that based on Mr Dlodlo's apparently parlous financial situation, he will no doubt struggle to pay the various adverse costs awards. I am not however persuaded that the existence of such adverse orders, combined with Mr Nkala's impecuniosity and indications of irregular litigious conduct, suffice to grant an order for a stay of proceedings. It appears axiomatic that for an unpaid adverse costs award to result in an order to stay proceedings, there must perforce first be an actual failure by the relevant litigant to comply with such adverse costs award (which failure cannot be anything other than a failure to pay).

[30] Put simply, until such time as an amount of costs payable by Mr Dlodlo have been determined and he has thereafter failed or refused to pay that amount, Mr Dlodlo cannot be said to be acting in contravention of any of the various adverse interlocutory costs awards.

[31] Ms Blumenthal submitted that a requirement for the Nkalas to have already taxed the amount of costs payable is somewhat unfair on them; the submission was that the exigencies of the Covid pandemic have made it extremely onerous for them efficiently to procure the taxation of a bill of costs. This may well be so, nonetheless until such time as there has been a failure to pay an amount in respect of the costs awarded, Mr Dlodlo cannot be deemed to be in default of any of the adverse costs awards.

[32] During the course of the hearing, I enquired whether there is authority to grant a stay application on the basis of the existence of one or more adverse costs awards against a litigant, but in circumstances where such costs have not yet been finally taxed. Ms Blumenthal indicated that she was not aware of any such authority. I have likewise been unable to locate any such authority. Further, and considering the imperative of the right of access to the Courts (section 34 of the Constitution), absent clear precedent to the contrary I would in any event think that a court should be

reluctant in the present circumstances, to exercise its discretion to order a stay of proceedings.

[33] The fact that in this matter there are *indicia* of Mr Dlodlo abusing litigation processes does not alter the position. Ultimately this is not an application in which the Nkalas have sought to procure a stay by having Mr Dlodlo declared as a vexatious litigant.

[34] I therefore conclude that the Nkalas are not entitled to the relief sought by them in this stay application and their application falls to be dismissed.

COSTS

[35] Given Mr Dlodlo's conduct in this litigation, particularly his history of engaging in unnecessary interlocutory skirmishes and also given that the process of completing the taxation of bills of costs might been delayed by the exigencies of the Covid pandemic, I do not consider that it would be appropriate to award Mr Dlodlo the costs of this application.

[36] The Nkalas' stay application whilst premature, and somewhat misconceived was motivated by an understandable desire to avoid being needlessly brought to court. Their perception that given Mr Dlodlo's financial position, the prospect of an adverse interlocutory costs award does not serve as a deterrent to his launching further unnecessary interlocutory applications, is likewise, in my view a reasonable one. This militates against imposing a costs order against the Nkalas in respect of the dismissal of their stay application.

[37] In addition, it is clear that Mr Dlodlo's abovementioned ad hoc application for a ruling that his compelling application (for the delivery of heads of argument) fell to be heard prior to this stay application, was yet another instance of his bringing an unnecessary application. The Nkalas are accordingly entitled to the costs associated with that further (unnecessary) application.

[38] I accordingly make the following order:

1. The stay application dated 25 May 2020, is dismissed.

2. Save in respect of what is set out below, there is no order as to costs.

3. The respondent in the stay application (Mr Dlodlo) is to pay the applicants (the Nkalas) the costs occasioned by his (Mr Dlodlo's) unsuccessful application for this Court to hear his application to compel the applicants (the Nkalas) to furnish their heads of argument (in the variation application) prior to and before the hearing of the above stay application.

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

Appearances

For the applicant:	Represented in person
For the respondents:	Ms R Blumenthal
Instructed by:	Ramsay Webber Inc
Date of hearing:	28 January 2021