IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 5378/2006

In the matter between:

SHAUKAT ALLI MOOSA N.O.
AND 24 OTHERS **First Applicant**

and

MAHOMED ASLAM OSMAN AKOO
AND 14 OTHERS **First Respondent**

Judgment delivered:

JUDGMENT 22 June 2010

MSIMANG, JP

[1] The present application constitutes a sequel to a longstanding and prolonged litigation involving family trusts. The litigation commenced on 28 July 2006 when the first applicant, together with other trusts, launched an application against the first respondent together with other trusts, citing the Master of the High Court for the Province of Kwazulu-Natal as the seventeenth respondent.

[2] The relief sought by the applicants in that litigation was a declarator that a partnership relationship subsisting between the parties had been lawfully dissolved with effect from 28 February 2006 and for an order appointing a liquidator with powers to effect a final liquidation of the partnership and to make

applicable distributions to the partners according to the extent of their determined interests in the partnership.

[3] The first four respondents in that application intimated that they intended to oppose the application but during the exchange of the pleadings it became evident that they were not opposed to the granting of an order declaring the partnership to have been dissolved on 28 February 2006 but that they were opposed to an order appointing a liquidator. In addition, they filed a counter-application seeking an order declaring the **Osman Family Trust** to have been equal partners with the applicants as at the date of the dissolution of the partnership on 28 February 2006 and seeking, *inter alia,* an order directing the said Trust to deliver a statement of account of the partnership as at 28 February 2006.

[4] The matter subsequently came before me and after argument I, on 12 October 2007, issued the following order :-

> "1. I grant an order in terms of paragraphs 1 to 11 of the Notice of Motion save that paragraph 2 thereof is substituted with the following paragraph:-
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> > "The liquidator to be appointed in terms of this order shall be a chartered accountant agreed upon by the parties within five (5) days of this order or, failing that, one nominated by the Chairman for the time being of the South African Institute of Chartered Accountants".
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> 2. The costs of the application must be borne by the first, second, third and fourth respondents, jointly and severally, the one paying the others to be absolved. Such costs to include the costs occasioned by the employment of two counsel.

3. In terms of Rule 6(5)(g) the issues in the counter-application set out in Annexure 'A' of this order are referred for the hearing of oral evidence on a date to be arranged with the Registrar.

4. The costs of the counter-application are reserved for determination by the Court hearing that oral evidence."

[5] The important issues which were referred for the hearing of oral evidence and which were set out in Annexure "A" of the order were as follows :-

"1.1 The terms of the partnership agreement concluded between the ten trusts represented by the applicants on the one hand, and the Mahomed Aslam Osman Family trust on the other hand, which agreement was concluded after the termination of the partnership relationship between the ten trusts represented by the applicants on the one hand, and the O S Akoo family Trust on the other hand.

1.2 The percentage of each partner's interest held by each of the ten trusts represented by the applicants on the one hand, and the Mahomed Aslam Osman Family Trust on the other hand, in the said partnership."

[6] The hearing of oral evidence commenced on 5 May 2008 and further evidence was heard on ten other days and the last day to which the hearing of further evidence had been adjourned was 31 May 2010. On the said date it transpired that the first applicant had roped in Mr. **Shaw Q C** to present argument on his behalf. Mr. **Shaw** launched yet another application which he termed an interlocutory application incidental to the pending proceedings. In that application the following relief was sought :-

"2. That paragraph 3 of the Honourable Justice Msimang made on 15 October 2007 whereby he referred certain issues in the counter application for the hearing of oral evidence be varied as follows:-

2.1 By substituting for paragraphs 3 and 4 of the said order the following:-

> "3. That the counter application be dismissed with costs such costs to include the costs consequent upon the employment of two counsel."

2.2 In the alternative to sub paragraph 1, that there be added to the said order the following paragraph 3A

> "That Mahomed Aslam Osman Akoo be ordered to attend personally to be examined and cross examined as a witness before any other witness is heard at the commencement of any further hearing of oral evidence with regard to the counter application."

3. That the respondents pay the costs of this application including those consequent upon the employment of two counsel."

[7] The basis for that application, as I understood it, is thus. The Trust Deed in respect of the **M A Osman Family Trust** was executed on 25 February 2002 and the trust was registered with the Master under IT No. 255/2004N who issued Letters of Authority authorizing **Mahomed Aslam Osman Akoo** (the first respondent) and **Fowsia Osman** to act as trustees of the **M A Osman Family Trust**. In paragraphs 30 and 31 of the first to fourth respondents' affidavit filed in support of the counter-application and deposed to by the first respondent, the latter intimates that, during the year 2002, he represented the **M A Osman Family Trust** when it took over the interests of the **O S Akoo Family Trust** in the partnership.

[8] Mr. **Shaw** then referred to Section 6(1) of the Trust Property Control Act, [1] the provisions of which read as follows :-

> "(1) Any person whose appointment as trustee in terms of a trust instrument, Section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master ……."

[9] Relying on those provisions, the first applicant contended (and it was argued by Mr. **Shaw**) that the first respondent could not validly have represented **M A Osman Family Trust** when the said Trust purported to take over the interests of the **O S Akoo Family Trust** in the partnership. It is accordingly not possible for this Court to grant the first respondent the relief he seeks in the counter-application, namely, an order declaring the said trust to have been equal partners with the applicants as at the date of the dissolution of the partnership on 28 February 2006, the argument concluded.

[10] The application is opposed by the first, second and third respondents and they have filed an answering affidavit deposed to by the first respondent.

[11] Relying upon the decision in **Kropman and others NNO Nysschen** [2] **,** Mr. **Cassim SC,** who appeared for the first respondent, submitted that the Court, in the exercise of its discretion, should retrospectively validate the actions of the trustees in acting on behalf of the Trust, prior to the issue of Letters of Authority. Indeed, in **Kropman** Letters of Authority had been granted on 26 April 1991 and

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1 57 of 1988;
2 1999(2) SA 567 (T);

McArthur J found that cession of the assets in the estate earmarked for the Trust, including the claim against the defendant, had taken place prior to that date. Finding that such acquisition should be validated, irrespective of the provisions of Section 6(1) of the Trust Property Control Act, he remarked as follows :-

> "Having regard to the purpose of the legislation, which is clearly designed to protect those who will ultimately benefit from the trust, there seems no reason why a Court in exercising its discretion cannot retrospectively validate any such actions if the circumstances deem it fit to do so ……..
>
> In the present matter the question of alienating trust property does not arise. The plaintiffs, in acting as trustees before being officially appointed, received the assets, including the claim against the defendant, and this was done for the benefit of the trust, and in the circumstances I am of the opinion that act should be approved and ratified." [3]

[12] The finding in **Kropman** on the issue is in direct contrast with the finding in an earlier decision in **Simplex (Pty) Ltd v van der Merwe and others NNO.** [4] The latter case involved the validity of an agreement concluded by a trustee, in his capacity as such, prior to being authorized thereto by the Master in terms of Section 6(1) of the Trust Property Control Act. It had been argued on behalf of the trustees that the prohibition prescribed in Section 6(1) was directory and not peremptory. Not so in the judgment of **Goldblatt J** in that case. He opined:-

> "I do not agree with such submission. The language of the prohibition is, in my view, peremptory. The words 'shall ….. only' are clearly of a peremptory nature, indicating an unambiguous prohibition on acting as trustee until authorized thereto in writing by the Master. It is a precondition to a trustee's right to act as such that he be authorized to so in terms of s 6(1) of the Act.

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[3] Ibid. 576 E-G;
[4] 1996(1) SA 111 (W);

> I am further of the view that s 6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee." [5]

[13] The construction of the section came up pointedly for decision in **van der Merwe v van der Merwe** [6] and the issue to be decided by the Court revolved around the validity of a juristic act performed by a Trustee prior to the issue of Letters of Authority by the Master in terms of the section. **Griesel J** referred to **Simplex (supra)** and to **Kropman (supra)** and, in a jurisprudentially convincing judgment, he preferred the interpretation given to the provisions of the section in **Simplex,** concluding that :-

> "Indien eenmaal aanvaar word dat 'n ongemagtigde handeling deur 'n trustee nietig is, volg dit dat dit agterna geratifiseer kan word nie." [7]

[14] Having considered the matter I, too, have found the **Simplex** and **van der Merwe** interpretation of the section to accord with the principles of our law and accordingly that the first respondent's act, when he purported to represent the Trust when it took over the interests of the **O S Akoo Family Trust** in the partnership, was void and that, on the authority of **van der Merwe,** it cannot be ratified.

[15] Mr. **Cassim,** however, submitted that, as from 23 September 2004 to 20 February 2006, the parties before Court, namely, the **M A Osman Family Trust** on the one hand and the **I O Moosa Family Trust** on the other, conducted

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5 Ibid. 112 H- 113 A;
6 2000(2) SA 519 (c);
7 Ibid. at 525 C;

themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as endured before. Relying on the Supreme Court of Appeal decision in **Golden Fried Chicken (Pty) Ltd v Sirad Foods CC and others** [8], he urged the Court to find that the facts establish that there was a tacit relocation of the partnership agreement.

[16] For a number of reasons, I have found Mr. **Cassim's** submissions on the issue to be devoid of any substance. In the first place, the facts in **Golden Fried Chicken** are clearly distinguishable from the facts in the present case. Besides, the case based on tacit relocation of the partnership agreement has never been first respondent's case in the proceedings. Also, Mr. **Cassim's** submission loses sight of an important issue in the application, to wit, the invalidity of a juristic act based on non-compliance with the law in respect of which **Griesel J** pronounced himself as follows in **van der Merwe (supra)** :-

> "Die verdere oorweging wat deur MacArthur R genoem word, naamlik dat dit Wet nie spesifiek voorsiening maak vir nietigheid in geval van nie-nakoming van die vereisters van art 6(1) nie, is ook nie oortuigend nie. Die algemene uitgangspunt is juis die teenoorgestelde: in die afwesigheid van 'n ander bedoeling is die algemene reël dat 'n handeling in stryd met 'n Wet verrig, nietig is." [9]

[17] I accordingly find for the applicants for the main relief and have found it unnecessary to deal with the alternative relief. What is now left is for the Court to exercise its discretion in the award of costs in this matter.

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[8] 2002(1) SA 822 (SCA);

[9] Van der Merwe (supra) at 524 C-D;

[18] On 5 May 2008, Mr. **Cassim** made an application for leave to withdraw the counter-application and tendered costs. The application was strenuously opposed by Mr. **Singh** who, at the time, acted for the applicants and who argued that it was important that the shareholding in the partnership should be determined by the Court. I refused application for leave to withdraw the counter-application and the matter proceeded on 6 May 2008 and on other days when witnesses were called to testify. It was only on 31 May 2010 that the applicants launched the present interlocutory application.

[19] In my judgment the interlocutory application ought to have been launched after the dismissal of an application for leave to withdraw the counter-application. The delay in launching the same is therefore not justified. I have accordingly concluded that, though the costs should follow the result, the first, second and third respondents should not be mulcted in costs of 6 May 2008 and other days when evidence was adduced

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> **I accordingly grant an order in terms of paragraphs 2 and 2.1 of the draft order save that the first, second and third respondents will be responsible for the costs incurred only on 5 May 2008 and 31 May 2010.**
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> **The costs which the respondents incurred on other days must be borne by the applicants, those costs to include the costs consequent upon the employment of two counsel.**

For the Applicants:	Adv. D Shaw QC with Adv. U Lennard (instructed by Lockhat & Associates)
For the Respondents:	Adv. N A Cassim SC with Adv. D Ramdhani (instructed by Abbas, Latib & Co.)
Matter heard:	31 May 2010
Judgment delivered:	22 June 2010