



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

CASE NO: 2022 / 031631

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

8/6/2023
DATE

J Moorcroft
SIGNATURE

In the application by

PRIOSTE, MARIA DA CONCEICAO FREITAS

Applicant

and

EDELSTEIN FABER GROBLER INC

First Respondent

GROBLER, RONEL

Second Respondent

Neutral Citation: *Prioste v Edelstein Faber Grobler Inc and Another* (Case No. 2022 / 031631) [2023] ZAGPJHC 666 (8 June 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Mandate – Instruction by two joint owners to register transfer of immovable property and to then pay the balance of the purchase price after deductions into bank account of one owner

Both owners owned an indivisible 50% share in property

Owners as mandators are individually entitled to vary instruction to conveyancer in respect of bank account into which the owner's share must be paid

Order

[1] In this matter I make the following order:

1. *The application is dismissed.*
2. *The applicant is ordered to pay the respondents' costs.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant seeks an order that either of the respondents, alternatively the respondents jointly and severally, pay an amount of R833 865.48 to her, with interest and costs. The claim arises out of what is described as a “*mandate*” given to the first respondent as a firm of conveyancers by the applicant and Mr Prioste, her former husband to whom she was married in community of property until 2015, to transfer the immovable property owned by them jointly to a third party purchaser and to pay the balance of the proceeds into the applicant's bank account.

Money paid into trust

[4] Money paid into trust must be used only as instructed and may not be used for any other purpose. In *Frikkie Pretorius Inc and Another v GG*¹ the proceeds of the sale of a jointly owned property was paid into trust with the wife's attorney. The attorney held the funds for the benefit of both parties irrespective of who the attorney's client was, and it was not permissible for the attorney to deduct arrear maintenance owed by the husband to his client from the amount payable to the husband and held in trust.

[5] In *Aeroquip SA v Gross and others*² Southwood J, dealing with money in an attorney's trust account, said:

[13] The applicant has not referred to any authority that an attorney becomes personally liable for payment of a debt where he fails to pay over to a client's creditor an amount held by him on behalf of his client in his trust account. The contrary appears to be true. An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than he is instructed by the client. It is trite that it must always be available to the client. [emphasis added]

[6] The questions that must then be answered are –

- 6.1 What was the instruction given to the first respondent?
- 6.2 Who gave the instruction?
- 6.3 Was it varied?
- 6.4 Could it be varied by one of the two parties who gave the instruction without the knowledge or co-operation of the other?

¹ *Frikkie Pretorius Inc and Another v GG* 2011 (2) SA 407 (KZP).

² *Aeroquip SA v Gross and others* [2009] 3 All SA 264 (GNP).

The instruction

[7] The mandate, or instruction relied upon consists of two documents, namely a questionnaire³ and an “*instruction to register transfer*.”⁴ Both documents were completed and signed by the applicant and Mr Prioste in 2022.

[8] The second respondent states in the answering affidavit that the transfer documents were sent to the applicant and Mr Prioste as the sellers and were thereafter signed by both sellers and returned to the first respondent. In the email⁵ requesting the applicant and Mr Prioste to sign the instruction document they were requested specifically to “*complete banking details for the payment and sign in full*.”

[9] The pre-typed questionnaire requires clients of the first respondent to “*supply proof of the banking account into which you require payment in order to prove that it is your account*” and the banking account then given is the Capitec bank account of the applicant. Next to the words “*please confirm the banking account into which payment of your proceeds is to be made*” the applicant’s bank account details appear. It would seem that the purpose of the questionnaire was to place the conveyancer in possession of the personal details of the sellers of the property.

[10] In the second document headed “*Instruction to register transfer*”, the first respondent was given an instruction to transfer ownership of the property to the purchasers. The firm was instructed to “*attend to the registration of transfer of the above-mentioned property on our behalf and [we] authorise you to receive the purchase price on our behalf in cash or by way of guarantees from a bank, building society or other institution*”.

[11] The document then states that “*we further authorise you out of the proceeds of the sale and upon receipt of such proceeds, to pay, or when so requested, to undertake to pay the costs to cancel existing bonds and the legal costs, agents commission, rates and taxes or levies*”, and to pay the balance into the applicant’s bank account. This was a clear and unequivocal instruction by both owners to pay the balance of the proceeds of

³ CaseLines 01-108.

⁴ CaseLines 01-112.

⁵ CaseLines 01-49.

the sale into the applicant's bank account.

[12] The instruction document reflects the names and signatures of the applicant and Mr Prioste and the date of 17 March 2022 appears above their signatures. The instructions were given by both the applicant and Mr Prioste - It was a joint instruction.

[13] The application turns not on the facts surrounding the divorce or any other agreements or arrangements, but exclusively on the interpretation of the two documents (being the questionnaire and the instruction) relied on. Both parties refer to the authority given to the first respondent as a mandate. It is not necessary for the purpose of this judgment to analyse the distinction between a mandate and an instruction, but it seems to me that the document is more accurately described as an instruction to perform a juristic act.⁶

The variation of the instruction

[14] It is common cause that the first respondent did not carry out the original instruction in respect of the payment of the balance into the bank account of the applicant. It made payment in two equal amounts of R833 865.48 to the applicant and to Mr Prioste.

[15] In the respondents' answering affidavit the second respondent avers that the instruction was contrary to the provisions of the Court order in terms of which the applicant and her husband were divorced in 2015. The Court order provided for the equal division of the joint estate whereas the applicant now claimed all of the net proceeds of the sale of the property and not only 50%. The reliance on the Court order is misplaced as the applicant and her husband were at liberty to agree to pay all the funds into her account or indeed to any third party, and to give such an instruction to the first respondent as conveyancer. The first respondent was not called upon to interpret and implement the Court order but was called upon to carry out the instruction as contained in the instruction.

[16] I note in passing that the evidence by Mr Prioste in his affidavit was that there was

⁶ Joubert and Van Zyl, '*Mandate and Negotiorum Gestio*,' *The Law of South Africa*, 2nd ed 2009, Vol 17, Part 1, para 2.

never any agreement in place to vary the terms of the court order. Such a variation might conceivably have been an explanation for an instruction to pay the proceeds of the sale to the applicant but there is nothing in the instruction documents that points to such an underlying agreement.⁷

[17] The second respondent refers to an affidavit⁸ deposed to by Mr Prioste attached to her answering affidavit. He confirms that on 17 March 2022 he went to the offices of the applicant's attorneys to sign transfer documents. He specifically noticed the applicant's banking details contained in the documentation and when he queried the details he was told by the applicant's attorney that he should send his banking details by email directly to the first respondent. Some six weeks later he again attended at the offices of the applicant's attorneys and was advised that the first respondent and not the applicant's attorneys were dealing with the transfer. Thereafter Mr Prioste liaised with the staff of the first respondent.

[18] On 5 May 2022, Mr Prioste's brother on his behalf emailed⁹ his banking details as well as a copy of the decree of divorce incorporating a settlement agreement to the first respondent.

[19] The email reads under the heading: *"Mr ATV Prioste banking details"*:

"Good day Matilda

Please find herewith banking details for Mr ATV Prioste.

Kind regards

*Paul Prioste
Operations Director"*

[20] The email does not constitute an express variation of the instruction given to the first respondent, but was interpreted as such by the first respondent and as a result 50% of the balance after deductions was subsequently paid into Mr Prioste's account. This

⁷ The application must be approached on the basis set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 and *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E – G, *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) 938A – B, and various other authorities.

⁸ CaseLines 01-57.

⁹ CaseLines 01-67.

interpretation by the first respondent no doubt arose out of the liaison between Mr Prioste and the first respondent's staff. There is a paucity of evidence by the first respondent in this regard but it must be accepted that it is common cause on the papers between the first respondent and Mr Prioste that this was indeed the instruction.

Was it permissible for Mr Prioste to change the instruction to pay his share of the proceeds into the applicant's bank account, and to do so unilaterally?

[21] Absent a cession,¹⁰ the terms of the instruction as accepted by all parties, or an underlying agreement binding also on the mandatary or agent, an authority given to another is not irrevocable.

[22] There is nothing in the instruction document to justify the inference that was irrevocable in respect of the instruction to pay the proceeds into the applicant's bank account, or that either the applicant or Mr Prioste could not unilaterally amend the instruction and provide the first respondent with a contrary instruction namely to pay his or her 50% share into some other account. The applicant and Mr Prioste were both free to deal with their own 50% share as they pleased.

Conclusion

[23] I therefore find that

23.1 Mr Prioste was free to vary the instruction to pay into the application bank account insofar as the instruction pertained to his 50% share;

23.2 He did so;

23.3 The respondents undertook no obligation to the applicant that was

¹⁰ Wanda, 'Agency and Representation,' *The Law of South Africa*, 2nd ed 2003, Vol 1 para 199.

independent of the instruction document to ensure that Mr Prioste's share was paid into her bank account, and once Mr Prioste had given alternate instructions in respect of his share, the first respondent was not obliged to pay his share into her bank account and was not permitted to deal with his share otherwise than in accordance with Mr Prioste's instruction.

[24] For the reasons set out above I make the order in paragraph 1.


J MOORCROFT

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 JUNE 2023**.

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COUNSEL FOR RESPONDENTS:	R SHEPSTONE
INSTRUCTED BY:	FAIRBRIDGES WERTHEIM BECKER ATTORNEYS
DATE OF ARGUMENT:	25 MAY 2023
DATE OF JUDGMENT:	8 JUNE 2023