



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 23569/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
28/04/2021	
DATE	SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

MADIGAGE, ELIAS ASHTON

First Respondent

MADIGAGE, LINAH MAKHAYA

Second Respondent

JUDGMENT

TERNENT AJ

1. This matter came before me in the opposed Motion Court and was allocated for hearing on Tuesday, 14 April 2021 at 10h00. Prior to the commencement of the argument, I requested that the counsel representing the applicant and the respondents ("the first and second respondents") place themselves on record. Ms Dénichaud confirmed that she represented the applicant. Ms Hartzenberg advised me that she had recently been briefed in the matter as Mr Francois Greeff ("Greeff"), the respondents' counsel, who was going to argue the matter (and who had filed heads of argument), was no longer able to do so. She advised me that she had been instructed to only appear on behalf of the first respondent. I then enquired as to whether a notice of withdrawal as the attorney of record had been served on the second respondent and, if so, whether she was aware of the opposed application set down for today. Ms Hartzenberg was unable to address these issues and the matter was briefly adjourned for her to take instructions. Having taken instructions, she informed me that her instructions simply were to represent the first respondent. I informed Ms Hartzenberg, that she should approach her instructing attorney and obtain an affidavit explaining whether or not a notice of withdrawal of the attorney of record had been served on the second respondent, in accordance with Rule 16(3), as the applicant's counsel informed me that no notice of withdrawal had been served on the applicant and that

the impression that had been gleaned from the application papers, heads of argument and practice note was that both respondents were represented.

2. The answering affidavit recorded that the respondents were husband and wife and their marriage was in community of property. As such, I called for an affidavit to be deposed to by Greeff setting out why a notice of withdrawal had not been served and filed and why I should not make a costs order *de bonis propriis* against him on the punitive scale. It was apparent to me that the second respondent was unrepresented and was unaware of the date of set down of the opposed application. I afforded Greeff an opportunity to file the affidavit by the following morning, 14 April 2021.
3. The affidavit was delivered and the matter proceeded on 15 April 2021.
4. Ms Hartzenberg agreed that the notice of set down had not been served on the second respondent. It was, accordingly, common cause that the application could not be dealt with in her absence and, without her knowledge, and as a consequence would have to be postponed *sine die*.
5. The remaining issue was the appropriate costs order to be made by

me.

6. On reading the affidavit that the court had directed to be filed it became evident that:

6.1 the respondents' attorney of record was Ms Retha Du Plessis ("Du Plessis") who practises under the name and style of Retha Du Plessis Attorneys;

6.2 in her affidavit, Du Plessis stated that she had come on record as the attorney for the respondents (the first and second respondents) on 19 November 2020, after the withdrawal of Greeff and Van Wyk Attorneys and, more particularly, Greeff;

6.3 Greeff was Du Plessis' former principal;

6.4 Greeff had also deposed to an affidavit which would provide the information called for by me and she confirmed and aligned herself with the submissions that Greeff made in his affidavit;

6.5 Greeff, in his affidavit, informed the Court that he had ceased practising as an attorney at the end of 2019/beginning of 2020

and had wound down his practice by 31 March 2020;

6.6 A notice of withdrawal as attorneys of record had not been delivered in respect of the second respondent;

6.7 Du Plessis, the first respondent, and Greeff were unable to confirm that they had a mandate from the second respondent as she had become estranged from the first respondent, and they had lost contact with her. No explanation was furnished as to what attempts, if any, had been taken by either attorney to make contact with the second respondent;

6.8 it was not disputed that a notice of intention to oppose this application had been filed by Greeff, as the erstwhile attorney, on behalf of both respondents. He stated that the first respondent had left a copy of the application at his office on the morning of 20th July 2017 and he had been telephonically advised, by the first respondent, that he should oppose the application, which he subsequently did on the 21st of July 2017. He confirmed that because there had been a number of previous applications between the parties it was not necessary for him to consult with the respondents. He had,

in due course, instructed his receptionist to arrange a consultation with both the respondents, to finalise the opposing affidavits, and this consultation notably was handled by Du Plessis who was his professional assistant in his employ.

6.9 it was at this consultation, that Du Plessis was advised that the relationship between the first and second respondents had broken down, and the second respondent had abandoned the matrimonial home (which is the subject matter of the application, the bank seeking to foreclose on the home and obtain leave to sell it in execution). It is self-evident from the affidavit that was filed by the first respondent that in granting the loan finance, both the first and second respondents' incomes were considered and that they are co - owners of the property and joint bondholders;

6.10 Greeff explained that if he had withdrawn, a default judgment could have been obtained against the second respondent which, as the parties were jointly and severally liable for the debt due to the applicant, would be effective against the first respondent, and he would have been unable to defend the

application, as he is doing and his constitutional rights to a fair and judicial hearing would be infringed.

7. The filing sheet to the opposing affidavit in the main application, on closer reflection, makes specific reference to the fact that it is the first respondent's affidavit, and is being filed on behalf of the first respondent in Greeff's capacity as his attorney of record.

8. In the applicant's replying affidavit the applicant, not having been alerted to Greeff's lack of a mandate, nor having received a notice of withdrawal as her attorney of record, pointedly states:

"85. The Second Respondent has failed to confirm the First Respondent's evidence. No confirmatory affidavit has been deposed to by the Second Respondent."

9. Ms Dénichaud correctly submitted that on a reading of the opposing affidavit allegations were made for and on behalf of the second respondent. As such it appeared that either the first respondent had been authorised to do so or the second respondent had given instructions to that effect, hence the averment in reply.

10. A practice note was filed by Greeff, on behalf of both the respondents,

on 18th November 2020.

11. The notice of set down, setting the opposed application down before me, for 12th April 2021, was emailed to Retha Du Plessis Attorneys as the new attorney of record for the respondents, by the applicant's attorney, on 4th March 2021, at the email addresses mail@greeffvanwyk.co.za and retha@rduplessis.co.za. There was no response and no notification that the second respondent was not represented by Du Plessis.
12. Heads of argument, which also appear to have been drafted by Greeff, were served on behalf of both respondents and were uploaded to CaseLines on 9 April 2021.
13. Accordingly, at the hearing of the application, neither the applicant nor the Court were alerted to the fact that the second respondent was unrepresented and had not been notified of the notice of set down of the application.
14. In ***Advocate S Sayed N.O. vs Road Accident Fund***¹, Mahon AJ

¹ Sayad N.O. v RAF and others (50887/18;38403/17;33821/17;35970/18; 49128/18;23116/14;447/160 ZAGPPHC 76 (4 March 2021)

stated that:

“[6] As a general principle, but subject to certain exceptions, whatever the nature of the matter in hand, a client is entitled at any time to put an end to the attorney and client relationship and upon his doing so the attorney must accept the dismissal. This is a long established principle in England and has been followed in South Africa and remarked upon as being implicit in our system of administration of justice.

[7] In the handling of any matter which comes or is to come before any court, an attorney must at all times act with proper respect for that court so as not in any way to impair its authority and dignity.

[8] An attorney of record in litigation is no mere post box or conduit for the receipt and dispatch of documents. He plays a pivotal role in the progress of litigation, the functioning of courts and the administration of justice. The attorney's function is to understand his client's problem and, even where he knows that counsel will be briefed, to go as far as he reasonably can in the time available, not only to grasp the facts but also to investigate the legal questions involved. It goes without saying that these duties cannot be fulfilled where the attorney

has washed his hands of the matter and is present in name only.

[9] It must be remembered that an attorney owes duties, not only to his client, but to the court and, indeed, to his opponents and their clients.

[10] It is for good reason, therefore, that an attorney's role in the representation of his client in litigation has been regulated by the Uniform Rules of Court."

15. Rule 16(4)(a) of the High Court Rules provide:

"(4)(a) Where an attorney acting in any proceedings for a party ceases so to act, he shall (my emphasis) forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.

(b) After such notice, unless the party formerly represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in subrule (2), it shall not, be necessary to serve any documents upon such

party unless the court otherwise orders: Provided that any of the other parties may before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented.

(c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.

(d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b)."

16. The affidavit called for was silent about this duty and the attorney's non-compliance with the rule.
17. The tenor of the affidavit was self-serving and high handed, to my mind, and sought to deflect responsibility for notification of the set down to the applicant by suggesting that because the Notice of Motion had been served on the second respondent, the applicant should know where she is. This, of course, is unacceptable.
18. Neither Du Plessis nor Greeff accepted any responsibility for their failure to comply with Rule 16(4) and their ethical duty to the second

respondent. Their failure to act reasonably and timeously, knowing full well that their mandate was in question, was the sole cause of the postponement of the application, and the wasted costs which had been incurred by the applicant, so too the inconvenience caused to this Court which was prepared to hear the opposed application. Notably, no tender was made in the affidavit to pay the wasted costs.

19. Glaringly, as stated above, not one letter or allegation was made by Du Plessis or Greeff that they had made any effort to contact the second respondent. It became clear that they had simply disregarded her rights, and their duty to her, the applicants and this Court.
20. Ms Hartzenberg, at my request, took an instruction as to whether a tender would now be made in respect of the wasted costs. Having done so, I was informed that Du Plessis and/or her firm tendered payment of the wasted costs to the applicant, *de bonis propriis* on the party party scale.
21. Ms Dénichaud accepted the tender conditionally in that she was instructed to persist in seeking that the wasted costs be paid on a punitive scale. In addition, she submitted that Greeff who, also during his practise as an attorney, materially failed to comply with Rule 16(4)

should be held jointly and severally liable together with Du Plessis for these wasted costs.

22. In seeking a punitive costs order, Ms Dénichaud highlighted that the manner in which the attorneys had dealt with the representation of the second respondent suggested an unacceptable indifference as to the consequences. Materially, Greeff² had stated that he did not file a notice of withdrawal terminating his representation of the second respondent, because he sought to protect the first respondent's rights, as stated above. The argument for the applicant emphasised that, in so doing, he had acted unethically and deceptively, as he clearly had no mandate to continue acting for the second respondent and yet held out that he did so, a position which was compounded by the fact that Du Plessis continued to hold out that she too acted for the second respondent.

23. It is clear that an attorney can only act on instructions from his/her client.

24. In the matter of ***Kay-Pee Ntila Attorneys v Minister of Safety and***

² Paragraph 3 of Mr Greef's affidavit

Security³, a notice of withdrawal had been filed by the applicants who were the attorneys firm and the attorney respectively, yet they had not delivered the notice of withdrawal to their client for which they were penalised with a costs order. They sought to rescind an order of costs that had been granted against them *de bonis propriis*, on a punitive scale and in their absence.

25. It is apparent from the judgment that although they filed a notice of withdrawal as attorneys of record they only faxed the notice to the opposing attorneys and filed it at the Registrar's office, without having the notice delivered to their client. The issue was that the notice failed in a number of respects to comply with Rule 16(4) of the Uniform Rules of Court.

26. Kemp AJ stated:

“9. *The fact that applicants did not give notice to Nodu (their client) deprived him of the right to elect whether or not to exercise any of the rights provided for in sub rule (b), as a result of which he*

³ 2012 JDR 0728 (ECG)

*may well have been materially prejudiced.*⁴

27. The judgment further made reference to ***Transorient Freight Transporters Corporation v Eurocargo Co-Ordinators (Pty) Ltd***, a judgment of Fleming J,⁵ which I repeat here:

“Failure to comply with the very explicit requirements of a notice of withdrawal to the Registrar may then, on the lines which I have indicated, render an attorney liable to pay some compensation to the opposite party. The position of an attorney clearly creates obligations not only towards his own client but also towards the Court and to some extent to the opposite party. However, the interests to be guarded over by the Courts cannot be made dependent upon the degree of activity of individual parties in respect of claims for compensation. It may well become appropriate mero motu to order an attorney whose failure to comply with Rule 16(4) causes costs of additional service or postponements, to pay such costs de bonis propriis.”

28. Although there is no specific rule of practice in this division, of interest are the rules in the Eastern Cape High Court, Grahamstown, which practice provides some instruction. Rule 7 of that division's Rules of

⁴ ***Kay-Pee Ntila Attorneys v Minister of Safety and Security*** (*supra*) at para 9, page 4

⁵ 1984 (3) SA 542 (W) at page 546A-C

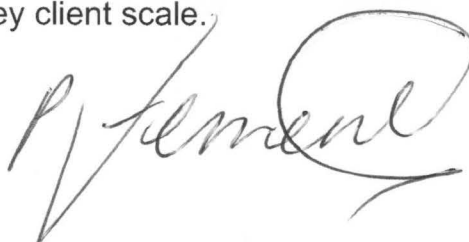
Practice provide that if an attorney withdraws where a date of a hearing has been allocated his notice of withdrawal should actually state “*whether and in what manner the client has been informed of the date of hearing*” and furthermore, as I requested here, that in circumstances of a late withdrawal that an affidavit be delivered to explain and provide a “*satisfactory*” explanation as to why the wasted costs occasioned by the late withdrawal *de bonis propriis* should not be paid by the attorney.

29. I am inclined to agree with Ms Dénichaud that the conduct displayed by Greeff and, to which Du Plessis aligns herself, and perpetuated, is unbecoming and unprofessional for two attorneys of this division.
30. Greeff and Du Plessis, knowing full well that they had no instructions from the second respondent, and making no effort to clarify that this was so, continued to represent that they were her attorneys of record over a period of many months, which was the direct result of the postponement of this application and the consequent wasting of costs and the Court’s time. The explanation for their failure to do so materially exposes the misrepresentation and is not excusable or satisfactory. Their ethical obligations are paramount.
31. As a consequence, I have no hesitation in finding that Du Plessis and

Greeff, both attorneys of this division, albeit that Mr Greeff is a non-practising attorney, have conducted themselves in a dishonest and unprofessional manner and should be penalised with a punitive costs order.

32. In the circumstances, I make an order in the following terms:

- (1) The application is postponed *sine die*.
- (2) Retha Du Plessis Attorneys shall deliver a notice of withdrawal as the second respondent's attorneys of record, in compliance with Rule 16(4) of the High Court Rules, within 5 (five) days of the date of this order.
- (3) The applicant's wasted costs occasioned by this postponement shall be paid *de bonis propriis* by Retha Du Plessis, who is practising under the name and style of Retha Du Plessis Attorneys and Francois Greeff, the first respondent's erstwhile attorney of record, jointly and severally, the one paying the other to be absolved on the attorney client scale.



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ACTING JUDGE OF THE HIGH COURT
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DATE OF HEARING: 15 April 2021

DATE OF JUDGMENT: 28 April 2021 (handed down electronically,
uploaded to Caselines and emailed to the parties)

APPEARANCES

Applicant's Counsel:	Ms C Dénichaud
Instructed by:	Glover Kannieappan Incorporated Mr L Kannieappan
First Respondent's Counsel:	Ms I Hartzenberg
Instructed by:	Retha Du Plessis Attorneys Ms Retha Du Plessis