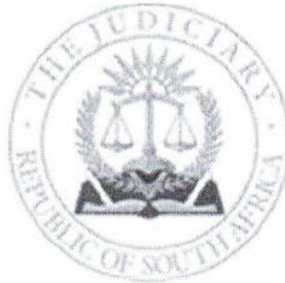


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-055949

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES

2.OF INTEREST TO OTHER JUDGES: YES

3.REVISED: YES



Judge Dippenaar

In the matter between:

MERRIAM MAKWENA MANAMELA

APPLICANT

AND

GRACE MAITE

RESPONDENT

Summary: Urgent contempt application – enrolled on urgent court roll on two occasions despite a previous similar contempt application being struck from the roll for lack of urgency which remains pending – counter application for rescission of order on which contempt application based also pending - lack of proper service – contempt applications - inherent urgency – still requires factual context why particular contempt application is

urgent - abuse of process of urgent court - *de bonis propriis* costs order granted against applicant's attorney of record – attorney and client scale - disentitled to charge applicant fees

ORDER

- [1] The applicant's urgent contempt application dated 20 July 2023 is dismissed.
- [2] The costs of the application in [1] above, including the reserved costs in the urgent court on 1 August 2023 are to be borne by the applicant's attorney of record, Mr Vincent Seloane, *de bonis propriis*, on the scale as between attorney and client.
- [3] The applicant's attorney of record, Mr Seloane, is directed not to present a bill, nor to recover any fees or disbursements from the applicant in respect of any work performed in respect of the contempt application dated 20 July 2023;
- [4] A copy of this judgment and order is to be served by the applicant's attorney of record on the applicant forthwith.

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail, and being uploaded to the CaseLines digital system of the GLD. The date and time for hand-down is deemed to be 10h00 on the 06th of SEPTEMBER.

DIPPENAAR J:

[1] The pernicious effect of legal practitioners simply disregarding the rules of court is that the very fabric of the Rule of Law is being eroded.

[2] There appears to be an alarming trend that legal practitioners through apparent hubris or feigned ignorance directly ignore or flaunt their indifference towards the rules of Court and worse yet, merely do not comply with Court orders.

[3] As Yeats¹ once wrote:

*"The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
...
The best all lack all conviction, while the worst
Are full of passionate intensity..."*

[4] The Constitution affirms its supremacy² and the judicial authority of our Courts.³ To maintain these attributes of our constitutional order, judicial decisions must be implemented and judicial authority should not be impugned. Courts are constrained to protect their institutional authority and judgments.

[5] In *Letsi*⁴, Opperman J highlighted the following apposite remarks by Deputy Judge President Sutherland:

"... In a climate of burgeoning caseloads and the unrelenting pressure on courts to deliver on the expectations of the litigating public, it is plain that the dependence of the judge on the legal practitioner is acute... The symbiotic relationship between the roles of judge and legal practitioner

¹ The Second Coming by William Butler Yeats

² Section 2 of the Constitution.

³ Section 165 of the Constitution.

⁴ *Letsi v Mepha and Another* (42/2021) [2022] ZAFSHC 122 (13 May 2022) para 2.

*warrants the respect necessary to produce efficient and fair litigation... The critical imperative is that legal practitioners act ethically...*⁵

[6] This urgent contempt application sharply brings this relationship and the duties on a legal practitioner into focus.

[7] It is necessary to set out the history of the litigation between the parties in some detail as it sets out the course of conduct embarked upon by the applicant's attorney of record, Mr Vincent Seloane. This history emerges from the undisputed facts in the respective parties' affidavits.

[8] The litigation between the parties commenced by way of a spoliation application launched by the applicant's attorney of record over a weekend in the urgent court, resulting in an order being granted on 10 June 2023 by Shepstone AJ ("the spoliation order").

[9] On 15 June 2023, the applicant launched an urgent contempt application based on the respondent's alleged wilful non-compliance with the spoliation order ("the first contempt application").

[10] The applicant attempted to enroll the application on the urgent roll for 20 June 2023, but it was not enrolled by the Registrar, presumably because the applicant did not meet the requisite deadlines.

⁵ 2021, Sutherland, Deputy Judge President of the Gauteng Local Division of the High Court, Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non-Disclosure, South African Judicial Educational Journal, (2021) 4 (1), December 2021 at page 47. Quote on page 64.

[11] The application was enrolled in the urgent court on 27 June 2023. It was removed from the roll as Makume J was not satisfied that proper service had been effected on the respondent and required service by Sheriff, as is the norm.

[12] The applicant again enrolled the first contempt application on the urgent roll for 11 July 2023, where it was heard by Motha J.

[13] According to the undisputed facts in the affidavits filed of record, the spoliation order and the contempt application were only properly served on the respondent on 5 July 2023, thus after the launching of the first contempt application.

[14] The respondent opposed the application and launched a counter application in two parts: the first, seeking the stay of the execution of the spoliation order on an urgent basis; the second, seeking the rescission of the spoliation order in the normal course. The respondent delivered a comprehensive answering affidavit setting out the grounds underpinning both her opposition to the allegations of contempt and why rescission of the spoliation order was being sought. On both issues, the lack of proper service on the respondent of the various legal proceedings was raised.

[15] After hearing argument from the parties, on 13 July 2023 Motha J struck the first contempt application and the respondent's counter application from the roll. Costs were directed to be in the cause.

[16] Having struck the matter from the roll, it is clear that after due consideration of the facts placed before the court, Motha J exercised his discretion against hearing the first

contempt application as a matter of urgency. It is well established that matters are struck from the urgent roll where they lack urgency.

[17] Both the contempt application and the respondent's counter applications remain pending and are due to be heard in the normal course on the opposed motion roll.

[18] Shortly thereafter and on 17 July 2023, the applicant's attorney addressed a letter to the respondent's attorney, demanding that the respondent comply within 24 hours with the order of Shepstone AJ, failing which an urgent contempt application would be launched. At this juncture, the applicant was fully aware of the respondent's defences to the contempt application and the grounds upon which rescission of the spoliation order was being sought.

[19] In response thereto, the respondent's attorney on 20 July 2023, *inter alia* pointed out that the applications which had been struck from the urgent court's roll remained pending and should be heard in the normal course. It was recorded that the respondent's affidavits made it clear that she could not restore possession of the property, was not responsible for the dispossession which allegedly occurred and that portions of the spoliation order were unenforceable as the respondent was not resident on the property.

The letter concluded:

"We also record that your client has now approached this court on an urgent basis on 20 June 2023, 27 June 2023 and 13 July 2023- none of which was successful. We now caution you against approaching the court for a further urgent application as, clearly, this matter is not urgent and your client is not entitled to urgent relief".

[20] In response, on 20 July 2023 the respondent's attorney again demanded an urgent undertaking to comply with the spoliation order, failing which the contempt application "would be reinstated" on an urgent basis. In relevant part, the letter further stated:

"You will also note that your client's counter-application was also struck off the roll therefore there is no pending counter application for our client to oppose. Your client's counter application has no merit. We are not in a position to address your client's (sic) regarding urgency and other points of law".

[21] Notwithstanding the caution from the respondent, the second urgent contempt application was launched on 20 July 2023, enrolled for hearing on 1 August 2023. The current proceedings concern the second contempt application.

[22] The application was enrolled for hearing before Opperman J. On the eve of the hearing, the applicant's attorney addressed a letter to Opperman J requesting a postponement due to his illness and consequent inability to represent the applicant at the hearing.

[23] At the hearing on 1 August 2023, the applicant's attorney's candidate attorney, Mr Qakayi, appeared and sought a postponement of the matter to 8 August 2023. The respondent objected to such postponement and argued that the matter should be removed from the roll as the matter was not urgent, having been considered and struck off the urgent roll for lack of urgency by Motha J. The applicant's attorney did not brief counsel to attend the matter, but instead simply sent his candidate attorney, who he would have known had no right of appearance in the High Court, to seek a postponement.

[24] After consideration, Opperman J removed the matter from the roll and reserved costs.

[25] It was undisputed that during the course of those proceedings, Opperman J cautioned the applicant against again enrolling the application on an urgent basis and warned that it could result in an adverse costs order. The applicant was further warned about the proper processes and advised that the rescission application could be determined in the fullness of time. This caution was, on instruction of Opperman J, conveyed to Mr Seloane by the respondent's counsel by way of correspondence, the contents of which was confirmed by the candidate attorney, Mr Qakayi.

[26] Undeterred, the applicant's attorney however simply re-enrolled the application for hearing on the urgent roll of 8 August 2023, disturbingly without notifying the respondent's attorneys of the enrollment and without serving a notice of set down on them.

[27] In doing so Mr Seloane effectively disregarded the decision of Opperman J not to grant the applicant the postponement which was sought in the hearing before her and ignored her caution.

[28] The applicant's replying affidavit was not delivered prior to the hearing of 1 August 2023. It was only uploaded onto the electronic platform on Monday 7 August 2023, the day before the hearing. The document does not reflect that any service thereof was effected on the respondent's attorneys.

[29] When counsel for the applicant appeared on Tuesday the 8th of August 2023, it was not brought to my attention that no notice of set down had been served on the respondent. The respondent's counsel was not present. As it was clear that the application was opposed, I instructed the applicant's counsel to make contact with his

opponent so that they could both appear in the matter simultaneously before it could be heard.

[30] When the respondent's counsel, Adv Lindazwe, appeared, I was informed by her that, had it not been for my instruction, the respondent would have been unaware that the application had been re-enrolled on the urgent court roll and that no notice of set down had been served on the respondent's attorney of record. That submission was not disputed.

[31] It is disconcerting that the applicant's attorney believed he could blatantly exclude the respondent from the further proceedings, given the history of the litigation.

[32] In the second contempt application, the following substantive relief was sought:

"2 That the respondent be found to be in contempt of the court order granted by Honourable Shepstone AJ on 10 June 2023 ("the court order");

3 That leave is granted to the applicant to reinstate and supplement her application of 15 June 2023;

4 That the respondent be committed to prison for contempt of court for a period of 6 (six) months or such period as the court deems just and equitable;

5 That a fine of R30 000 be imposed upon the respondent;

6 The respondent pay the costs of this application on attorney and client scale."

[33] In the founding affidavit, under the heading "*Leave to Supplement*" it was acknowledged that the contempt application and the respondent's counter application to stay execution had been struck from the urgent roll on 13 July 2023. The applicant did not seek to supplement the first contempt application, but rather launched a further substantive contempt application. It was contended that "*little had changed since the court order of 10 June*", that service of the order had been achieved and that the respondent

remained in contempt of court. Leave was sought to reinstate and supplement the application for contempt “in the interests of justice”. No mention was made of the respondent’s pending rescission application of the spoliation order in the founding affidavit.

[34] To justify urgency, it was contended that the application “*remains urgent due to the inherent nature of contempt proceedings*” coupled with the broad allegation that “the applicant and her family suffer ongoing prejudice against their dignity”. Reliance was also placed on the contention that as the spoliation order had been obtained on an urgent basis and those circumstances still prevailed, the contempt application was urgent.

[35] The respondent opposed the application and attached copies of her affidavits in the first contempt application which set out her version and defences to the application in detail. Therein the respondent *inter alia* contended that proper service of the spoliation application had not been effected on her. As in the first contempt application, she challenged urgency. In her affidavit, the respondent characterised the application as an abuse as it was based on exactly the same facts and grounds as the first contempt application which had been struck from the urgent roll by Motha J and accused the applicant and her legal representative of *mala fides*. The respondent sought the dismissal of the application with a *de bonis propriis* costs order against Mr Seloane.

[36] The belated replying affidavit of 7 August 2023 did not factually contribute to the determination of the issues in dispute. It was argumentative, replete with dubious legal arguments and contained an unwarranted and scathing attack on the respondent.

[37] Given that the respondent had in her answering affidavit sought costs against the applicant's attorney *de bonis propriis*, and no affidavit had been filed by Mr Seloane in response, I enquired from applicant's counsel whether the attorney wanted an opportunity to deliver an affidavit dealing with such issue. I was informed that Mr Seloane wanted to deliver such affidavit. Accordingly, I stood the matter down and set timelines for the delivery of such an affidavit and a response thereto by the respondent.

[38] Mr Seloane's affidavit did not meaningfully address the *de bonis propriis* costs issue. In challenging the respondent's version as to why the first contempt application had been struck from the roll, it was baldly contended that the respondent should have attached the order of Motha J. On his version, the application was struck from the roll on the basis of "lack of knowledge" of the spoliation order. It is however clear that the merits of the first contempt application were not dealt with or determined by Motha J.

[39] The high water mark of the affidavit was that Mr Seloane was apparently acting on behalf of the applicant on a *pro bono* basis and had paid expenses from his own pocket. That is irrelevant to the present enquiry. Inasmuch as that explanation was proffered as a justification or excuse for his conduct, the argument does not pass muster and can never justify a disregard of the Rules of Court.

[40] In setting out the history of his attempts to enroll the contempt application on the urgent court roll, it became clear that Mr Seloane had attempted to do so without serving the application papers on the respondent via Sheriff, until directed by Makume J to do so on 27 June 2023.

[41] The argument that pursuant to his demand, the respondent blatantly refused to comply with the court order, disregards the various factual disputes which already arose between the parties in the first contempt application, which still must be determined in due course.

[42] He further launched a further unwarranted blistering attack on the respondent and her attorney of record and sought a *de bonis propriis* cost order against them on the basis that the respondent continued with her disregard of the law “by raising technical points”. Those averments were based on the pending applications and again disregards the substantial factual disputes between the parties on those issues. No cogent grounds were advanced in support of the granting of such order.

[43] In the respondent’s responding affidavit, deposed to by her attorney, Ms Ehlers, the relevant events which occurred were particularised, including in some detail the events which transpired before Opperman J on 1 August 2023, to which I have already referred. Mr Seloane did not seek any opportunity to respond to those averments and they remained unchallenged.

[44] Significantly, Mr. Seloane did not in his affidavit deal at all with why the notice of set down for 8 August 2023 was not served on the respondent’s attorneys, despite such issue having been raised as a matter of concern before the matter was stood down.

[45] Against this backdrop it is necessary to consider the second contempt application. Considering the history of the litigation and the facts, it is clear that the applicant manifestly failed to make out any case for urgency or why the matter was to be dealt with on the urgent roll for 8 August 2023.

[46] The pending rescission application of the spoliation order is destructive of any notion that this second contempt application could be urgent. The applicant and her attorney were already forewarned of the folly of proceeding with the application in the urgent court by Opperman J on 1 August 2023.

[47] The applicant's broad reliance on "contempt proceedings being inherently urgent" is also misconceived. Simply because an application concerns contempt proceedings, that does not of itself justify the enrolment of such application on the urgent court's roll. As in every other urgent application, the issue of urgency must be evaluated in the context of the specific facts of the matter. There must be exact compliance with the requirements of r 6(12)(b) and an applicant must explicitly set out the specific facts which render such application urgent and why an applicant could not be afforded substantial redress at a hearing in due course.

[48] In doing so, primary facts must be presented rather than secondary conclusions devoid of primary facts substantiating them. The mere payment of lip service to these requirements and the bald contention that contempt proceedings are urgent, does not meet the relevant criteria. In the present case, no proper case for urgency was made out.

[49] The notion that simply because legal proceedings were commenced in the urgent court, renders whatever follows also urgent, is also misconceived, more so where the facts relied on in the urgent spoliation application were not placed before the Court and are in dispute between the parties, as in the present instance.

[50] For these reasons, I would have been justified in striking the application from the roll for lack of urgency.

[51] However, there are further issues which require consideration.

[52] Considering all the facts, the second contempt application can best be described as an abuse of process. It is trite that a Court has the inherent jurisdiction to prevent an abuse of its process⁶.

[53] It is clear that the applicant and her attorney of record have entirely misconceived the proper procedures and due legal process. Centrally, the present contempt application is one which impermissibly seeks to review or appeal the decision of Motha J to strike the application from the roll. On this basis alone, the second contempt application should be dismissed.

[54] It would have been open to the applicant to seek leave to supplement her papers in the first contempt application, if a proper case was made out to do so. Simply launching a second contempt application, whilst the first remained pending, was an improper avenue to pursue.

[55] Moreover, the applicant further cannot simply frustrate the pending rescission application by the launching of a fresh contempt application. Insofar as that may have been the motive for the launching of the second contempt application, as appears from the tenor of the applicant's attorney's correspondence to the respondent's attorney, that of itself constitutes an abuse of process as the application was launched with an ulterior motive, justifying its dismissal.

⁶ *Beinash v Wixsley* 1997 (3) SA 721 SCA

[56] Such abuse is exacerbated by the lack of service of the notice of set down for 8 August 2023 on the respondent. This failure is egregious and flaunts a fundamental norm of our law. As recently again emphasised in *Mazetti*⁷:

"In our law, there is the fundamental norm that no decision adverse to a person ought to be made without giving that person an opportunity to be heard. In a court of law, this norm is scrupulously observed."

[57] Well knowing that the respondent was opposing the application, it smacks of *mala fides* that her legal representatives were not notified of the enrolment for 8 August 2023. That cannot be attributed to the applicant, but is squarely to be placed at the door of her attorney, Mr Seloane.

[58] There is no basis to deviate from the normal principle that costs follow the result. The issue is what costs order would be appropriate.

[59] The unfounded launching of the second urgent contempt application resulted in substantial unnecessary legal costs being incurred in relation thereto by the respondent.

[60] Significantly, in the second contempt application not all the relevant facts were disclosed in the founding affidavit or brought to the Court's attention, notably the pending rescission application against the spoliation order underpinning the applicant's claim to relief.

[61] Given the advance warning of the risks involved in continuing on his path of abusing the urgent court by Opperman J, and in light of the fact that the matter had already been struck from the urgent roll by Motha J, the applicant's attorney had full

⁷ *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others* (2023-050131) [2023] ZAGPJHC 795 (3 July 2023), para 1.

knowledge that the enrolment of the application on the urgent court roll for 8 August 2023 would be inappropriate, specifically after the request for a postponement to that roll was declined by Opperman J.

[62] Seen cumulatively, the conduct of the applicant's attorney was entirely unbecoming of a legal practitioner and displays a disturbing disrespect for the Court, its rules and for judicial authority.

[63] As illustrated by the history of the litigation, Mr Seloane flouted important and fundamental tenets pertaining to service and urgent applications and ignored decisions made by the Judges who heard the matter in the urgent court.

[64] Such conduct can and should not be countenanced, as it undermines the authority of the Court and impacts negatively on the efficacy of its orders.

[65] I conclude that on the present facts, a *de bonis propriis* cost order would be appropriate marking the Court's displeasure at Mr. Seloane's conduct⁸. On the facts, an order on the scale between attorney and client is justified, considering the egregious nature of his conduct and as the respondent has been put to unnecessary legal expense in defending the multiple applications⁹. Even though such order was not expressly sought by the respondent, such order is warranted in light of Mr Seloane's conduct.

[66] The respondent further sought an order that the applicant's attorney be disentitled to charge his client, the applicant, any fees in the matter.

⁸ South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others 2009 (1) SA 565 (CC) paras [48], [54]

⁹ Nel v Waterberg Landbouers Ko-operatiewe Vereeniging 1946 AD 597 at 601; Swartbooi and others v Brink 2006 (1) SA 203 (CC)

[67] Considering what transpired in this matter, it is clear that as a lay person, the applicant would not have been aware of the intricacies of the legal processes and that she relied on her attorney's advice on such issues.

[68] I have already referred to the relevant facts. Although put up through the notional mouth of the applicant, the contents of the applicant's affidavits and the substantial argumentative matter raised therein, were demonstrably founded on contentions in respect of which a lay person would not have had insight and in respect of which she would be dependent upon advice from her attorney to have conceived and to have made those statements¹⁰. The applicant would also have relied on the advice from her attorney pertaining to how to conduct the litigation.

[69] For that reason, I am persuaded that it would be appropriate to disentitle Mr. Seloane from charging any fees in relation to the contempt application dated 20 July 2023.

[70] I grant the following order:

[1] The applicant's urgent contempt application dated 20 July 2023 is dismissed.

[2] The costs of the application in [1] above, including the reserved costs in the urgent court on 1 August 2023 are to be borne by the applicant's attorney of record, Mr. Vincent Seloane, *de bonis propriis* on the scale as between attorney and client;

¹⁰ Le Car, Auto Traders v Degswa 1038, CC and others (2011/47650) [2012] ZAGPJHC 286 14 June 2022

[3] The applicant's attorney of record, Mr Seloane, is directed not to present a bill, nor to recover any fees or disbursements from the applicant in respect of any work performed in respect of the contempt application dated 20 July 2023;

[4] A copy of this judgment and order is to be served by the applicant's attorney of record on the applicant forthwith.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 8 and 9 August 2023
DATE OF JUDGMENT	: 6 September 2023
APPLICANT'S COUNSEL	: Adv Matshidza
APPLICANT'S ATTORNEYS	: Seloane Vincent Attorneys
RESPONDENT'S COUNSEL	: Adv S Lindazwe
RESPONDENT'S ATTORNEYS	: Joubert Scholtz Inc