

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 34251/21

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ NO
16/2/2023	
	

In the matter between: -

SIMEON NGOMANE

1st Applicant

S NGOMANE INC.

2nd Applicant

AND

M.T. SILINDA N.O.

1st Respondent

SIMEON NGOMANE N.O.

2nd Respondent

LAZARUS TIKI ZITHA N.O.

3rd Respondent

MAKHOMBO FARM MANAGEMENT (PTY) LTD

4th Respondent

(in liquidation)

DANIEL TERREBLANCE N.O.

5th Respondent

HILMI DANIELS N.O.

6th Respondent

In re:

M.T. SILINDA N.O.

1st Applicant

SIMEON NGOMANE N.O.

2nd Applicant

LAZARUS TIKI ZITHA N.O.

3rd Applicant

and

MAKHOMBO FARM MANAGEMENT (PTY) LTD

1st Respondent

(in liquidation)

DANIEL TERREBLANCHE N.O.

2nd Respondent

HILMI DANIELS N.O.

3rd Respondent

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

This is an application for leave to appeal against my judgment and order of 22 November 2022.

1. In my judgment I made the following order:

[37] The application is dismissed.

[38] The applicants and S Ngomane Attorneys are ordered to pay the costs de bonis propriis jointly and severally on the scale as between attorney and client, which costs should include the wasted costs of 3 and 17 August 2021.

[39] The registrar of this court is requested to bring this judgment and order to the attention of the Legal Practice Council for further investigation into the conduct of Simeon Ngomane (the second applicant and attorney of record for the applicants in the main application).'

2. The application for leave to appeal states in its grounds that:

1. The court erred in ordering the applicants to pay the costs of the application de bonis propriis, jointly and severally with the first to third respondents and in directing that the applicants be referred to the Legal Practice Council:
 - 1.1 Without the applicants being joined as parties to the proceedings; and
 - 1.2 Without affording the applicants an opportunity to make representation and/or reasonable opportunity to make submissions, why they should not be held liable for the costs of the application de bonis propriis and why the matter ought not to be referred to the Legal Practice Council, for investigation.'
3. I did not order Simeon Ngomane, the first applicant in this application for leave to appeal, to pay the costs de bonis propriis. The order was made in his purported capacity as the second applicant in the application which was launched. I ordered that he personally be investigated by the Legal Practice Council as to his conduct in this matter.
4. I did not order S Ngomane Inc. to be referred to the Law Society. The firm was ordered to pay the costs de bonis propriis but the law firm, as such, was not referred to the Legal Practice Council.
5. Be that as it may, I deal with the application for leave to appeal. For the reasons which follow, it is refused.
6. I do not, with respect, understand the ground in the application for leave to appeal which says that the applicants for leave to appeal should have been joined as parties to the proceedings. By its very nature, these types of costs orders are made against persons, either attorneys and counsel or individuals representing a juristic person without them being a party to the proceedings.
7. These types of orders are granted, as a general rule, where there has been conduct on the part of these persons which are deserving of the court's displeasure.

8. Although it is true as Mr Matebese SC for the applicants stated that one appeals an order and not the reasons in the judgment, what he, with respect, fails to appreciate is that it is the findings of fact and reasons which of necessity underpin the order made. In this particular matter it is not contended that I made a single incorrect finding of fact in my assessment of the conduct of the purported trustees and the applicants. There is no suggestion that my judgment is wrong in setting out the conduct of the purported trustees and the applicants for leave to appeal. Of course, one of the purported trustees is Mr Ngomane, the attorney who represented them, including himself as a purported trustee. As confirmed by Mr Matebese SC upon a question from myself, Mr Ngomane is prepared to pay the costs *de bonis propriis* where he purported to act on behalf of the trust, but he is not prepared to pay the costs *de bonis propriis* in the circumstances where the firm was being ordered to pay the costs. There is, to me, some tension in this stance.

9. The argument on behalf of Mr Matebese SC is simply this. Section 34 of the Constitution would require that the applicants get proper notice of the special cost order against them and the referral to the Legal Practice Council. This, it is argued, was absent in this matter and on this basis leave should be granted. He relies, *inter alia*, on the decision of Chithi and Others; *In re: Luhlwinini Mchunu Community v Hancock and Others* [2021] ZASCA 123 ("the Chithi case").

10. With respect, I don't believe that Mr Matebese is correct on his understanding of the facts in this regard. Although in my judgment I only refer to one instance where notice was given of the special costs order to be sought, the record reflects that it occurred often over a period of almost 16 months in the lead up to the hearing which took place before me. I deal with the instances below:
 - 10.1. On 28 July 2021 in the answering affidavit at paragraph 174 in dealing with the issue of whether or not the institution of these proceedings had properly been authorised the following is stated:

'As such I submit that the only logical outcome would be that this application is dismissed with costs and if, by the time this matter is heard the applicants' attorney failed to satisfy the notice in terms of rule 7 of the Uniform Rules of Court, such costs to be costs de bonis propriis and on the scale as between attorney and own client'.

10.2. In the letter of 4 August 2021, it is stated:

'our conduct is, with respect, due for urgent investigation by the Legal Practice Council and we will, as such, request the court to direct that this matter be referred to the LPC or immediate investigation and further disciplinary action.'

10.3. In the letter of 4 August 2021, after setting out a long history, paragraph 9 states as follows:

'In fact, unless you withdraw the urgent application and tender the costs de bonis propriis by close of business on 6 August 2021 this letter will be appended to the said supplementary affidavit and we will insist that a court orders your firm to pay the costs de bonis propriis. The argument behind the aforesaid is, of course, that neither your firm nor the applicants have the authority or the mandate to make any costs tender on behalf of the Mjejane Trust'.

10.4. In paragraphs 18 and 20 of the supplementary affidavit filed on 12 August, it is stated:

'I have indicated in this papers and in my letter (annnexure 'SUP3') that the only appropriate order for costs must be an order against Mr Ngomane and the applicants de bonis propriis'.

'As such I beg the court to dismiss the application with costs on a scale as between attorney and own client, same against the applicants de bonis propriis and S Ngomane Inc. (jointly and severally) as the attorney who persisted with the application despite being afforded reasonable opportunity to withdraw the application and tender costs'.

- 10.5.** In the respondents' heads of argument of 3 March it is stated in paragraph 5.11:

'The deponent in the founding affidavit, who was a party to the proceedings before Tuchten J and Hughes J is also the director of the attorneys firm acting on behalf of the applicants. The firm of attorneys S Ngomane Attorneys should accordingly also be ordered to pay costs de bonis propriis since the firm of attorneys was instrumental in abusing this court's process whilst knowing that the mere bringing of the application is in direct conflict with an interdict'.

- 10.6.** In the respondent's heads of argument dated 3 March 2021 it is stated at paragraph 7.3:

'As a conclusion of the heads of argument: The applicants and S Ngomane Attorneys are ordered to pay the costs de bonis propriis jointly and severally on the scale as between attorney and client, which costs shall include the wasted costs for 3 and 17 August 2021'

- 10.7.** In paragraph 11 of the respondent's supplementary affidavit dated 5 October 2022 it is stated:

'As such the respondents will insist that a costs order against the applicants and their attorney de bonis propriis, on the scale as between attorney and client and the application is dismissed'.

- 10.8.** In paragraph 4 of the letter dated 14 October 2022 the respondents' attorney states that:

'We submit that you need to reconsider your position and, rather, withdraw the ill-considered attempt to obtain moot relief without authority to bind Mjejane Trust. The application is to be withdrawn, your firm and the applicants to tender costs de bonis propriis. A tender for costs 'on behalf of Mjejane Trust' would be of no consequence since you have no mandate to do so'.

- 10.9.** In paragraph 3 of the letter dated 12 November 2022 the respondents' attorney states as follows:

'As such, this letter (will be uploaded to caselines) was served in support of a punitive and de bonis propriis costs order on 14 November 2022'.

- 10.10.** It is to this letter to which S Ngoname Inc. in fact replied concluding with:

'We are also uploading this letter to caselines so that the court will be aware of our position in this matter'.

11. There can be no argument that the applicants in the application for leave to appeal did not know that special costs orders and a referral to the Legal Practice Council will not be sought against them. The matter is wholly distinguishable from the Chithi case. In fact, it is more in line with the matter of *Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture, Corruption and fraud in the public sector including organs of state and Others* [2021] ZACC28 where the previous State President deliberately did not attend proceedings. The conduct of the applicants in this matter is in my view equally contemptuous, knowing the relief which was sought against them. There is simply no reason to prolong this matter and grant leave to appeal. It is clear that the applicants had ample warning as to the relief which was being sought against them. Instead of being present on the day of the hearing to argue why the relief should not be granted or, during all of the times in which they were warned not to present evidence before the court as to why the order sought will be inappropriate, they did not do so. In fact, they made a deliberate decision not to be there and withdrew as the attorney of record, figuratively, on the eve of the matter. Why that was done, one can only speculate as no reason was given for the withdrawal.
12. In my view there is no prospect of another court coming to a different decision.
13. The application for leave to appeal is dismissed with costs.

14. The applicants were not warned that the costs sought would be punitive and if that was asked I would have done so. The costs are to be on a party-party scale.

Order

I make the following order:

15. The application for leave to appeal is dismissed with costs, to be paid by the applicants jointly and severally, the one paying, the other to be absolved.



REINARD MICHAU

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 15 February 2023

Date of judgment: 16 February 2023

Appearance

On behalf of the Applicant Adv H Wessels

On behalf of Applicants for leave to appeal Adv Matebese SC

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