

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 51776/2020

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

(4) Date: 18 May 2023

Signature:

In the matter between:

LAWRENCE MATSENA

Applicant

And

NATIONAL RESEARCH FOUNDATION

1st Respondent

ALEXANDER FORBES

2nd Respondent

**NATIONAL RESEARCH FOUNDATION
PROVIDENT AND PENSION FUND**

3rd Respondent

**NATIONAL RESEARCH FOUNDATION
PENSION FUND BOARD OF TRUSTEE**

4th Respondent

MR BISHEN SINGH

5th Respondent

MR KEDIRANG CAGILE

6th Respondent

MR JOHN MARTIN HOGG	7 th Respondent
DR BEVERLEY DAMONSE	8 th Respondent
MR JOHAN PAUW	9 th Respondent
MR JOHN PILCHER	10 th Respondent
THE BOARD OF DIRECTORS OF THE NRF	11 th Respondent
DR MOLAPO QOBHELA	12 th Respondent
DR NOMPUMELELO OBOKOH	13 th Respondent
PROF HAROON BHORAT	14 th Respondent
PROF GLENDA GRAY	15 th Respondent
MS CLAIRE BUSETTI	16 th Respondent
MS MPHO LETLAPE	17 th Respondent
MR RONNY LUBISI	18 th Respondent
PROF TINYIKO MALULEKE	19 th Respondent
PROF NOMALANGA MKHIZE	20 th Respondent
PROF SARAH MOSOETSA	21 st Respondent
DR BONGANI NGQULUNGA	22 nd Respondent

PROF NADINE PETERSEN	23 rd Respondent
PROF SAURABH SINHA	24 th Respondent
PROF ZEBLON VILAKAZI	25 th Respondent
PROF REFILWE PHASWANA-MFUYA	26 th Respondent
THE MINISTER OF SCIENCE AND INNOVATION	27 th Respondent
THE MINISTER OF FINANCE	28 th Respondent
THE NATIONAL PROSECUTING AUTHORITY	29 th Respondent
THE FINANCIAL SECTOR CONDUCT AUTHORITY	30 th Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] On 27 July 2021 a rule nisi was issued out against Adv. MacGregor Kufa and his instructing attorneys Machaba Attorneys (“Machaba”). The matter came before me on the extended return date for the hearing of the discharge or confirmation of the rule *nisi*.
- [2] The court order forming subject of the rule *nisi* is far-reaching in that it awards costs *de bonis propriis* against Machaba attorneys and attorney and client costs against Adv. Kufa.

B. BACKGROUND

- [3] The Plaintiff, Mr Matsena, instituted action against 22 parties including 19 parties related to the First Respondent in this matter, the National Research Foundation (“the NRF”), under case no 47435/2020 on 16 September 2020 (“the action”).

- [4] Shortly after that, 6 October 2020, Mr Matsena launched an urgent application, essentially to attach the pension fund interests of various of the directors of the NRF (the First and Fifth to Twenty-Sixth Respondents in the application will hereinafter be referred to as “the NRF Respondents”), under case no 51776/2020 (“the application”).

- [5] Adv. Kufa had previously represented Mr Matsena in disciplinary proceedings which had led to his dismissal from the NRF, and which were now the subject in both the action and the application.

- [6] Mr Matsena was represented, both in the action, and in the pension attachment application, by a legal team consisting of a firm of attorneys, Machaba Attorneys (“Machaba”), and three advocates, namely, in order of seniority, Advocates MacGregor Kufa, Ngoako Moropene and Marcus Tshivhase.

- [7] Defamatory and scurrilous allegations were made both in the Particulars of Claim in the action and in Mr Matsena’s founding affidavit in the pension attachment application.

- [8] In her affidavit the main deponent for the NRF Respondents, Dr Obokoh, challenged Mr Matsena to withdraw the defamatory and scurrilous allegations. Dr Obokoh added that Mr Matsena's legal team had “allowed themselves to be made party to the reckless making of baseless and defamatory allegations”. It later transpired from Mr Matsena's affidavit that he had allowed himself to be

made party to this conduct, but that the instigator and author of the allegations was in reality Adv. Kufa himself.

[9] Despite the above, Mr Matsena didn't withdraw the allegations in his Replying Affidavit. Instead, he aggravated them.

[10] In those circumstances, the attorney for the NRF Respondents notified Machaba, and through them the three advocates, that the NRF Respondents would seek not just punitive costs against Mr Matsena, but also punitive costs *de bonis propriis* against the legal team, for their conduct in (a) making themselves instrumental to the defamatory and scurrilous allegations, and (b) aggravating this, by not just refusing to withdraw those allegations but, indeed, persisting with them, even though they were entirely groundless.

C. THE GENESIS OF THE ALLEGATIONS

[11] The baseless and defamatory allegations first surfaced after Mr Matsena was disciplined, found guilty and dismissed from the NRF. The full record of the disciplinary proceedings was supplied not by Mr Matsena, but by the NRF Respondents. It was attached to Dr Obokoh's answering affidavit. That record, including Mr Matsena's appeal document, which was drawn up for him by Adv. Kufa, shows that the allegations first emerged in the action and in the application, and played no part whatsoever in the disciplinary proceedings. This betrays the extortionate nature of the allegations — in the action, and in the application. Mr Matsena in effect pretended that he had been dismissed because he had uncovered rampant corruption in the NRF. But throughout the entire disciplinary process, and its appeal process, this was never part of his defence.

[12] Machaba withdrew as attorneys of record for Mr. Matsena on 31 May 2021, shortly after the NRF Respondents and the Second to Fourth Respondents in the application had set same down for hearing on 26 July 2021.

[13] The NRF Respondents' attorneys wrote to Machaba on 17 June 2021, notifying them that their withdrawal as attorneys of record — and consequently the termination of the three advocates' mandates — did not relieve them of the fact that the NRF Respondents sought costs against them *de bonis propriis*, and that this question would also be argued when the application came to be heard.

[14] Letters to the advocates in question, including Adv. Kufa, were also delivered through medium of the Sheriff, notifying them of the foregoing.

[15] Adv. Moropene responded, first by letters and then by an affidavit, and Mr Matsena (who had since Machaba's withdrawal been unrepresented) also responded by letters and affidavit. The thrust of what both said was that they were innocent, and that the very launching of the application, let alone the scurrilous allegations in both the Particulars of Claim and in Mr Matsena's affidavit, was all Adv. Kufa's doing.

[16] The NRF Respondents accepted Adv. Moropene's explanation and that, although Adv. Tshivhase had for whatever reason not written to defend himself, the same must apply to him, and on that basis, they withdrew their contentions against them. This left the Applicant, Mr. Matsena (who could not be allowed to divorce himself so easily from responsibility), Machaba and Adv. Kufa, against which latter two punitive costs *de bonis propriis* were still sought.

D. Judge Khumalo's rule *nisi* of 27 July 2021:

[17] The matter came before her ladyship Khumalo J on Tuesday 27 July 2021, on the Microsoft Teams electronic platform.

[18] The NRF Respondents and the Second to Fourth Respondents were legally represented. Mr Matsena represented himself. Machaba and Adv. Kufa did not attend.

[19] After hearing argument, Khumalo J granted an order dismissing the application, with punitive costs in favour of (a) the NRF Respondents, and (b) the Second to Fourth Respondents (including two counsel in both cases).

[20] In addition to that, the learned judge:

20.1 Granted costs *de bonis propriis* against Machaba on the basis that she was satisfied that they were fully aware of the hearing; and

20.2 Granted a rule *nisi* against Adv. Kufa, returnable on 6 September 2021, calling on him to show cause why he should not also be ordered to pay the costs of the NRF Respondents on an attorney-client scale, including the costs of two counsel, *de bonis propriis*.

20.3 Ordered that this liability is joint and several with the costs liability of the applicant and of Machaba attorneys, the one or more paying, the other or others to be thereby absolved.

[21] In terms of the rule *nisi*, Adv. Kufa was to file an affidavit by 16 August 2021, if he intended opposing the confirmation of the Rule.

[22] Despite service of the Rule on him personally at his office on 3 August 2021, Adv. Kufa chose not to file an affidavit, and the matter proceeded without any affidavit in opposition from him.

E. NRF respondents' case for confirmation of the rule *nisi*:

[23] This matter was set down for hearing by the Respondents. They assumed the duty to begin and discharge their evidentiary burden.

[24] The Respondents submitted that the consequences of Adv. Kufa's failure to file an affidavit in accordance with the court order of 27 July 2021 are that the matter proceeds without any opposition from him. He may still oppose by offering legal argument (either on legal-technical points, or on the existing papers).

[25] Both Mr Matsena and Adv. Moropene said in their affidavits that Adv. Kufa had taken the lead in deciding what to do, and what to say, both in the action and in the application.

[26] Adv. Kufa was clearly the leading counsel, and so especially in the absence of any affidavit from him, one would in any event have concluded that he was primarily responsible (even absent Mr. Matsena's and Adv. Moropene's affidavits).

[27] Adv. Kufa clearly acted malevolently as counsel. This much can be gleaned from Mr. Matsena's and Adv. Moropene's affidavits. For example, in paragraph 24 of his affidavit, Adv. Moropene's states:

"As you can see on page 21 of annexure "NM2", you will realise that he confirms that he was issuing his summons meaning that he did everything by himself. He further stated on page 21 that he wants to teach NRF a lesson and that he was serving the summons urgently. He also mentioned that **"let's fight these bastards"**. On page 7 of this annexure, Adv. Kufa states that **"he wants Bishen's head"**, and explains the information that **he needs for Mr Matsena's summons and that the summons can become fool proof**, whereas on page 10 he says they need **to submit urgent application to attach Molopo's pension."**

[28] Mr. Matsena's affidavit also sheds light to the fact that Adv. Kufa was himself once an employee of the NRF and his employment there was terminated after he was disciplined. For example, in paragraph 12 Mr. Matsena states: "...*Little did I know that Adv. Kufa will use my case to fight his own battle with the NRF*". At paragraph 13 Mr. Matsena continues, "...*I took his advice as one of the best until I realised that there seems to be similarities around his case against NRF and mine. I then realised that the delay caused in finalising my matter was well orchestrated by him to solicit information from me to launch an attack on the NRF...*"

[29] From the above, it is clear that Mr. Matsena was being surreptitiously led by the nose, by Adv. Kufa.

F. Adv. MacGregor Kufa's case for the discharge of the rule *nisi*:

[30] Adv. Kufa did not engage any of the allegations relating to the scandalous and defamatory statements in his papers and in the document known as annexure "NM2".

[31] As his defence, Adv. Kufa states that this matter of the confirmation or discharge of the rule *nisi* should serve before 3 retired Constitutional Court Justices. According to him all the Judges of the Gauteng Division should recuse themselves due to bias because Counsel for the NRF Respondents, Adv. Mullins SC has acted as judge numerous times in the division. Adv. Kufa refers to a slew of decided cases dealing with recusal in this respect. This is a general purview of recusal and has no specific relevance to his alleged complaint.

[32] Secondly, Adv. Kufa states that he brings his "application" in terms of section 38 of the Constitution Act 108 of 1996. He then quotes the section under the heading "**enforcement of rights**". Adv. Kufa then sets off on a lengthy

rambling discourse of how he acts in his own interest as well as the public interest. Strangely, he then drifts back to his earlier reasons why Gauteng Judges ought to be disqualified from hearing this matter and that his electronic communications were intercepted by intelligence structures.

[33] Adv. Kufa then submits that the nature of costs *de bonis propriis* is vindictive.

[34] It is apposite for the sake of completeness to highlight the role played by Machaba. Despite several letters from SJA the attorneys for the respondents to Mr. Matsena and Machaba warning them to either withdraw or amend the offensive pleadings as requested all along, in most of his letters to SJA, Machaba stand their ground and reinforce their allegations. The letter dated 28 October 2020 reveals the following response: “3. *We believe your actions are designed to instil fear and threaten the Applicant and his legal team from exposing the alleged corrupt activities of the relevant Respondents and to assert his constitutional rights within the prescripts of the law.*” The letter goes on and on in similar vein. As matters stand not a shred of evidence in proof of the allegations.

[35] Adv. Kufa seeks to rely on a contention that this is a matter in the public interest as envisaged in section 38 of the Constitution Act 108 of 1996. Adv. Kufa then submitted that this should trigger the principle enunciated in *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) and *Economic Freedom Fighters v Gordhan and Others* 2020 (8) BCLR 916 (CC) and result in no order as to costs.

[36] Adv. Kufa advanced the relatively novel defence of Strategic Lawsuit Against Public Participation (SLAPP). All he stated was that the respondents are trying to muzzle him and discourage him from litigating against them. Adv. Kufa was referring here to the matter that had been heard by the Constitutional Court in the appeal against a Western Cape High Court decision. The matter has now

been concluded and reports as *Mineral Sands Resources (Pty) Ltd and Another v Reddel and Others* [2022] ZACC 37 (CC)/ 2023 SA (2) SA 66 (CC). Majiedt J, writing for a unanimous court "...found that the SLAPP suit defence does form part of our law. To make out the defence requires more than the respondents pleaded..."¹.

[37] A diligent perusal on my part could not locate any rebuttal of the case made by the NRF respondents in their case for punitive costs and the reasons they advanced in support thereof. Nothing was ventured by Adv. Kufa in support of his SLAPP suit defence that he put forth.

G. The law applicable to rules *nisi*:

[38] On the return date of the rule *nisi* at the hearing for the confirmation or discharge of the 'provisional order', the onus remains just as before and does not shift. The matter is treated as a rehearing of the original application.

[39] If any person wishes to oppose the confirmation of the rule *nisi* he or she must, except when relying solely upon a point of law, file and serve answering affidavits in which a defence is set out.²

H. The legal principles on costs *de bonis propriis*:

[40] An award of costs *de bonis propriis* may be made only when a person acts or litigates in a representative capacity.³ This principle thus envisages legal representatives acting in their professional capacities, trustees and similar persons. The basic notion is material departure from the responsibility of office.

¹ Para [98] *Mineral Sand Resources*.

² *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* – 5th Ed, 2009 Ch14 – p456.

³ *Moller v Erasmus* 1959 (2) SA 465 (T) at 467B-C; *Herbstein and Van Winsen* 5th Ed, 2009 ch36-p983.

[41] As regards costs generally, the position is that costs follow the cause or that the successful party is entitled to his or her costs. The successful litigant is thus indemnified against having to incur the expenditure because of “having been unjustly compelled to either initiate or to defend litigation as the case may be”.⁴

[42] In *Indwe Risk Services (Pty) Ltd v Van Zyl: In re Van Zyl v Indwe Risk Services (Pty) Ltd* (2010) 34 IL3 956 (LC) at paragraph 38, Basson J held that:

“...an order for costs *de bonis propriis* is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted bona fide or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative.”

[43] The Constitutional Court has recognised the necessity of awarding punitive costs *de bonis propriis* in appropriate instances. O' Reagan J held as follows in a recent Constitutional Court judgment in the case of *SA Liquor Traders Association v Gauteng Liquor Board 2009 (1) SA 203 (CC)*: “an order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs

⁴ Baloyi v Public Protector 2022 (3) SA 321 (CC) at para [51]; Lawyers for Human Rights v Minister in the Presidency [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 14, citing Texas Co. SA Ltd v Cape Town Municipality 1926 AD 467 at 488.

being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.”

[44] In *Webb and Others v Botha* 1980 (3) SA 666 (N) the court punished what it regarded as reprehensible conduct on the part of an attorney by ordering him to pay all the parties’ costs on a scale as between attorney and client. In this case the instructing attorney had in the face of warnings by the bench, persisted in instigating a veritable barrage of unfounded technical appeals and reviews before the High Court.

[45] In this matter Machaba filed their notice of withdrawal as attorneys of record on 21 May 2021, appreciably long after the damage had been done.

I. Conclusion:

[46] Having regard to the foregoing analysis, I make the following order:

1. The Rule *Nisi* issued on 27 July 2021 and extended on 9 September 2021 against Adv MacGregor Kufa (“Adv Kufa”) is hereby confirmed.
2. Adv Kufa is hereby ordered to pay the costs of the NRF Respondents in connection with the application under case number 51776/2020:

2.1 On the scale as between attorney and client;

2.2 Together with the costs of the NRF Respondents employing two Counsel;

2.3 *De bonis propriis*; and

2.4 Jointly and severally with the Applicant and with Machaba Attorneys as per the court order dated 27 July 2021 (The one or more paying, the other(s) to be thereby absolved).

3. Adv Kufa is also ordered to pay the costs of and associated with the *Rule Nisi*, inclusive of the costs of service thereof upon him and of the NRF Respondents' Heads of Argument and appearances and of the extension of the Rule Nisi, in the same terms as outlined in paragraphs 2.1, 2.2, 2.3 and 2.4 above.

J.S. NYATHI

Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 11 May 2022

Date of Judgment: 18 May 2023

On behalf of the Applicant: Adv. M. Kufa

On behalf of Adv. McGregor Kufa (Himself in his own matter)

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With: Adv. K.D. Magano (Adv. T. Phehane in the Heads of argument)

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Ref: Mr P Viljoen/LL/AIG057

On behalf of the 2nd, 3rd, and 4th Respondents: Adv. P. Van Den Berg SC

With: Adv. H. Gray.

Thyne Jacobs Inc

Mr. Matsena listened to the proceedings but did not participate.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 18 May 2023.