



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

CASE NO: 066599/2023

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

DATE 07/08/2023

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LENYAI J

In the matter of:

THE ROAD ACCIDENT FUND

APPLICANT

and

SHERIFF, CENTURION EAST

S.E. DHLAMINI N.O.

KABELO MALAO

K MALAO INCORPORATED

LEGAL PRACTICE COUNCIL

LANA NEL N.O.

LAW SOCIETY OF SOUTH AFRICA

GENERAL COUNCIL OF THE BAR

PAN AFRICAN BAR ASSOCIATION OF SA

THE PLAINTIFFS LISTED IN ANNEXURE "NM1"

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

SEVENTH RESPONDENT

EIGHTH RESPONDENT

NINTH RESPONDENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14:00 on 07 August 2023

J U D G M E N T

LENYAI J

[1] This matter was heard on the 25th of July 2023 and an *ex tempore* judgment was delivered. On the 28th of July 2023 the second respondent requested written reasons for the judgment. The second respondent was advised that we will request the transcript of the proceedings and proceed to write thereafter. This is an application for an urgent interim interdict, wherein the applicant sought the following relief:

1.1 That the forms and service provided by the Rules of Court be dispensed with in terms of Rule 6(12) and that the matter be heard by way of urgency;

1.2 That pending the finalization of the main application under case number 049621/23 the First Respondent is interdicted from:

1.2.1 Proceeding to attach and/or sell RAF assets in relation to the writs of execution relating to the 2nd and/or 3rd Respondents as listed in Annexure “NM1” attached hereto.

1.2.2 Including any of the writs of execution, in relation to the 2nd and 3rd Respondents as listed in Annexure “NM1”, in the auction scheduled for the 28th of July 2023.

1.2.3 Alternatively staying and suspending the operation of the court orders and writs of execution issued pursuant thereto, listed in Annexure “NM1” in relation to the 2nd and 3rd Respondents.

2. Authorising the Applicant to pay the amounts claimed from it in terms of the writs of execution listed in Annexure “NM1” to the Fifth Respondent;
3. That upon receipt of the payments, the Fifth Respondent shall hold the amounts referred to in prayer 3 above in trust for the benefit of the plaintiffs in whose favour the writs of execution were issued pending the final determination of the main application.

[2] The applicant avers that it has launched an application against the second and third respondents under case number 049621/2023 (Main Application), in terms of which it seeks an order initially suspending the second respondent from practising as a legal practitioner and thereafter striking the second respondent from the roll of attorneys. The applicant is requesting the court to allow it to make payment to the Sheriff Pretoria East.

[3] It is noteworthy to mention that the Legal Practice Council [LPC] is opposing the main application and maintains that the relief sought by the applicant in the main application is flawed and cannot succeed for the following reasons:

3.1 The applicant lacks the required *locus standi* to seek the relief;

3.2 The matter is premature as the investigation and disciplinary enquiries relating to the first respondent's alleged conduct are ongoing and have not yet been finalized.

[4] Turning to the matter before the court, the applicant avers that it became apparent to it that prior to the second and third respondents instituting the execution process against it, 18 of the 27 amounts claimed in the various writs of execution were paid into the trust account of the third respondent. Therefore, any execution process based upon these writs of execution is improper and unlawful.

[5] The applicant filed a supplementary affidavit on the eve of this hearing and the second and third respondents opposed the admission of this affidavit into evidence. The court ruled that it was in the best interests of justice, and it was just and equitable to admit the supplementary affidavit into evidence, as it is a reply to a direct question posed to the applicant by the second and third respondents to place proof of payment before court and it was placing the full facts before court.

- [6] The applicant avers that it had to approach the court on an urgent basis because on the 4th of July 2023 it received a letter from the Sheriff Centurion East, requesting feedback or reasons on each warrant that was not paid in order for the non-payment to be formally communicated to the instructing attorneys. The letter went further to state that in the absence of the requested information, the sheriff is left with no option, but to proceed with the attachment and go ahead with the auction on the 28th of July 2023. The failure of the sheriff to comply with both the instructions from the attorneys and the warrants will result in contempt of court.
- [7] The applicant avers that they had no choice but to approach the court urgently because the first respondent did not give an undertaking that it will not proceed with the execution of the writs. This undertaking was sought through a letter sent to the first respondent on the 6th of July 2023.
- [8] In the supplementary affidavit, applicant avers that after receiving the letter from the first respondent, it contacted the RAF Treasury to enquire whether any payments had been made to the second and third respondents, in respect of the matters listed in the letter from the first respondent, upon which the first respondent was instructed to execute. The enquiry was to ensure that all the facts were placed before the court as it was aware that the RAF Treasury had made payments to the second and third respondents.

- [9] The applicant avers that the RAF Treasury only reverted to it on Friday the 21st of July 2023 and advised that payments had already been made to the second and third respondents in 21 of the 27 matters. The applicant also attached the remittance advice to confirm that the payments were made to the second and third respondents.
- [10] The applicant further avers that the remittance advice indicates that 18 of the 21 matters were paid on the 20th of January 2023, approximately four months before the first respondent was given instructions by the second and third respondents to attach its assets. The other three matters were paid on the 23rd of June 2023, prior to the 23rd of July 2023 when the second and third respondents instructed the first respondent to remove and sell its assets.
- [11] The applicant contends that the second and third respondents in instructing the first respondent to attach and sell its assets, were acting in an improper and unlawful manner taking into consideration that 21 of the 27 matters were paid and the remaining 6 were at the RAF Treasury, awaiting payment authorization.
- [12] The applicant avers that 21 of the matters on the list have been paid and there is no basis upon which the first respondent should continue with the execution in respect of these matters. The applicant further contends that it has a legitimate interest in the disciplining of attorneys who overreach their clients with its payments.

- [13] The applicant contends that it has an obligation to act and bring relevant facts to the attention of the LPC and other relevant authorities including the Courts, where the conduct of its officers is an issue. The applicant further contends that it has a legitimate interest in the disciplining of attorneys who overreach their clients with the payments it makes, which interest flows directly from its statutory objects and obligations.
- [14] The applicant avers that in order not to render the relief sought in its main application moot, it must prevent the proposed attachment and sale by the first respondent from proceeding on the 28th of July 2023.
- [15] Furthermore, the applicant contends that should its assets be attached and sold in execution, it will result in it being unable to meet its statutory objective of compensating thousands of victims of motor vehicle claims. It would not be able to process claims or pay compensation to deserving claimants, it would not be able to meet the medical expenses incurred by victims of motor vehicle accidents, nor would it be able to administer the undertakings in terms of section 17(4)(a) of the Road Accident Fund Act, granted to victims of motor vehicle accidents.
- [16] The applicant avers that the balance of convenience favours it as the second and third respondents have attached affidavits from a few of their clients

indicating that they were very satisfied with the services they received from them and they have also already paid them their fees. The second and third respondents will not suffer any prejudice and the funds should rather be paid to the fifth respondent pending the finalization of the main application. Alternatively, to have such outstanding funds paid directly to the plaintiffs in whose favour the writs of execution were issued. The second and third respondents on their own version in their answering affidavits, demonstrated a very good and trustworthy relationship with their clients, and once the monies are in their clients' possession, they would easily be able to recover any outstanding fees due to them.

[17] The applicant further avers that if the relief sought is not granted, it shall not be able to obtain substantial redress in the ordinary course as the matter would have become moot.

[18] The attorney of record of the applicant in this matter was also represented by counsel in her personal capacity, pursuant to the allegations levelled against her by the second and third respondents in their answering affidavit deposed to by the second respondent, including the prayer for a *de bonis propriis* costs order against her. An application for condonation for filing of her affidavit was made and the court granted the condonation.

[19] The attorney of record of the applicant (the attorney) avers that the second respondent made serious allegations of impropriety against her, requesting the

Court to make findings against her in her personal capacity as an attorney, and also seeking a punitive costs order against her personally.

[20] The attorney avers that in paragraph 77 of the answering affidavit, the second respondent accuses her of conduct that “*constitutes unlawful and unethical conduct for which a finding should be made by this honourable court.*” The basis upon which the second respondent relies for seeking a *de bonis propriis* costs order against her, and a finding against her, is that she had allegedly advised the applicant not to adhere to a court order. The second respondent bases his allegations on an e-mail she sent to the applicant’s regional manager in Cape Town to “*hold on a bit*” before processing payments to the third respondent, this following the order of the 14 April 2022. Some of the writs forming part of this application are subject to the said order.

[21] The said order suspended writs of execution pending rescission applications on a number of bills of costs which the applicant alleges were irregularly taxed by the second respondent. These taxations are part of the investigations against the second respondent currently underway by the LPC.

[22] The said order further ordered that new cost offers had to be made by the applicant within one month of the order, and thereafter if the offers are accepted, payment had to be made within 1 month of settlement of the bills. The applicant had to make new cost offers by 13 May 2022. In execution of the order of the 14th of April 2022, the applicant immediately started making offers

on costs which were immediately accepted by the second respondent. During this time the applicant was considering bringing an application to have all payments to the third respondent, paid to an independent third party to administer the funds because of the pending LPC complaints and investigations against second respondent. Because payment was not due immediately and the applicant had not taken a final decision on the said application, the attorney requested the applicant's regional manager in Cape Town to hold on a bit before processing any payments. This request was made on the 25th of April 2022 long before any payments were due, because the contemplated application had the potential of redirecting payments to an independent third party instead of the third respondent's trust account. The applicant decided not to immediately proceed with the contemplated application.

[23] The attorney further avers that the second respondent was copied in the e-mail to the regional manager in Cape Town to keep him in the loop, instead of appreciating the gesture, the second respondent unjustifiably accused the attorney of impropriety.

[24] Once the applicant decided not to proceed with the contemplated application, the attorney advised applicant to ensure full compliance with the order of the 14th of April 2022 by the due date and closer to the time she again reminded the applicant of the due dates for compliance with the said court order. The attorney contends that it is not true that she advised the applicant to disregard the court order, in addition these allegations do not relate to the relief sought

by the applicant in this present application or the merits thereof and cannot serve as a basis for a request that she pays the costs of this application personally.

[25] It is noteworthy to mention that the second respondent withdrew these allegations in open court and tendered the costs for the costs of the *de bonis propriis* costs order against the attorney of the applicant.

[26] The second and third respondents contend that the applicant has not satisfied the requirements for an urgent interim interdict:

26.1 a *prima facie* right to which the irreparable harm would ensue if the interdict is not granted;

26.2 a reasonable apprehension of irreparable harm ensuing to the applicant's right;

26.3 that the balance of convenience favours the granting of the interim interdict;

26.4 the absence of an alternative and adequate remedy.

[27] It is trite that the procedure set out in Rule 6(12) for matters being heard on an urgent basis is not there for the taking. An applicant must clearly state the circumstances upon which it avers renders the matter to be heard on an urgent basis and satisfy the elements of an interim interdict. The applicant must also

clearly state the reasons why it believes it will not be afforded substantial redress in due course.

[28] The granting of an interim interdict requires the applicant to satisfy the Court that it has a *prima facie* right, a well-grounded apprehension of irreparable harm, a balance of convenience and the absence of any other satisfactory relief. ***East Rock Trading 7 (PTY) Limited and Another v Eagle Valley Granite (PTY) Limited and Others* (11/33767) [2011] ZAGP JHC 196** and ***Mogalakwena Local Municipality v The Provincial Executive Council Limpopo and Others* (2014) JOL 32103 (GP) at para 63 – 64.**

[29] The second and third respondents aver that the writs in issue were executed on the 8th of May 2023 and the applicant decided to approach the court on an urgent basis after two months and did not confide in the Court and explain why it decided to do so. The applicant on the other hand explained in its founding affidavit that the reason they rushed to court was the impending auction of its assets on the 28th July of 2023 by the first respondent on the instructions of the second and third respondents despite substantial payment being made by the applicant on 21 of the 27 matters, with the remaining six matters being in the pipeline of being paid. I am of the view that the explanation by the applicant was substantial, and it showed that it had no choice but to come to court in the manner it did to stop the sale of its assets at an auction.

- [30] The second and third respondents contend that the purpose of this application is to prevent funds from being paid to the second respondent whom it believes is guilty of misconduct in relation to fees and costs. The respondents further aver that the applicant failed to confide in the court and state the details of the misconduct to enable the Court to ascertain the gravity of the alleged misconduct. The applicant failed to state when it commenced to believe that the second respondent was guilty of misconduct and what steps it took to remedy the situation.
- [31] The second and third respondents contend that the applicant found them to be guilty of misconduct without following due process of the law, more so that the applicant is not seeking an interim relief pending the investigations by the LPC. The applicant is also not saying whether it has referred its allegations to the LPC and the second and third respondents submits that the applicant is seeking to use the Court to grant an unlawful order. The applicant has indicated in its founding affidavit that it has referred the alleged transgressions of the second respondent and third respondent to the LPC and that it is seeking the interim relief pending the finalization of the main application. The court is not required at this stage to deal with the main matter, as it is not before us.
- [32] The second and third respondents contend that the first respondent's plan to execute the order is what is expected of her to carry out, as the writs have now become operational since around June 2022 and the applicant does not deserve any other substantial redress. The respondents contend that the issue is not that the applicant refuses to pay the writs but that it wants the sheriff to

pay the plaintiffs and not the attorney who has been mandated to act on behalf of the plaintiffs. The respondents further submit that there is no urgency in this matter, and it should be struck off the roll with costs. The applicant on the other hand has demonstrated to the court that it has already paid 21 of the 27 writs to the second and third respondents directly and only six of the writs are outstanding. The remaining six are at its treasury in the queue to be paid. I am of the view that the applicants are justified in their apprehension against the second and third respondents' conduct, in that they were insisting being paid even on matters where they have already been paid. The second and third respondents made submissions through their legal representatives in open court that they have not been paid on any of the 27 writs. I am of the view that the second and third respondents were not being candid with the court and the court frowns upon such conduct especially from its officers. Legal practitioners are officers of the court, and they have an obligation to promote justice and effective operation of the judicial system. Legal practitioners have an absolute ethical duty to tell the court the truth and avoid being willfully dishonest.

- [33] The second and third respondents also contest the *locus standi* of the deponent to the founding affidavit. The deponent does not state that she is authorized to depose to institute legal proceedings on behalf of the applicant. In the matter of ***Ganes and Another v Telecom Namibia 2004 (3) SA 615 (SCA) at 624I-625A***, the court held that the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. What is clear to the court is that, the deponent to the founding affidavit has direct knowledge of the facts of the claims in issue and has access to all

the documentation which allows her to acquire such knowledge and in doing so she is lawfully able to be a witness in the matter and is therefore competent to depose to the affidavit. This principle was confirmed by the Supreme Court of Appeal in the matter of ***Unlawful Occupiers, School Site v The City of Johannesburg* 2005 (4) SA 199 (SCA)** at paragraph [14].

- [34] The second and third respondents further contest the mandate of Malatji & Co to represent the applicant. They allege that the applicant and the attorneys of record seek to give this Court the impression that they hold a *carte blanche* mandate without providing a board resolution to that effect. The second and third respondents issued a Rule 7(1) notice querying the mandate of the attorneys of record and, the attorneys of record submitted a power of attorney dated November 2021 and a delegation of authority policy dated 2015. It is contested that as the attorneys of record was only established in 2020, the then Board could not have pre-empted their future existence. The power of attorney which was signed by the CEO is not accompanied by a Board resolution, which makes it irregular. The second and third respondents further contend that the power of attorney of 2021 could not have preempted this application. They further allege that it is evident that treasury is not aware of the appointment of the attorneys of record's appointment, which is at variance with section 51(1)(g) of the Public Finance Management Act 1 of 1999. The applicant also failed to show why only the said attorneys of record are the only attorneys who are given these sorts of applications before this Court.

- [35] The respondents relied on the matter of ***Department of Agriculture, Forestry and Fisheries and Another v B Xulu and Partners Incorporated and Others*** (6189/2019) [2020] ZAWCHC 3 at paragraphs [22] and [23], where the court dealt with the issue of appointment of attorneys without following procurement processes. In this matter it was emphasized that the accounting officer of an organ of state must develop and implement a supply chain management system that is amongst other things, fair, equitable, transparent, competitive, cost effective and consistent with the Preferential Procurement Policy Framework Act 5 of 2000. The accounting officer must only deviate from a competitive bidding system process in exceptional cases subject to the written approval of treasury and also where there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the situation. The respondents contend that there is no evidence that the attorneys of record of the applicant possess the unique and singularly available capacity to deal with this case. There are no exceptional circumstances to justify a deviation, and there is no prior written approval from National Treasury.
- [36] The second and third respondents contend that the attorneys of record of the applicant know that their appointment is unlawful and as a result they have no mandate to represent the applicant. They contend that the applicants are abusing the court processes in that the relief it seeks cannot be sustained because the applicant lacks *locus standi* in the main application.

[37] The applicant in reply to the Rule 7 Notice delivered by the second and third respondents, presented the Power of Attorney and the Delegation of Authority, which indicate that the attorneys of record of the applicant have been duly appointed. I am of the view that the applicant has satisfied the court that its attorneys are properly mandated to represent them. The applicant further avers that the second and third respondents seem to be complaining about the procurement process that was followed to appoint its attorneys of record in this matter. The applicant contends that the legality of the procurement process is an aspect which must be addressed by the second and third respondent in a separate review application. In my view this is a classic effect of the *Oudekraal* principle on the rule of law. ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)***. This principle was crystalized by the Constitutional Court in the matters of ***MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC)***, ***Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC)*** and ***Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC)***. Put simply the *Oudekraal* principle is that administrative decisions may not be ignored without recourse to a court of law and until they are reviewed and set aside by a court of law, they remain legal and binding.

[38] The second and third respondents aver that the applicant is attempting to vary the order of the 14th of April 2022. The respondents submitted in their answering affidavit and again in open court that they have not received any payment from the applicant in relation to the 27 matters in issue. In my view it is simply incorrect for the second and third respondents to make such a statement. The

applicants have proven that they have substantively complied with the order of the 14th of April 2022. Save for the six outstanding writs the applicant has paid the respondents directly into their account the 21 matters. The remaining six are in the pipeline of being paid and as stated above, the apprehension of the applicant is justified, taking into consideration that the second and third respondents insist that they have not received any payment and continuing to instruct the first respondent to auction its assets.

[39] In my view the applicants have satisfied the requirements of an interim relief and in the premise the following order was made on the 25th of July 2023:

1. The forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with and the applicant's non-compliance with the forms, service, and the time periods prescribed by the Uniform Rules of Court is condoned and it is directed that the matter be heard as one of urgency in accordance with the provisions of Uniform Rule 6(12) of the Uniform Rules of Court.
2. The 2nd and 3rd respondents are ordered to pay the legal costs in respect of an application for a costs *de bonis propriis* against Ms Elloff on an attorney and client scale.
3. Pending the finalisation of the application under case number 2023/049621 the operation of the court orders and writs of execution, issued pursuant thereto, relating to the second and third respondents as listed in Annexure "NM1", including any writs of execution in relation to

the second and third respondents as listed in Annexure “NM1”, in the auction for July 2023, are suspended and stayed.

4. The applicant is authorised to pay the amounts claimed from it in terms of the writs of execution listed in ‘NM1’ to the fifth respondent.
5. The fifth respondent, upon receipts of these payments, shall hold the amounts referred to in paragraph 3 above in trust for the benefit of the plaintiffs in whose favour the writs of execution were issued, pending the finalisation of the application under case number 2023/049621.
6. The second and third respondents are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved.

LENYAI J

**Judge of the High
Court, Pretoria,**

Gauteng Division

Appearances

Counsel for Applicant	: Adv T Pillay
Instructed by	: Malatji & Co.

Counsel for Second and Third Respondents	: Adv M Mogotsi Adv VJ Chabane
Instructed by	: K Malao Incorporated

Counsel on behalf of Applicant's Attorney

(Re: Order sought for *de bonis propriis costs*). : Adv T Odendaal

Date of hearing. : 25 July 2023

Ex Tempore Judgement. : 25 July 2023

Written Reasons. : 07 August 2023