

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No.: 42/2021

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

DINTIKILE GEORGINA LETSI¹

Applicant

and

MATHAMANE ELISA MEPHA²

First Respondent

TSELA JOSEPH KGOELENYA

Second

Respondent

In Re:

DINTIKILE GEORGINA LETSI

Applicant

and

MATHAMANE ELISA MEPHA

First Respondent

THE REGISTRAR OF DEEDS

Second

Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

¹ "Ms. Letsi".

² "Ms. Mepha".

Coram: Opperman, J

Date of hearing: 5 May 2022

Order: 13 May 2022

Reasons for Judgment: The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 13 May 2022. The date and time for hand-down is deemed to be 13 May 2022 at 15h00.

Summary: Costs order – *de bonis propriis*

JUDGMENT

INTRODUCTION

[1] “It is not only the strength of the judiciary that is being tested, but the strength of our chosen democracy. As Corder and Hoexter rightly observe, ‘public confidence [is] the ultimate currency of judicial legitimacy’ ”.³ (Accentuation added)

[2] “Moreover, 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 warrants the respect necessary to produce efficient and fair litigation... The critical imperative is that legal practitioners act ethically...”⁴ (Accentuation added)

[3] On 11 February 2022 I, unfortunately so, had to call upon the erstwhile attorney of the applicant to show cause to the Court as to why an order *de bonis propriis* should not be granted against him for the entire application or part thereof. This is the order and subsequent rule *nisi* so issued:

³ 2021, Froneman, Johan, Retired Justice of the Constitutional Court, *Four Stories of Judges, Government and the Rule of Law*, South African Judicial Educational Journal, (2021) 4 (1), December 2021 at page 30. Quote on page 46.

⁴ 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.

1. The withdrawal of the application by the Applicant is confirmed.
2. A rule *nisi* is granted calling upon Tsela Joseph Kgoelenya to show cause to the above Honourable Court on Thursday, 05 May 2022, at 09:30 or so soon thereafter as the matter may be heard, why the following order should not be made final:
 - 2.1 That a costs order *de bonis propriis* be granted against him for the entire application or part thereof;
 - 2.2 That the conduct of Tsela Joseph Kgoelenya in this matter be referred to the Legal Practice Council: Free State for investigations.
3. Tsela Joseph Kgoelenya may, and within 15 days after service of this order upon him, file his answering affidavit, if any.
4. The Applicant and First Respondent may, and within 10 days after Tsela Joseph Kgoelenya having filed his answering affidavit, file their replying affidavits, if any.
5. The Applicant tenders the remainder of the agreed or taxed party and party costs.

[4] Current Counsel for the applicant that replaced Mr. Kgoelenya and the first respondent, sketched the unfortunate background aptly in their Heads of Argument filed on 25 April 2022 and 29 April 2022. The shattered expectations of the applicant and the trust she had in her legal representative is echoed in her affidavit. The trauma of the first respondent to defend her case against the litigation was obvious. The statements of the applicant and the first respondent and the proof provided therein also demolished the veracity of the content of the statement of the impugned legal representative.

[5] Advocate Naidoo echoed the sentiment of the Court when he stated that:

- 1.1 It is regrettable that litigation has taken this route and it is unfortunate that parties are placed in this precarious position.

1.2 We are all colleagues of this profession and need to work together to strive towards a stronger legal profession. Although we practise in competition with one another there is always someone willing to help a colleague out when (sic) is not sure about litigation proceedings, this is the unique nature of our profession.

1.3 Practitioners have a duty towards their client but also a duty to the Court. The Court must be able to trust legal practitioners not to be misled the Court. Should the Court not have this trust in practitioners, the field of legal; practise will devolve into an unbearably hostile environment.

THE LAW

[6] The reality of the events depicts the state of affairs and little more need be said to draw a conclusion of ill-advised and reckless litigation and egregious conduct interwoven with negligence in a serious degree by the legal practitioner.

[7] I will return to the facts of the case but pause to state the law to lay the basis on which the facts must be pondered. Erasmus⁵ studied the case law on the issue of a costs order *de bonis propriis* as it evolved and it culminated in the finding of the following principles:

1. Costs orders *de bonis propriis* are embedded in the Constitution of the Republic of South Africa, 1996. *In casu*, it goes to the principle of a fair trial and proper and effective access to Court.⁶
2. The basic notion underlying such an award is to protect the sanctity of the administration of justice and the veracity of the legal profession. The trust of the public in the justice system is democratically sacred.
3. There must be a prayer for an order of costs *de bonis propriis* before the Court can make it.

⁵ Erasmus: *Superior Court Practice*, CD-Rom & Intranet: ISSN 1561-7467, Internet: ISSN 1561-7475, Jutastat e-publications, RS 16, 2021, D5-30C to RS 16, 2021, D5-36.

⁶ *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019).

4. The *audi alteram partem* rule applies. In *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) the rule was established:

[26] There was no issue on appeal between the attorneys and the respondents regarding the attorneys' liability. The attorneys were not participants on appeal. They should at the very least have been invited to make submissions. That did not happen. Consequently, they were not heard. For these reasons the attorneys are entitled to seek relief in this Court.

5. The facts must justify the order.

6. The Court must give reasons for the order; just as for any other.

7. The aim of the order, in this case, would be to indemnify a party against an account for costs from his own representative and the opposition.

8. Costs *de bonis propriis* are unusual and not easily awarded. It must only be awarded in exceptional circumstances.

9. It is not unprecedented that costs orders *de bonis propriis* are made on an attorney and client basis.

10. The test is not that the matter must be adjudicated from the point of view of a trained lawyer, but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question at issue. The perspective of Ms. Letsi, the applicant and Ms. Mepha, the first respondent *in casu*, is a good indicator.

a) Whether a person who acts in a representative capacity has acted *bona fide*, with due care and reasonably, must be decided in the light of the particular circumstances prevailing in the case with which the Court is concerned.

b) Costs orders *de bonis propriis* must be supported by facts and cannot be granted in the abstract.

c) Ill-advised and reckless litigation⁷ and egregious conduct is frowned upon.⁸ There must be 'negligence in a serious degree'.

⁷

President of the Republic of South Africa v Public Protector 2018 (2) SA 100 (GP) at 147A–148I, *Absa Bank Ltd v Public Protector and Several Other Matters* [2018] 2 All SA 1 (GP).

d) The general rule is that a person suing or defending in a representative capacity may be ordered to pay costs *de bonis propriis* if there is a want of *bona fides* on his part or he acted unreasonably.⁹

e) In *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019) the Court ruled that: “They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a Court.”

f) No order will be made where the representative has acted *bona fide*; a mere error of judgment does not warrant an order of costs *de bonis propriis*.

g) The fact that the party has a substantial personal interest in the outcome of the matter constitutes an important factor in shaping such a decision.

h) A person acting in a representative capacity who institutes an action in circumstances in which he can have no certainty that the action will be successful, and makes no provision for the defendant’s costs, may be ordered to pay a successful defendant’s costs *de bonis propriis*. In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) it was stated that:

Costs — Costs *de bonis propriis* — When to be awarded — Against practitioner — Conduct so deviating from norm that it would be unfair to expect practitioner’s clients to bear costs — Conduct earning displeasure of Court, such as dishonesty, obstruction of justice, irresponsibility, gross negligence, reckless litigation, misleading the Court, gross incompetence, and carelessness — Costs *de bonis propriis* would not always be indicated in case of errors of law and failure to comply with rules.¹⁰

⁸ *Gordhan v The Public Protector* [2018] 2 All SA 1 (GP).

⁹ *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC).

¹⁰ Cilliers *et al* Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa*, 5th edition, volume 2 at 984, Internet: ISSN 2224-7319 Jutastat e-publications.

i) In *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) at paragraph 54 the Constitutional Court considered circumstances where a *de bonis propriis* costs order was warranted and held that:

[54] 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 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. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs *de bonis propriis* on the scale as between attorney and client. (Accentuation added)

THE FACTS

[8] The catastrophe started with the Notice of Motion that was issued on 7 January 2021. The Notice of Set Down that is dated the same day, reflected that the matter was to be adjudicated on 11 February 2021. Litigiously bizarre is the fact that the application and set down happened simultaneously and without waiting for the *dies* to lapse.

[9] The motion claimed the following:

1. Declaring that the applicant owns 50% of the undivided share of immovable property situated at Erf No. [...] M [...] District, Bloemfontein, Free State.
2. That the registration of the property in the name of the first respondent be set aside.

3. That the third respondent be ordered to recall and cancel the Letter of Authority issued by him on 26 August 2020 in favour of the first respondent.
4. Declaring that those of the respondents who oppose the application bear the costs of the application jointly and severally, the one paying the others to be absolved.

[10] The claim eventuated from the fact that the applicant was married to the late Kgotso Moses Mepha in community of property and divorced in 1999. A division of the joint estate was ordered that allegedly never occurred. Mr. Mepha passed away on 3 July 2020. After the divorce he married the first respondent. The first respondent duly registered the estate and a Letter of Authority was issued by the second respondent granting the first respondent authority to take control of the assets. The marriage of the first respondent and the ex-husband of the applicant took place on 25 January 2000. The allegation of the first respondent is that the immovable property in issue was acquired by her and her late husband during November 2008 from the Municipality and that the applicant has no claim to it. It did not and could not have formed part of the joint estate of his first marriage to the applicant since the divorce happened in 1999.

[11] Mr. Kgoelenya nonetheless advised the litigation. The Letter of Demand was issued on the 8th of September 2020 already.

[12] As soon as the current Counsel came on board they ethically, wisely and immediately withdrew the application which the Court so allowed due to a lack of any prospects of success.

[13] Advocate Naidoo correctly pointed out that the proceedings were a non-starter because the founding and replying affidavits did not declare any cause of action. From the onset it was unclear as to which area of law was utilised. In the original Heads of Argument by said Counsel he speculated on two possible avenues of law; one being the divorce law and the other being the Conversion Act.

[14] On about 5 February 2021 the first respondent delivered her Notice of Intention to Defend the application. The application and set down was served on the first respondent via Sheriff on 26 January 2021 but the papers had no case number. The necessary inquiries on the case had to be done and case numbers had to be obtained. If Mr. Kgoelenya waited until Friday the 5th of February 2021 before setting the matter down, as per usual practice, the matter would not have appeared on the unopposed motion court roll on 11 February 2021. The wasted costs were caused by Mr. Kgoelenya.

[15] Several postponements and withdrawals took place because the matter was enrolled erroneously and negligently by the erstwhile attorney. Glaringly is the fact that Mr. Kgoelenya, in his affidavit, jumps from January 2021 to May 2021 and September 2021 without explaining what transpired with the matter between the 1st of April 2021 and the 3rd of June 2021.

(A chronology of events was drafted by Counsel for the first respondent and filed as “RN4” at page 28 in the bundle indexed on 29 April 2022.)

[16] The applicant was now, after the 11th of February, informed by Mr. Kgoelenya that the matter was postponed to 1 April 2021. The 1 April 2021 - enrolment/date fell during the recess period and no opposed matters are adjudicated during recess. This is a fact that Mr. Kgoelenya is assumed and expected to know as an attorney practicing in this division. Consequently, the application was removed from the roll of 1 April 2021.

[17] Mr. Kgoelenya set the matter down for hearing on 6 May 2021, on the unopposed motion court roll. But the matter was once again removed from the unopposed motion court roll of 6 May 2021 as the matter became opposed on 5 February 2021 already.

[18] The first respondent filed her opposing affidavit on 15 March 2021.

[19] Upon further enquiry by the applicant regarding the next hearing date, Mr. Kgoelenya informed applicant that the matter was placed on the roll of 3 June 2021. This was done on the 20th of May 2021 without the Master's report being available. She could not find that the matter was placed on any of the court rolls of 3 June 2021 as alleged by Mr. Kgoelenya because he removed it in the meanwhile.

[20] After numerous enquiries with Mr. Kgoelenya, the applicant was informed by him that the only date on which the matter could be heard was 16 September 2021. The application was once again placed on the unopposed motion court roll of 16 September 2021 despite the fact that the matter was opposed by the first respondent and an opposing affidavit was filed in March 2021 already. The matter was postponed to 11 November 2021 to the opposed motion court roll.

[21] The first respondent's attorney of record withdrew on 10 September 2021 but was immediately substituted by the current attorney.

[22] The applicant's replying affidavit was supposed to be filed on 28 October 2021 but the applicant was belatedly contacted by Mr. Kgoelenya on 2 November 2021 for her to report to his offices to sign the replying affidavit.

[23] The matter was set down for hearing on 11 November 2021. Mr. Kgoelenya was not in court and the matter was once again postponed. The matter was postponed for hearing on 3 February 2022 and for the applicant to file a supplementary replying affidavit and condonation application because she was late in the filing of the supplementary replying affidavit.

[24] Already on this date Advocate Naidoo inferred unethical conduct by Mr. Kgoelenya that caused him to be castigated by the Court to apologise to his colleague for any insult that might have been caused. It is now known that he was correct and that Mr. Kgoelenya's explanation placed before the Court was a complete fabrication. The fabrication placed the Court in a precarious position as the Court trusted the word of the

attorney, as it ought to have done. In *S v Mbuyisa* (2018/6) [2018] ZAGPJHC 421; 2018 (2) SACR 691 (GJ) (21 May 2018) it was stated that the Courts must have the luxury of trusting the word of legal practitioners. At paragraph 12 it was stated that:

...The adversarial system of litigation, to which we adhere, is premised on a profession of licenced legal practitioners whose role is to assist the Courts in performing their adjudicative function. The licensing of these independent professional intermediaries is not a mere formality. Rather, the insistence on the materiality of representatives being licensed is an integral part of the very system itself. The reliance of the Courts upon persons who have been accorded a right of audience is heavy, not only for their skills in Court craft, but because they are bound by an ethical code that addresses the considerable zone of the unseen which is an important dimension of the role as representative of persons who come before the Courts. (Accentuation added)

[25] Mr. Kgoelenya gave the applicant a document to sign without discussing the contents of the document. In consultation, her current attorney of record inspected the pleadings and informed her that she stated that her phone was lost and that Mr. Kgoelenya could not make contact with her which was the reason why the applicant's supplementary affidavit was filed late. The applicant stated unequivocally that this was untrue as she had continuously reached out to Mr. Kgoelenya and was always readily available directly or through her daughter when needed. Any lateness in respect of the replying affidavit was due to Mr. Kgoelenya's fault.

[26] On 3 February 2022, Mr. Kgoelenya was absent from court and the applicant, through her daughter, contacted Mr. Kgoelenya to enquire on his whereabouts. He informed her that the Presiding Judge contacted him and the matter was stood down to either at 12h00 or 14h00. The applicant and her daughter were present in court and their matter was being heard in the absence of any legal representative acting on their behalf. The information that the matter was stood down to 12h00 or 14h00 was not true.

[27] Mr. Kgoelenya under oath, in his answering affidavit, has conceded that he was not present in court on 3 February 2022.

[28] The Court caused Mr. Kgoelenya to be contacted by the registrar on this day but to no avail. In addition, the applicant's daughter and the opposing legal representative endeavoured to contact him. Again, to no avail.

[29] A court official doing duties in another court was then called by Advocate Naidoo to state under oath that Mr. Kgoelenya was in that court and thus in the court building. He submitted Heads of Argument in the other matter and left shortly thereafter.

[30] Consequently, the matter was postponed to 11 February 2022 as a result of his absence. After this occurrence Mr. Kgoelenya ignored the applicants calls and messages; thus, compelling her to terminate his mandate due to his silence and failure to account to his client regarding her matter. He withdrew as attorney of record.

CONCLUSION

[31] Mr. Kgoelenya was without any doubt the cause of the postponements and removals of the matter which has inadvertently caused a significant delay in finalizing the matter and an embarrassment. The veracity of the claim in the application also seems doubtful. The administration of justice has been prejudiced by his conduct. The trauma to and costs incurred by all the role players are significant. The trust that the lay-person must have in the justice system, was crushed. Mr. Kgoelenya will have to take responsibility for the matter in its totality.

[32] The legal practitioner's conduct was wilfully and errantly illegal and unethical. He was glaringly dishonest to the Court and his client.

[33] **ORDER**

1. A costs order *de bonis propriis* on the scale as between attorney and client is granted against Tsela Joseph Kgoelenya for the entire application.
2. The registrar of this Court must cause a copy of this judgment to be submitted to the Director: Free State Provincial Office of the Legal Practise Council, forthwith.

M OPPERMAN, J¹¹

APPEARANCES

For the applicant:

ADVOCATE I MACATI

Free State Society of Advocates

BLOEMFONTEIN

079 792 9535

051 430 3567

imacati@gmail.com

EG COOPER MAJIEDT INC.

77 Kellner Street

Westdene

BLOEMFONTEIN

051 447 3374/5/6/7

adrienne@egc.co.za

BK3214

For the first respondent:

ADVOCATE KARLIN NAIDOO

Free State Society of Advocates

BLOEMFONTEIN

076 441 9170

¹¹ Signed copy of the judgment in the file.

naidookarlin@gmail.com

JL JORDAAN ATTORNEYS

4 Brill Street

Westdene

BLOEMFONTEIN

051 447 0805

marike@jlj.co.za

MEP2/0001/MR

For Tsela Joseph Kgoelenya

UNKNOWN

KGOELENYA ATTORNEYS

119 St. Andrew Street

President Building

BLOEMFONTEIN

066 133 4724

tselakgoelenya@gmail.com

p.kgoelenya@gmail.com