



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER 86454/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>9 March 2018</u> <u>S. Chap.</u>	

In the matter between:

MACBETH ATTORNEYS INCORPORATED

FIRST APPLICANT

MANDLA MACBETH NCONGWANE

SECOND APPELLANT

and

ADV P NEL obo WEZI BEVERLEY JUMBE

FIRST RESPONDENT

BONGANI LOIUS MATSANE

SECONDRSPONDENT

SIBONGILE MUWAMBA CHIMIMBA

THIRD RESPONDENT

JUDGEMENT – LEAVE TO APPEAL

TLHAPI J

[1] This is an application for leave to appeal an order made on 7 December 2016.

[2] The respondents had initially launched an application on urgency, for an order declaring that paragraph 4 of an Order of Court dated 21 November 2016 by Molahlehi AJ was an interlocutory one, which did not have the effect of a final order, and that its operation and execution was not suspended, pending the outcome of an application for leave to appeal the said Order. Furthermore, that the applicants be declared to be in contempt of the said paragraph 4 of the order and for the imposition of a fine in the discretion of the court and a committal to imprisonment for a period of 90 days. The application was opposed and a counter application was launched.

Having read all the papers, the counter application was struck off the roll due to lack of urgency.

[3] Paragraph 4 of Molahlehi AJ's Order read:

"4. The first respondent is ordered to, within (2) days of service of this order pay to Weavind and Weavind Attorneys into their trust account,

any or all funds held on behalf of Ms Wezi Bervely Jumbe, which were received by the first respondent in terms of the court order dated 24 May 2013 under case number 50304/2008, together with interest thereon to be dealt with by Weavind and Weavind in accordance with the court order of 24 May 2013.”

The applicants launched an application for leave to appeal Molahlehi AJ's Order.

[4] What was addressed with both counsel regarding my judgment in this application was my view that the according to the averments in the application and counter application, there seemed to be some sort of feud between the attorneys for the applicant and for the respondents. There were accusations and counter accusations being made of improper conduct on the part of the respective legal representatives. The respondents also questioned the *locus standi* of the first applicant in that the appointment of the second respondent as *curator ad litem* was still extant. Also contained in the order of 21 November 2016 was one which ordered an investigation into the Trust accounts of the applicants. The following excerpts from my judgement of 7 December 2016 are relevant to this application:

“[4] ...It is not open to the applicant to seek a declaration on urgency that the order in paragraph 4 was an interlocutory one which does not have the effect of a final order. Of importance and urgent is that on 31 October 2016 the first and second respondent were informed that their client Ms Wezi Bervely Jumbe had terminated their mandate and this was followed by an application which resulted in the orders of 21 November 2016 of which paragraph 4 in one of them.

The first and second respondents failed to comply with the order and such order still exists. Even if the application for leave was properly

filed the monies held for the client belonged to the client. If a mandate has been terminated an attorney has no right to deal with such monies or to hold on to such monies unless otherwise directed by a court. In as far as such payment was not made within the specified period, the first and second respondent were in my view in contempt.

- [7] In view of the complexity of the issues in the matter which is the subject of appeal, in the interests of justice, those monies which have been ordered to be deposited into the trust account of Weavind and Weavind should be paid into a separate interest bearing account and be frozen until such time as the sixth respondent has completed its investigation as ordered. In my view the sixth respondent is the only statutory body which is entitled to speedily conduct an indepth investigation into the Trust accounts of the first and second respondents. It is the only body which can with certainty and after a proper investigation has been conducted to assist the court"

The investigation referred to was the one envisaged in Paragraph 9 Part B of Molahlehi JA's judgment of 21 November 2016.

- [5] Counsel for the applicants proposed to deal with this application under three headings, (a) the interpretation of paragraph 4 of the Order of Molahlehi AJ, (b) the requirements of a contempt application (c) the legal requirements under which this application has to be considered in terms of section 17 (1)(a)(i) and (ii) and 17(c) read with section 18 (1) and 18(5) of the Superior Courts Act 10 of 2013. In paragraph [3] the judgement I also found that despite the difficulties the applicants had experienced in seeking to file their application for leave to appeal Molahlehi AJ's Order such application was properly filed and although an unstamped copy had been annexed to the founding papers I accepted a stamped copy from the bar.

[6] He contended that the applicants' application for leave to appeal the Order of Molahlehi AJ of 21 November 2016 had in terms of section 18(1) suspended the operation thereof pending the finalization of the appeal, therefore the applicants were not in contempt of the order of court. He argued that the Order was not an interlocutory one, that it was not even an interim order in that the effect thereof was final. The monies had to be moved from the applicant's trust account to that of attorneys Weavind and Weavind. However, should the court find that the filing of the application for leave to appeal had not interrupted the operation of the order, then the court had to determine whether the onus of proving contempt had been discharged.

[7] I refused to have sight of anything that had to do with the application before Molahlehi AJ and of his judgment which had not been delivered when this application was launched. I kept on reminding the parties that I was seized with only what was contained in paragraph 4 of the Order and this was displayed in the excerpt quoted in paragraph [4] above. It is my view that the application for leave to appeal Molahlehi AJ's Order did not interrupt its operation. Having found that the applicants were in contempt, I have now to determine for purposes of this application whether the judgement dealt with contempt proceedings as required by law. Counsel for the respondent contended that the applicants conduct was to be discerned from their denial to comply with the order of court in their exchange of letters; that the applicant had therefore made out a proper case and that the respondents had failed to show on a balance of probability that it was not in wilful default.

[8] The judgment took a robust approach without addressing the applicants conduct in order to arrive at a conclusion that their conduct was wilful and *mala fide* beyond a reasonable doubt and in dealing with the reverse onus. Our law regarding contempt proceedings is clearly stated in *Fakie N.O v CCII Systems (Pty) Ltd* 2006 (4) SA 326 as at paragraphs [23], [42] and [63]. I therefore find that there are

reasonable prospects of another court coming to a different conclusion regarding the finding that the applicants were in contempt and with regard to the sanctions that go with it.

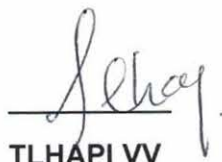
[9] Counsel for the applicants conceded that there was no objection to paying the monies over to be dealt with as directed in paragraph [4] of my order:

“ The monies be paid into the Trust Account of Weavind and Weavind by the first and second respondents and are to be deposited into a separate interest bearing account and be frozen, until such time as the sixth respondent has finalized its investigation”

Furthermore, the ground of appeal relating to the striking of the counter application due to lack of urgency was not pursued.

[10] In the result the following order is given:

1. Leave to appeal to the full bench of this court is granted in respect of paragraphs [1]; [2]; [3]; [5] of the order of 7 December 2016.



TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	17 MARCH 2017
JUDGMENT RESERVED ON	:	17 MARCH 2017
ATTORNEYS FOR THE APPLICANT	:	WEAVIND & WEAVIND ATT.

ATTORNEYS FOR TYE RESPONDENT

:

MACBETH ATTORNEYS INC