

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2022-23339

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

In the matter between:

P[...] M[...] OBO A MINOR

Applicant

and

MEC FOR HEALTH GAUTENG

Respondent

Delivered: 10 September 2024 – This judgment is handed down electronically by circulation to the parties' representatives via email, uploading it to CaseLines and releasing it to SAFLII.

ORDER

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1. The application is struck from the roll.
 2. Mr Selaelo Malatji is ordered to pay the costs of the respondent *de bonis propriis* on the attorney and client scale, including the costs of senior counsel.
 3. Mr Malatji is precluded from charging his client any fees relating to this application.

4. This judgment is to be brought to the attention of the South African Legal Practice Council.

JUDGMENT

BESTER AJ:

Introduction

[1] On Tuesday, 2 July 2024, the applicant, P[...] M[...], brought an application against the Member of the Executive Committee for Health in the Gauteng Province (the MEC) on behalf of her minor child, M[...].

[2] At the hearing, I refused to finally enrol the matter. I reserved the issue of costs and indicated that I also intended to give reasons for my refusal to enrol the matter. These are my reasons for the refusal and my decision on the costs.

Brief litigation history of the matter

[3] On 4 July 2022, the applicant served summons under this case number upon the respondent, claiming R38 million in damages on behalf of M[...]. The claim flows from brain damage that the child suffered because of the negligent conduct of the medical and other personnel at the Rahima Moosa Hospital during and immediately after her birth in April 2019. The respondent is defending the action. I will from here on refer to the parties as the plaintiff and defendant respectively.

[4] On 17 April 2023, Mr Malatji, an advocate with a trust account, replaced Malepe Attorneys (who had previously replaced Mamogobo Attorneys) as the plaintiff's legal representative.

[5] On 28 August 2023, per Vally J, the action was certified trial ready. On 20 October 2023, per Windell J, and by agreement between the parties, the merits of

the matter were settled fully in favour of the plaintiff, and the quantum was postponed for future determination.

[6] On 26 October 2023, the plaintiff applied for an interim payment in terms of Uniform Rule 34A. Goodman AJ heard the application on 22 and 23 January 2024. On 1 February 2024, she delivered judgment and ordered as follows:

- “1. The matter is removed from the roll.
2. the plaintiff is not permitted to re-enrol and set down the matter until:
 - 2.1 affidavits have been filed on her behalf dealing with at least the following:
 - (a) the total damages believed likely to be recovered by the plaintiff in due course, and the basis for such belief;
 - (b) when the trial in respect of quantum is likely to be ready for the trial;
 - (c) the minor child’s likely medical and other needs and expenses until that date; and
 - (d) any other facts relevant determining the reasonable proportion of the total damages which should be paid on an interim basis; and
 - 2.2 the plaintiff’s legal representatives have established and registered a trust to control and administer the interim payments on behalf of the minor child.”

[7] The plaintiff was dissatisfied with the outcome. However, she did not apply for leave to appeal the judgment by Goodman AJ at the time. I should mention that, shortly before this judgment was delivered, on 4 September 2024, a belated application to do so, dated 2 September 2024, was loaded to CaseLines, without an application for condonation of the late delivery thereof.

[8] In any event, instead of seeking leave to appeal the order by Goodman AJ (I express no view on the appealability of the order or the merits of an application to do so), the plaintiff issued a further application, claiming an interim payment of R13 million. I will refer to this application as the second payment application. In the first payment application before Goodman AJ, the amount claimed was R12 million. It is not evident what brought about the change in the amount.

[9] The notice of motion in the second payment application claims the following relief:

- “1. That the respondent makes an interim payment of money amounting in aggregate to the sum of R13 000 000 in accordance with Rule 34A of the Uniform Rules of Court;
2. Dispensing with the forms, service and time periods prescribed in terms of the Uniform Rules of Court, directing that the matter be heard as one of urgency in terms of rule 6(12) of the Uniform Rules of Court and condoning the non-compliance with any rule in this application;
3. The Applicant also seeks a declaratory order, declaring the whole proceedings conducted by Justice Goodman AJ, in Gauteng Local Division of the High Court of South Africa, Johannesburg, invalid as they were conducted in a manner which was inconsistent with the Constitution and Rules of the Court or rule of the law;
4. That the judgment delivered by Acting Judge Goodman discriminate the Applicant’s minor child based on disability, infringes the minor child’s rights and as such the Applicant prays that the judgement of AJ Goodman be referred to the Constitutional Court to be declared invalid by Chief Justice;
5. That the respondent should bear the costs of this application;
6. That the Applicant be granted leave to supplement or amend her papers where necessary; and
7. Further and/or alternative relief.”

[10] The matter was set down on the urgent roll before Cassim AJ on 20 February 2024, who removed the matter from the roll, apparently at the request of the applicant.

[11] It seems that Mr Malatji decided on a different strategy, because on the same day the plaintiff applied to the Constitutional Court, seeking an order in the following terms:

- “1. That the direct leave to appeal to the Constitutional Court be granted against the judgment and the orders Goodman AJ, dated the 01 February 2024 with costs and / or set aside the said judgment;

2. Alternative that the judgment of Ladyship Madam Goodman AJ be declared unconstitutional;
3. Costs of this application; and
4. Further and / or alternative relief.”

[12] The defendant opposed that application. The Constitutional Court refused the application on 6 June 2024.

[13] In the meantime, the trial on quantum came before Yacoob J on 9 May 2024. She determined that the matter was not ripe for hearing and removed it from the roll. Her order reads as follows:

- “1. The matter is removed from the roll.
2. The defendant is to pay the plaintiff’s taxed wasted costs on an attorney and client scale.
3. The parties are directed to hold a pre-trial conference on 10 May 2024 at which they endeavour to narrow the issues which must be decided by the court, and at which they negotiate settlement on each head of damages.
4. The Minutes of the pre-trial conference referred to above shall be uploaded on caselines by 17 May 2024.
5. Should the pre-trial conference not take place on 10 May 2024 as ordered, the plaintiff shall file a substantive application explaining why the plaintiff should nevertheless be permitted to set the matter down again.
6. The defendant’s expert reports are to be filed on or before 20 August 2024.
7. The parties are to ensure that joint minutes are to be filed within 6 weeks of the plaintiff’s expert reports being filed.
8. Should any party fail to comply with this order the other party shall take remedial steps in accordance with the Rules of Court.”

[14] In compliance with the order by Yacoob J, the parties held a pretrial conference, over 3 sessions on 10, 13 and 14 May 2024. The minute records that the plaintiff proposed a provisional payment of between R6 million and R10 million for future medical expenses, an additional interim payment of R1.5 million for future loss of earnings and an interim payment of R1.5 million for general damages.

[15] The defendant proposed an interim payment of R2 million, and it made a tender to that effect, subject to the plaintiff's compliance with the order of Goodman AJ. The plaintiff recorded that she *"is not required to comply with the Order of Goodman AJ as there is a pending application for leave for direct access to the Constitutional Court and [it is in] conflict with [the] order of Justice Yacoob"*. The plaintiff further records that the *"judgment of Justice Goodman AJ has no effect in this case"*.

[16] Shortly after the application to the Constitutional Court was refused, Mr Malatji returned his attention to the second payment application, which was re-enrolled, once again on the urgent roll. It came before Todd AJ, who granted the following order on 12 June 2024:

- "1. The urgent application which was enrolled on 11 June and argued on 12 June 2024 is struck from the roll.
2. The costs of the urgent application are to be paid by Mr Malatji *de bonis propriis*, including the costs of one counsel; and
3. Mr Malatji is precluded from charging his client any fees relating to the bringing of that urgent application."

[17] Subsequently, on 12 July 2024, Todd AJ handed down reasons for his order.

[18] Undeterred, the very next day, Mr Malatji enrolled the second payment application on the urgent roll for the following week. On Sunday, 16 June 2024, Mr Malatji uploaded an affidavit headed *"Affidavit Supporting – Urgent Interim Payment"*, on the face of it seeking to supplement the papers in the second payment application. The affidavit goes some way to deal with the damages the plaintiff believed she may recover at trial, thus in partial compliance with paragraph 2.1(a) of the order by Goodman AJ. However, the affidavit also includes criticism of Goodman AJ and Todd AJ.

[19] On 21 June 2024, Goedhart AJ ordered as follows:

“1. The application, which was set down on 13 June 2024 for hearing on the urgent court roll of 18 June 2024 and argued on 19 and 20 June 2024, is struck from the roll.

2. The costs of the urgent application are to be paid by Mr Malatji *de bonis propriis* such costs to include the costs of two counsel;

3. Mr Malatji is precluded from charging his client for bringing this urgent application.

4. A copy of this order and the judgment is to be made available to the South African Legal Practice Council.”

[20] Still unperturbed, Mr Malatji re-enrolled the second payment application on Friday, 28 June 2024, for Tuesday, 2 July 2024. That is when the application came before me.

[21] On 1 July 2024, the day before the hearing, Mr Malatji uploaded a further affidavit “supporting” the second payment application – once again deposed to by himself. In this affidavit, the Court was invited to determine the following issues, without any attempt to amend the notice of motion of February 2024:

“1.2.1. The question of whether Applicant has correctly invoked the interim payment application in terms of rule 34A and rule 34A sub-rule (3).

- If yes, whether the Court should grant interim payment of R13 000 000 in line with precedented case laws of the interim payment application. In the case of ME obo NP v The MEC for Health, Gauteng, judgment of Mahalelo J, Gauteng High Court, on 21/01/2022, unreported case no. 9257/2017, a sum of R13 million was awarded as an interim payment. (See para 41.1 subparagraph 1.2.3)

1.2.2. The question whether the Applicant’s minor child matter is urgent. If yes, the Court as upper guardian of all minor children is invited to determine minor Dimpho Mohomi’s matter in terms of the provisions of the Constitution dealing with children’s rights, children’s Act and in line with medical-legal reports of the minor child Dimpho.

1.2.3. The court is invited also to revisit the improper conduct of the HEALTH MEC Officials Mr Mhawukelwa Khoza and Ayabonga Tuswa of contravening State Attorney Act who caused malfeasants and dereliction of duties by

appointing MBA Attorneys without the State Attorney appointing MBA Attorneys.

- if court can find that the MEC Officials acted in the fraudulent manner and in contravention of the State Attorney Act the court should order Mr Khoza and Ayabonga Tuswa be jailed for a period of 24 months and be fired by the MEC for Health GP
- the Above Honourable will have to consider Supreme Court of Appeal cases dealing with matters on how can service of private attorney be secured to assist Organ of State.

1.2.4. The honourable court is further invited to revisit the improper conducts of attorney Mr A Perivolaris and Advocate Dlamini of presenting falsified evidence before the Court and citing party who is not involved in this matter.

Our court also emphasises that there is a duty to attempt to settle a dispute prior to litigation or to limit the issues in the dispute so that only the actual issues in dispute are on trial. In *Nyathi the MEC for the Department of Health, Gauteng and Another* (TPD) (unreported case no. 26014/2005, 30-3-2007) (Davis AJ) attorney and client costs were awarded against the first respondent, which did not agree on an interim payment in an action for damages and the impecunious applicant was compelled to apply for such an order

1.2.5. The question of whether the legal representatives of the MEC can defy the Court Order of Justice Yacoob granted on the 9th of May 2024 by tendering an offer of two-million-rand interim payment subject to the wrong terms and orders of the court order granted by Acting Judge Goodman in February 2024.

1.2.5. The Court Order of Acting Judge Goodman made wrong order that the applicant must create trust without parties having reached conclusions as to how much will the respondent MEC pay for the fees of administration of trust. Previously, the Applicant has argued and referred Acting Judge Todd and AJ Goodhart to consider precedence of this Honourable Court to learn how trusts are created rather than to order the indigent Applicant to establish trust out of her own pocket. Unfortunately, both Acting Judges missed the points and resulted in them order adverse costs against applicant's legal representative for baseless grounds.

The Applicant respectfully submits that this Court should consider case law of *DQN obo SSN vs the MEC of Health GP* Case No 15665/2016 and *ME obo NP vs the MEC for Health, Gauteng*, Judgment of Mahalelo J, Gauteng High Court, on 21/2022, unreported Case No. 9257/2017 to follow how trust is established and others. Both Case Laws are uploaded on the CaseLines section 0000D named List of Authorities.

This matter is no enrolled for the determination of damages on the interim basis.”

[22] The affidavit continues the theme of attacking the various judges before whom the application had served, as well as the defendant’s legal representatives. This includes spurious allegations of unprofessional conduct against Mr Dlamini SC.

[23] The defendant maintained its opposition to the application and once again sought punitive costs against Mr Malatji personally.

Urgency

[24] The essence of the urgency relied upon in the application, as at 20 February 2024, when the second payment application was first sought to be placed before an urgent court, is that the child requires continuous, around-the-clock care and medical treatment. This is in circumstances where her mother is unemployed. It is recorded in the pre-trial conference minutes that the child receives medical treatment at her local clinic. Clearly, this matter is important to the plaintiff and her child, and an interim payment is necessary. It is further obvious that the plaintiff cannot afford this litigation.

[25] Yet the papers do not detail the child’s immediate needs, nor the cost thereof. This is despite Goodman AJ, already in February 2024, pointing out this shortcoming in the first payment application and ordering that the details should be provided before the matter is re-enrolled. How a practitioner, in any event, could have considered such information unnecessary for an interim payment claim is difficult to fathom.

[26] The substantial amount claimed is not motivated, other than that a court in another matter awarded that amount. No attempt was made to draw parallels between the two cases. It is especially difficult to understand why an interim payment for future loss of earnings is urgent when the child is 5 years old.

[27] Any urgency that may have existed surely evaporated once the defendant made a tender of R2 million as an interim payment. No effort was made to explain why this amount would be insufficient.

[28] There is a clear reason why no interim payment has yet been made or agreed upon – Mr Malatji steadfastly refuses to establish a trust, as directed by Goodman AJ. Any purported urgency – indeed the need for the application itself – is fully to be laid at the feet of Mr Malatji.

[29] No attempt was made to justify the urgency in the required framework. Mr Malatji dismissively waived aside decades of direction on the approach to urgency¹ with vague but vociferous references to the child's rights in terms of the Children's Act² and the Constitution.

[30] The set down for 2 July 2024 was served on the defendant at 13h00 on Friday, 28 June 2024. Mr Malatji's proffered reason for the short notice was that it was convenient for him to do so.

The existing court order

[31] In *Ndabeni*³ the Constitutional Court had the opportunity to again emphasise the importance of respecting court orders. In the context of this matter, it seems prudent to quote the whole summary:⁴

“Complying with court orders

¹ Starting with cases such as *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) and *Luna Meubel Vervaardigers (Edms) Bpk v Makin And Another* 1977 (4) SA 135 (W).

² Children's Act 38 of 2005.

³ *Municipal Manager, OR Tambo Municipality and Another v Ndabeni* 2023 (4) SA 421 (CC).

⁴ Id in paras 23 to 26.

[23] Trite, but necessary, it is to emphasise this court's repeated exhortation that constitutional rights and court orders must be respected.⁵ An appeal or review — the latter being an option in the case of an order from the magistrates' court — would be the proper process to contest an order. A court would not compel compliance with an order if that would be '*patently* at odds with the rule of law'.⁶ Notwithstanding, no one should be left with the impression that court orders — including flawed court orders — are not binding, or that they can be flouted with impunity.

[24] This court in *State Capture* reaffirmed that irrespective of their validity, under s 165(5) of the Constitution, court orders are binding until set aside.⁷ Similarly, *Tasima* held that wrongly issued judicial orders are not nullities.⁸ They are not void or nothingness, but exist in fact with possible legal consequences.⁹ If the judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.¹⁰

[25] To distinguish the role of the litigants from the courts, the majority in *Tasima* said:

'The act of proving something irresistibly implies the presence of a court. It is the *court* that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations.'¹¹

[26] Court orders are effective only when their enforcement is assured.¹² Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow.¹³ Effective enforcement to protect the Constitution earns trust and respect for the courts.¹⁴ This reciprocity between the courts and the

⁵ *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) in para 85; *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) in paras 147 to 149; *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) (*Pheko II*) in paras 1 and 26.

⁶ *State Capture* above in para 85.

⁷ *State Capture* above in para 59.

⁸ *Tasima* above in para 182.

⁹ *Id*

¹⁰ *Id* in para 198

¹¹ *Id* in para 191.

¹² *State Capture* above in para 26, citing *Pheko II*.

¹³ *Id* in para 87.

¹⁴ *Id* in paras 26 and 27.

public is needed to encourage compliance, and, progressively, common constitutional purpose.”

[32] Mr Malatji has shown utter disregard for the order granted by Goodman AJ. He has repeatedly, ostensibly on behalf of his client, stated that it can simply be ignored. He has disregarded the most basic principle that dissatisfaction with a court order must be actioned with an appeal. As noted above, he has only recently delivered an application for leave to appeal against that judgment. He has repeatedly sought an order setting aside the order by Goodman AJ before other judges sitting as courts of first instance and persisted with it on 2 July 2024. He has to date deliberately refused to obey that court order on behalf of his client. Mr Malatji is contemptuous of the order.¹⁵

Unfounded personal attacks

[33] The application and the purported supplementary papers, for which no permission was sought, are rife with allegations of wrongdoing against every judge before whom the payment applications had been brought. This theme was also the mainstay of Mr Malatji’s argument. Goodman AJ is accused of having given an unlawful order, and all the subsequent judges did not understand, or bothered to understand, what Mr Malatji deems to be obvious and undisputable – that his client is entitled to an interim payment of R13 million merely on his say-so.

[34] Mr Malatji also challenged the authority of Mr Dlamini SC, who appeared on behalf of the defendant. He could not point out the plaintiff’s notice in terms of Rule 7 on CaseLines but became very insistent that the Motsoeneng Bill Attorneys did not have the authority to act for the defendant.

[35] Mr Dlamini SC identified the plaintiff’s Rule 7(1) notice, which had already been delivered on 19 January 2024, and the response dated 22 January 2024. The response shows that the defendant appointed Motsoeneng Bill Attorneys to replace

¹⁵ Regarding the nature of and the requirements for contempt of court, see *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); *Pheko II* above and *State Capture* above.

the State Attorney in representing her on 27 December 2023. Mr Malatji refused to acknowledge that there was a response and, without any further substantiation, persisted with his challenge. This was in the face of the detailed and satisfactory response to the notice, and the fact that Motsoeneng Bill Attorneys had represented the defendant in all the events referred to above, before the hearing of 2 July 2024.

[36] Mr Malatji also accused Motsoeneng Bill Attorneys and Mr Dlamini SC of fraudulent conduct, without laying any legally cognisable basis.

Refusal to establish a trust

[37] The order by Goodman AJ sets two preconditions to the re-enrolment of the first payment application. First, her order requires an affidavit or affidavits setting out the total damages likely to be recovered by the plaintiff and the basis for the belief in that quantum; an explanation of the trial readiness of the matter; an exposition of the minor child's medical and other needs and expenses to date; and any other relevant facts to the determination of what portion of the total damages should be paid on an interim basis. No reason has been given why this has not been complied with. No legally cognisable reason has been proffered as to why this requirement is unlawful and unconstitutional.

[38] Second, Mr Malatji had to establish a trust to control the money. Mr Malatji remained adamant that this was an infringement of the child's rights. He made vague, though emotional, references to the Constitution and the Children's Act. The only craps point raised by Mr Malatji was that the costs of establishing the trust were prohibitive. No elaboration was given, save for the contention in the papers that none of the judges seem to grasp the basics of the law of trusts.

[39] I have already pointed out that the plaintiff cannot afford litigation. She also likely cannot afford the costs of setting up a trust. However, there is no reason why these costs could not form part of an interim payment. Yet no steps have been taken to remove this stumbling block. The fact that the setting up of a trust is a sensible and necessary requirement need not be debated and has in any event already been decided.

Best interests of the child

[40] This is patently a matter where an interim payment ought to be made. The merits have been conceded and the child patently requires substantial care. A tender of R2 million has been made. No reason has been put up to suggest that this amount would not be sufficient to take care of the child's needs whilst the quantum trial is pursued.

[41] Mr Malatji seeks to justify all his actions and his criticisms of judges and opponents with reference to the best interests of the child. Yet the real concern is whether Mr Malatji has the child's best interests at heart. He refuses to comply with the order of Goodman AJ. He refuses to heed the warnings inherent in the further orders issued in urgent court. He makes casts unsubstantiated aspersions against colleagues and judges. He issues duplicate applications. He enrols matters urgently where it is clearly inappropriate to do so. This conduct is not in the best interests of the plaintiff and M[...].

[42] Mr Malatji deposed to all the affidavits in the interim payment applications. There is not even a single confirmatory affidavit from the plaintiff. It is not unreasonable to be concerned about the extent to which Mr Malatji's actions over the past several months flowed from informed instructions from his client.

[43] What is patently clear from Mr Malatji's behaviour in this matter, is that he is singularly focused on being allowed to receive the money into (presumably) his trust account, with no further oversight. It is not the defendant's conduct, or any failure in the administration of justice that has prevents M[...] from accessing interim funds almost a year after the merits of her claim had been conceded by the defendant. This failure falls squarely in the lap of Mr Malatji.

Relevant principles relating to costs

[44] In *Pheko II*¹⁶ the Constitutional Court explained the concept of costs *de bonis propriis* in the following terms:

“Costs de bonis propriis are costs which a representative is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably. Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case.”

[45] The Constitutional Court concluded that an attorney should be held liable for the costs because “[w]hile the evidence may not establish wilfulness or mala fides, it does establish a gross disregard for his professional responsibilities”.¹⁷

[46] In *Liquor Traders*¹⁸ the Constitutional Court explained that a costs order *de bonis propriis* is made against an attorney where a court is satisfied that there had been negligence in a serious degree which warrants an order of costs being made as a mark of the court’s displeasure. In that matter, the attorney filed away correspondence received from the Constitutional Court, without having read it first, and this was deemed sufficiently negligent to warrant costs *de bonis propriis*.

[47] In *Public Protector v Reserve Bank*¹⁹ the Constitutional Court pointed out that considering whether to award costs *de bonis propriis*, and considering a costs order on the attorney and client scale, are two separate inquiries:

“It does not follow that a punitive costs order will always be justified in circumstances where a personal costs order is warranted. An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment,²⁰ be viewed as ‘double punishment’. While the test for awarding a personal costs order or costs on a punitive scale may overlap, an

¹⁶ *Pheko II & Others v Ekurhuleni City* 2015 (5) SA 600 (CC) in [51].

¹⁷ Id in [54].

¹⁸ *South African Liquor Traders’ Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) in [54].

¹⁹ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) in [220].

²⁰ This is a reference to the minority judgment in the matter.

independent, separate enquiry should be carried out by a court in respect of each order. Both personal and punitive costs are extraordinary in nature and should not be awarded 'willy-nilly', but rather only in exceptional circumstances.”

[48] The Court further stated that punitive costs seek to counteract reprehensible behaviour on a part of a litigant.²¹ A court must consider what is just and equitable in the circumstances of the particular case to secure a just and fair outcome.²² The Court identified categories where such costs orders have been granted in the past: fraudulent, dishonest or *mala fide* conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.²³ The Court repeated its previous endorsement²⁴ of the statement by the Labour Appeal Court in *Plastic Converters Association of South Africa*²⁵ that:

“[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

[49] While not unprecedented, a double punitive award (that is, cost *de bonis propriis* on an attorney and client scale) is rare and extraordinary.²⁶

Mr Malatji should bear the costs

[50] In view of what has been set out above, I am of the view that this is one of those rare matters where Mr Malatji should bear the costs personally on a punitive scale, and not be allowed to recover his own fees from his client.

²¹ *Public Protector* above in [221].

²² *Id* in [222].

²³ *Id* in [223].

²⁴ *Limpopo Legal Solutions I v Vhembe District Municipality* 2017 (9) BCLR 1216 (CC); [2017] ZACC 14 in [28].

²⁵ *Plastic Converters Association of South Africa on behalf of members v National Union of Metal Workers of SA* [2016] 37 ILJ 2815 (LAC) in [46].

²⁶ *Public Protector supra* in [226].

Conclusion

[51] In the result, I make the following order:

- a) The application is struck from the roll.
- b) Mr Selaelo Malatji is ordered to pay the costs of the respondent *de bonis propriis* on the attorney and client scale, including the costs of senior counsel.
- c) Mr Malatji is precluded from charging his client any fees relating to the bringing of this application.
- d) This judgment is to be brought to the attention of the South African Legal Practice Council.

A Bester

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Heard on: 2 July 2024

Judgment Date: 10 September 2024

For the Applicant: S Malatji (Advocate practicing with a trust account)

For the Respondent: MW Dlamini SC instructed by MBA Incorporated