



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

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **✓**

CASE NO: 2024-008520



22 November 2024

SIGNATURE

DATE

In the matter between:

BLACK ROYALTY MINERALS KOORNFONTEIN (PTY) LTD.

APPLICANT

and

THE SHERIFF, MIDDELBURG

FIRST RESPONDENT

KWIKSPACE MODULAR BUILDINGS (PTY) LTD.

SECOND RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] On 24 October 2023 in this court the second respondent obtained an order before Dlamini J, (the Dlamini J order), having commenced proceedings in July 2023, against an entity called Black Royalty Minerals (PTY) LTD, different to Black Royalty Minerals Koornfontein (PTY) LTD (the applicant in this matter), under Case Number: 047548-2023. The Dlamini J order directed the following in summary form;

- 1.1. that the respondent and all persons holding under it, is ordered to vacate modular buildings, situated at Koornfontein Mines, '*which modular buildings were described in detail in the order and which I have come to know are simply prefabricated buildings or structures*' (the italics are my emphasis);
- 1.2. that the respondent and all persons occupying the modular buildings, vacate on or about 1 November 2023 failing which the Sheriff for the area within which the modular buildings are situated be authorised to evict the respondent and all persons holding occupation under it;
- 1.3. that the respondent is directed to disconnect all active and inactive services connected to the modular buildings;
- 1.4. that the respondents return the modular buildings to the applicant;
- 1.5. that the respondent pays the costs on attorney and client scale.

[2] Having obtained the Dlamini J order, the applicant in that matter and the second respondent in this one, through the sheriff, served the order on the party or entity

against whom the order was obtained, who happen to share the same registered address as the applicant in this matter, on 25 November 2023.

[3] On 25 January 2024, representatives of the second respondent, the Sheriff of Middelburg as well as the SAPS went to Koornfontein Mine, where the modular buildings are situated, most importantly, where the court order directed them to go, for purposes of executing the order. It is the visitation of the aforementioned persons at the mine that jostled the applicants into action, that of launching an urgent court application.

[4] The urgent application was not without challenges. On 6 February 2024 it was removed from the urgent roll by Davis J as it was not loaded onto the digital platform, CaseLines. On 14 February 2024 the urgent application was struck from the urgent court roll by Mkhabela AJ for want of urgency and costs were awarded against the applicant on attorney and client scale.

[5] The fact that the matter was struck from the roll for want of urgency, meant that the applicant could have another bite at the proverbial cherry. Inevitably, the matter served again in the urgent court and came before Nyathi J, who having heard the parties prepared a detailed written judgment setting out the history of the matter, briefly the facts, but most importantly the reasons for his order. Nyathi J, dismissed the matter for want of urgency and directed the applicant to pay costs on attorney and client scale. The applicant realised that a third bite at the cherry was in the offing,

in that dismissal on urgency meant the matter could be re-enrolled on the normal opposed roll, hence the current application.

Facts

[6] In the joint practice note the parties identify the following issues as common cause and they also identify issues for determination;

Common cause

- The second respondent obtained judgment and order against Black Royalty Minerals (Pty) Ltd on 24 October 2023.
- The applicant and Black Royalty Minerals (Pty) Ltd are two separate legal entities.
- The applicant was not party or joined in the proceedings instituted by the second respondent.

Issues for determination

Whether the first and second respondents are authorised and empowered to execute a judgment and order against a party not mentioned in the said judgment nor a party who is neither party to legal proceedings. As well as costs of the proceedings.

[7] The framing of the case for determination, by the applicant is not so accurate. The second respondent approached the court as per the above summary and obtained an order before Dlamini J. The order obtained was not against the applicant in this matter. The applicant laments the fact that they were not joined or cited in those proceedings and that as a party with a direct and substantial interest in the

matter, they ought to have been. The applicant seeks to argue that there is no reason why a party who was not part of the proceedings should be at the receiving end of the order of Dlamini J. Counsel submitted that vigilantism should not be permitted and that the rule of law should be permitted to prevail. He argued that there ought to be a stay of proceedings until a joinder is permitted. He argued that allowing that process, that of joinder, to eventuate would be permitting due process to take place.

[8] Counsel for the second respondent submitted that there is no vigilantism to speak of as alleged by the applicant. The second respondents went to court and obtained an order. When the second respondent and the sheriff went to the property it was not even to remove the pre-fabricated buildings. They firstly wanted to confirm that the structures were still there at Koornfontein Mine, even though the order obtained was wide enough and says the structures could be removed wherever found. He pointed out that the applicant was vague about whether the pre-fabricated material was in their possession. He also argued that one cannot in legal proceedings join a party they do not know. He submitted that the applicant does not have *locus standi* and in addition did not deal with the facts of the case specifically. Many paragraphs in the second respondents opposing affidavit went unanswered and the applicant failed to give clear particularity when it was required.

[9] Nyathi J made damning findings in his judgment. Among others the following findings were made;

“[20] The applicant's emphasis of a distinct legal persona between the two companies and the director is obviously contrived as a stratagem to evade obligations arising from the court order.

[21] Whilst the applicant submitted that there is no subsidiary relationship between the two entities under discussion, it is undeniable that there is a very proximate corporate consanguinity between them. When two companies share premises and where board members serve on both entities, the potential for a conflict of interest becomes unavoidable; in this particular case, even deliberate.

[22] The court order itself or its validity is not challenged by the applicant. Nothing is said about the subject matter of the court order, namely, the modular units and their whereabouts by the applicant. As the court order remains valid, it should be carried out by the respondents without any hindrance by the applicant or the so called third party.

[23] This court shall not allow itself to be utilized for the advancement of technical and peculiar defences which are by apparent design or effect aimed at defeating the ends of justice...”

[10] The insistence by the applicant that they should have been joined to the court proceedings while not admitting to being in possession of the modular units and at the same time stating that they have a direct interest in the subject matter of the Dlamini J order is indeed odd. Equally odd is the decision to leave the order in place and not challenge it, while disagreeing with it. The reality though is that until challenged and set aside, the order will stand and can be executed.

[11] The facts of the case are very briefly set out above and are not as framed by the applicant in the notice of motion and the founding affidavit. The applicant frames the matter from the time they became aware of the judgment that was obtained before

Dlamini J. That however is not the correct historical perspective. The correct one, begins when the second respondent entered into an agreement for the lease of the modular unit with Black Royalty Minerals (Pty) (Ltd) (not the applicant in this matter) who thereafter defaulted on that agreement. The second respondent then instituted legal action, motion proceedings, against that entity to vindicate its rights and to get back the modular units that belonged to it. As I understand things, the application before Dlamini J, which was not opposed was precisely about vindication. In any event it needs no repeating for the order speaks for itself.

[12] Very early during argument counsel for the applicant posed two questions, namely; whether a party who is not mentioned in an order can be executed against and secondly, whether can an attachment be made without an order. The propositions mentioned by counsel are detached from and not consistent with the facts of the matter as well as to the order of Dlamini J. The order of vindication is directed at Black Royalty Minerals (Pty) (Ltd), as the possessor of the modular units as well as any other person or entity who possess them through Black Royalty Minerals. It seems to me self-evident that if the applicant came into possession of the modular units through Black Royalty Minerals (Pty) (Ltd), something they have deftly avoided to mention, the reach of the order will engulf them. Therefore, the answer to the first question is in the affirmative. Even if not specifically mentioned by name in the order, provided they possess the modular units through Black Royalty Minerals, they can be executed against. This the applicant knows, which is why he was noncommittal about being in possession of the modular units, choosing instead to make vague allegation such as the following;

“The Applicant seeks an order to interdict and restrain both the First and Second Respondents and all their representatives, officials, employees, agents, and/or personnel from acting and executing, wrongfully on the Applicant, an order granted by the Honorable Dlamini J on 24 October 2023 against a third party who is not the Applicant, and/or unlawfully entering the premises of the Applicant and/or unlawfully intimidating and harassing the Applicants' representatives, agents, personnel and employees within and/or around the premises of the Applicant situated at Koornfontein Mines on Hendrina Road R542, Middleburg, Mpumalanga Province.”

[13] The second question is even more bizarre because in this matter there is an order, that of Dlamini J. Therefore, to pose the question whether one can attach without an order when one exists, is strange. The fact that the order does not mention the applicant does not mean that no order exists. If both questions were posed to drive the point home that there was some vigilantism taking place, then they fail dismally in doing so.

Costs

[14] The general rule in costs matters is that the successful party gets costs awarded in his/her favour. It is usually couched along the terms that ‘*costs follow the result*’. Counsel for the second respondent asked the court to award costs against the applicant on Scale C on the one hand and on the other counsel for the applicant asked that costs be awarded in applicant’s favour. The issue of costs is a matter for the discretion of a trial court. Smalberger JA elaborated on the nature of this

discretion as follows (in different context,) in *Intercontinental Exports (Pty) Ltd v Fowles*¹ at para 25:

“The court’s discretion is a wide, unfettered and equitable one. It is a facet of the court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party’s conduct in relation to the litigation.”

[15] It is trite that the awarding of punitive costs on the scale as between attorney and client, is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging*²:

“[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

[16] In the exercise of my discretion on costs, I have taken the following into account;

16.1. Firstly, the applicant in this matter went to the urgent court three times and each time the outcomes were not in its favour. The first time it was before Davis J on 06 February 2024, when the matter was removed by notice as it was not on CaseLines.

¹ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA).

² *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 (1) AD 597 at 607.

No costs order was made. The second time the matter came before Dlamini J on 14 February 2024 when it was struck from the roll for want of urgency. The applicant was mulcted with costs on attorney and client scale for two days, the 13th and the 14th February 2024. The third time the matter came before Nyathi J on 27 February 2024 who dismissed it for want of urgency and awarded punitive costs against the applicant in favour of the second respondent;

16.2. Secondly, the applicant relied on vague and at times unsubstantiated statements and allegations in its application;

16.3. Thirdly, the applicant skirted the most important issue in the proceedings, namely; whether the modular units were in fact in its possession so that the second respondent could execute the order it obtained;

16.4. Fourthly, the court (Nyathi J) made the following damning findings;

16.4.1. that the applicant used contrived arguments as a stratagem to evade obligations arising from the order of Dlamini J;

16.4.2. that the applicant deliberately hid behind a conflict of interest;

16.4.3. that the applicant utilised, to advance its case, technical and peculiar defences which are by apparent design or effect aimed at defeating the ends of justice.

[17] This court must express its displeasure at the manner in which the applicant went about in handling this matter. I am of the view that a punitive costs order is warranted.

Order

[18] The following order is made;

1. The application is dismissed;
2. The applicant is directed to pay the second respondent's costs on Scale C.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant: Adv M C Ntshangase

Instructed by: Mavhungu-Masibigiri Inc
Pretoria .

For Respondent: Adv S Mulligan

Instructed by: Nixon and Collins Attorneys
Pretoria.

Date of the hearing: 10 June 2024

Date of judgment: 22 November 2024

This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 22 November 2024.