

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 118227/2024

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

Date: 25 March 2025

E van der Schyff

In the matter between:

Kelebogile Stepphinah Mashele

Applicant

and

Gildenhuys Malatji Attorneys

First Respondent

Greyling Erasmus

Second Respondent

Moribe Attorneys

Third Respondent

Katlego Moribe

Fourth Respondent

Legal Practice Council

Fifth Respondent

Legal Practitioner's Indemnity Insurance Fund

Sixth Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] This application first came before me as an urgent application in October 2024. The application was struck from the roll. The applicant's attorneys were directed to file an affidavit as to why they should not be held accountable for the costs of the application. After considering the affidavit filed, a cost order *de bonis propriis* was granted against the applicant's attorneys of record. The applicant's legal representatives were afforded the opportunity to approach me in chambers to case-manage the application to ensure that it was heard after affording the respondents sufficient time to file opposing papers. I subsequently provided the applicants with a date to hear the application in the ordinary course, that is, not as an urgent application.
- [2] The applicant elected not to supplement or amend its application and served the respective respondents only with a notice of set down. As when the matter was heard in the urgent court, only the first and second respondents had a legal representative and counsel attending in court. The first and second respondents did not file supplemented papers, but additional heads of argument were filed.
- [3] The applicant seeks final relief. It is trite that parties are bound to the averments made in the affidavits filed. A party is also generally bound to the relief sought in the notice of motion. However, under the prayer 'further and alternative relief' a court is entitled to consider the papers filed of record to establish whether a case is made out in the papers for any alternative relief sought.¹

Relief sought

- [4] The notice of motion reflects that the applicant seeks the following relief against the first to fourth respondents:

¹ *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112D.

- i. That the court orders that the first or third respondent, whoever of the two holds the funds of the applicant in trust, pay the applicant the funds paid by the Road Accident Fund as compensation for a claim against the Road Accident Fund within a period of no more than seventy-two (72) hours from the date of the making of this order an order of court and subsequent service to (sic) of the order on the respondents, the amount being R1 973 403.79 (One Million Nine Hundred and Seventy-Three Thousand Four Hundred and Three Rands and Seventy-Nine Cents);
- ii. Alternatively, the second and fourth respondents be ordered to inform the applicant and the court in writing, what transpired after the funds from the Road Accident Fund were paid to either of the first or the second respondents within a period of not more than seventy-two (72) hours from the date of this order being made an order of court and the subsequent service of the order to the second and fourth respondents.'

Background

[5] The applicant, who was injured in a motor vehicle accident, instructed the third and fourth respondents (collectively referred to as the Moribe respondents) to institute a claim against the Road Accident Fund ("the Fund"). The Moribe respondents, in turn, appointed the first respondent, Gildenhuis Malatjie Incorporated ("GMI"), as its correspondent attorneys. The claim was finalised. GMI's banking details were captured on the order, and an amount of R2 631 205.05 was subsequently paid over by the Fund to GMI attorneys.

[6] I pause to note that the applicant's counsel spent much time elaborating why it was unbecoming that GMI was reflected on the court papers as the applicant's attorney and that the Fund paid over money to GMI's trust account. I fail to understand the relevance or importance of this point, particularly in the context of the relief sought and GMI's involvement in the matter. I understand that the applicant avers that she canceled the mandate with Moribe attorneys. However, her current attorneys stated in a letter dated 22 August 2024 that 'it is unclear when the mandate given to Moribe attorneys by our client was terminated.' In the papers filed, it is reflected that the

applicant wrote an email to GMI on 17 July 2024, stating that she 'would like to cancel her mandate with Katlego Moribe'. There is no indication that such termination was communicated to GMI prior to this date. By this time, the amount of R 1 977 204.94 was already paid over to Moribe attorneys. I find nothing *mala fide* in GMI's conduct as it is set out in the affidavits before me.

- [7] It is trite that a party's primary relationship is with its instructing attorney. Correspondent attorneys can be described as a 'tool used by instructing attorneys. Correspondent attorneys are physically located in the area of the court's seat. They act as representatives of the instructing attorneys who act on behalf of the client. Correspondent attorneys obtain their instructions from the instructing attorney and not from the client directly. In the result, correspondent attorneys account to their instructing attorneys.

- [8] The applicant came to realise that her claim against the Fund was successful. She, however, had not received any compensation. She laid a complaint against the fourth respondent, Mr. Moribe, with the Legal Practice Council (LPC) in Kimberley. Adverse findings were subsequently made against Mr. Moribe by the LPC, but it is unclear whether he was subsequently suspended or whether any disciplinary steps were taken by the LPC.

- [9] The 'complaint of misconduct' filed by the applicant with the LPC is dated 4 April 2023. It is evident that the applicant, already on 4 April 2023, knew that GMI made a payment to Moribe attorneys in excess of R1 900 000.00. It is common cause that the applicant's current attorneys wrote to GMI enquiring about the money. GMI answered the email, which was unfortunately sent to an incorrect email address. This was already traversed in the judgment handed down on 13 November 2024.

- [10] The letter was, however, attached by GMI to the answering papers in the urgent court application. Since the answering affidavit was filed, the applicant was apprised of GMI's response, the letter dated 16 September 2024, and proof of payment of the amount from GMI to Moribe attorneys. In the replying affidavit, also filed before the application was heard in the urgent court, the applicant expressly stated that the email letter did not reach her attorneys of record. She continued:

‘... if that was so, these proceedings would never have been brought against the first and second respondents.’

- [11] Mr. Erasmus reiterated that GMI paid over an amount of R1 977 204.94 to Moribe attorneys on 25 January 2023. Mr. Erasmus confirmed that a further amount of R395 115.93 was received by them on 7 June 2024 for taxed costs. This amount, GMI stated, would be paid over to the applicant's current attorneys when GMI was provided with written confirmation that its offices would be indemnified from any claims from Moribe attorneys or the applicant's current attorneys.
- [12] The applicant became aware of the additional amount of party and party fees held in trust with GMI when the answering affidavit and its annexures were received. In reply, she stated that she is entitled to the R395 115.93 party and party costs recovered by the fund.

Discussion

- [13] The applicant is, with good cause, frustrated. She suffered injuries in a motor vehicle accident. A substantial amount of money was paid over to her attorney of record after her claim was settled with the Fund, and yet she has not received a single cent to date.
- [14] The applicant undoubtedly made a case for the relief sought against the third and fourth respondents. She instructed the Moribe respondents to institute a claim on her behalf against the Fund. The claim was finalised. The reward, less GMI's costs and disbursements, was paid over to Moribe attorneys already on 25 January 2023. Her claim is for a liquidated amount.
- [15] Moribe attorneys are, in turn, entitled to the remuneration agreed to with the applicant. However, since they did not file any answer to this application, and in light thereof that they have received the reward already in January 2023 and failed to make any payment to the applicant, it is just to the applicant that Moribe attorneys

be ordered to pay the whole amount they received from GMI attorneys over to the applicant's current attorneys together with an estimate of their costs within 5 days of this order being served on the third and fourth respondents. The applicant's current attorneys are to retain the estimated costs in trust in favour of Moribe attorneys pending the taxation of their account. The remainder of the award must then be paid over to the applicant.

- [16] As for the party and party costs in the amount of R395 115.93 subsequently received by GMI, GMI should pay this amount to the applicant's current attorneys of record. This issue was not dealt with in the notice of motion or the founding affidavit but only came to the applicant's knowledge when the answering affidavit was filed. It was addressed in reply. It is sufficiently addressed in the papers filed for the court to grant further relief as far as this amount is concerned. These monies are for the benefit of the applicant. I have regard to GMI's cautionary approach and its insistence on an indemnification from the applicant's erstwhile and current attorneys before paying out the money. The money is, however, for the benefit of the applicant. Moribe attorneys are provided with an opportunity to charge the agreed fees from the applicant, and the payment of the amount of R395 115.93 will be made in terms of a court order.

Costs

- [17] The third and fourth respondents are liable for the costs of this application on attorney and client scale. Their conduct necessitated this application. In the circumstances, a punitive costs order is warranted.
- [18] In considering a fair costs order regarding the first and second respondents' costs, I take into account that the amount of R395 115.93 was retained subject to an indemnification being provided by Moribe attorneys and the applicant's current attorneys. GMI required written confirmation that it would be indemnified from any claims from Moribe attorneys and the applicant's current attorneys of record. No explanation was provided by the applicant as to why such an indemnification was not provided. Despite that the order stands to be granted authorising GMI to pay the

taxed costs in the amount of R395 115.93 over to the applicant's current attorneys of record, the dispute could have been resolved if the required indemnification had been provided. GMI is entitled to costs. Since the same counsel represented GMI and the second respondent it is not necessary to differentiate between the first and second respondents as far as costs are concerned. I am, however, not of the view that a punitive costs order is warranted.

ORDER

In the result, the following order is granted:

1. The third and fourth respondents, jointly and severally, the one to pay the other to be absolved, are ordered to pay over the amount of R 1 977 204.94 to the trust account of K.S. Ntuli Attorneys within 5 days of this order being served on them.
2. The third and fourth respondents are to provide K.S. Ntuli Attorneys with an estimate of their fees and costs, at their risk, within 5 days of this order being served on them.
3. The third and fourth respondents are ordered to provide a taxed bill of costs to K.S. Ntuli Attorneys as soon as such an account is available.
4. K.S. Ntuli Attorneys are directed to provide the third and fourth respondents with their trust account details captured on a bank letter simultaneously with this order being served on the third and fourth respondents.
5. K.S. Ntuli Attorneys are directed to receive the amount of R 1 977 204.94 in trust to the benefit of the applicant, and to release the said amount less the third and fourth respondents' estimated fees and costs to the applicant on receipt of the amount.
6. K.S. Ntuli Attorneys are to retain an amount equal to the third and fourth respondents' estimated fees and costs in trust and to release the amount to the third and fourth respondents only once provided with a taxed bill of costs.
 - 6.1. In the event that the taxed bill of costs reflects a lesser amount than the estimated costs retained, only the lesser amount is to be paid out to Moribe attorneys, the remainder to be paid to the applicant.
 - 6.2. In the event that the bill of costs reflects a higher amount than the estimated costs and fees, the full retained amount is to be paid over to Moribe attorneys.
7. The first respondent is authorised and ordered to pay over to K.S. Ntuli Attorneys for the benefit of the applicant, the amount of R395 115.93.

8. The third and fourth respondents, jointly and severally, the one to pay the other to be absolved, are to pay the costs of this application on attorney and client scale, including the costs paid by the applicant to the first and second respondents regarding this application heard on 17 March 2023 as provided for in paragraph 9 of this order.
9. The applicant is to pay the first and second respondents' costs on scale B.
10. A copy of this judgment is to be provided to the Legal Practice Council.



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:	Adv. M. Musetha
Instructed by:	K.S. Ntuli Attorneys

For the first and second respondents:	Adv. M. van der Westhuizen
Instructed by:	Gildenhuys Malatji Inc.

Date of the hearing:	17 March 2025
Date of judgment:	25 March 2025