

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 8447/2024

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: <u>23/6/2025</u> SIGNATURE: 	

In the matter between:

NTSHOSA MADIBA INCORPORATED

APPLICANT

And

EMMANUEL TEKUTEKU MOKHAWANE

FIRST RESPONDENT

FIRST NATIONAL BANK OF SOUTH AFRICA

SECOND RESPONDENT

PHILEMON LESIBA MATHABATHE

THIRD RESPONDENT

AFRICAN BANK

FOURTH RESPONDENT

SARAH GETRUDE MHLANGA

FIFTH RESPONDENT

CAPITEC BANK

SIXTH RESPONDENT

ROAD ACCIDENT FUND

INTERVENING PARTY

JUDGMENT

KGANYAGO J

- [1] The applicant is a firm of attorneys which has been representing the first, third and fifth respondents (respondents) in third party claims which have been lodged with the intervening party as a result of the injuries they have sustained during motor vehicle collisions. The applicant had successfully finalised the claims of these respondents by obtaining default orders which entails the intervening party to pay the amount the applicant had successfully claimed into the applicant's trust account.
- [2] The intervening party did not pay the amounts which the applicant had successfully obtained by default orders on behalf of the respondents within the 180 days as per the respective court orders. That led to the applicant on the instructions from the respondents to institute contempt of court application against the intervening party. The intervening party opposed the applicant's contempt of court applications. At the hearing of the application, the intervening party was ordered to pay 75% of the respondents' claim directly into the respondents' personal bank accounts and not into the applicant's trust account.
- [3] When the respondents received payment from the intervening party, they did not notify the applicant. That led to the applicant instituting separate applications on *ex-parte* urgent basis against the respondents seeking interim relief that 25% of the portion of the respondents' funds be frozen. According to the applicant, the 25% portion was equivalent to the fees owed by the respondents

to the applicant in terms of the fee agreements entered into between the parties. In the *ex-parte* applications, the applicant did not cite the intervening party as a party to the proceedings. On 7th August 2024 Naude-Odendaal J granted the interim orders, issued a rule nisi with the return date. On the return date the intervening party appeared in court and seek indulgence to file intervening papers. Pillay AJ granted the indulgence, and also made an order consolidating the three applications to proceed under case number 8447/2024. In the application for intervention, the intervening party is also seeking an order that the orders granted by Naude-Odendaal on 7th August 2024 be set aside.

- [4] In its founding affidavit of the intervention application, the intervening party has stated that the applicant at the hearing of its *ex-parte* applications, has failed to appraise Naude-Odendaal fully of the material information that was fundamental to the court's ability to arrive at a just decision. The relevant orders that the applicant has failed to disclose are the De Vos AJ's judgment and order, Sikhwari's AJ's order, Phatudi JP's order; and Tshidada J's order. The applicant has failed to bring it to the attention of the court that on 23rd September 2023 the Gauteng Division of the High Court, Pretoria per De Vos AJ handed down a lengthy judgment in which the applicant was interdicted from executing (and issuing instructions to the sheriff to do so) all present and future writs of execution against the intervening party in (but not limited to) the matters listed therein, pending inter alia the Legal Practice Council's (LPC) application to strike Ntshosa Madiba off as an attorney of the High Court.
- [5] On 21st November 2023 the applicant appeared before Sikhwari AJ on urgent basis in the Mathonsi matter in which the applicant obtained an order to remove the assets of the intervening party. A rule nisi with a return date was issued.

When the applicant obtained this interim order, it did not disclose the De Vos judgment to the court. The applicant withdrew as attorney of record on 16th February 2024 and was replaced by Shabangu Mfundo Sibiyi Attorneys. On the return date the parties appeared before Phatudi JP whereby by agreement the rule nisi was discharged, and the applicant was ordered to file an affidavit explaining why a cost order *de bonis propriis* should not be awarded against it for its failure to disclose the De Vos judgment. The applicant never filed the affidavit, but on 13th May 2024 filed application for leave to appeal the De Vos judgment, which the intervening party submit that it was the applicant's effort to escape the consequences of its failure to file the affidavit per Phatudi JP's order.

- [6] After the filing of the application for leave to appeal, the applicant brought a contempt of court application against the intervening party in matters in which it represented Mathonsi and Nkogatse. The intervening party opposed the application. The matter came before Tshidada J on 10th June 2024 and part of the orders that Tshidada J granted were that (i) the Fund (intervening party) was authorised and directed, to pay 75% (seventy-five percent) of the capital costs directly into the bank accounts of each of the applicants, subject to a verification of their identity and bank accounts by the Fund; and (ii) the Fund was authorised and directed to retain 25% (twenty five) of the capital costs and legal costs owed to the claimants pending the finalisation of a audit exercise by RAF to determine the costs that NMI is entitled to recover from each of the claimants and the finalisation of the LPC's application to strike Mr Madiba from the roll of attorneys.

- [7] The intervening party avers that the interim relief that the applicant has obtained before Naude-Odendaal was for the satisfaction of the legal fees, to which to the knowledge of the applicant has been retained by the intervening party. The intervening party submit that it had paid the other claimants in terms of the Tsidada's order, and that the applicant's claim for monies due to it lies against the intervening party which is the 25% which has been retained for applicant's legal fees pending the finalisation of an audit exercise by the intervening party, to determine the costs the applicant is entitled to recover from the respondents; and the finalisation and outcome of the LPC's application to strike Mr Madiba off the roll of attorneys. The applicant was supposed to have joined the intervening party to its *ex-parte* applications, as the repository of the applicant's retained legal fees. The intervening party has therefore a direct and substantial interest in the subject matter of the application.
- [8] The applicant is opposing the intervening's party application and had submitted that the intervening party has failed to demonstrate that it had a direct and substantial interest in the main application. The applicant has further submitted that the intervening party cannot have direct and substantial interest over the monies belonging to the claimants. According to the applicant, the Chief Executive Officer (CEO) of the intervening party has instituted this application with the sole intention of being vindictive against the applicant as in another related matter the CEO has deposed an affidavit stating that payments of the applicant's fees by the listed clients is a matter between the applicant and claimant. In that other related matter the CEO has further stated that the applicant should engage with its clients for payment in terms of the fee agreements concluded between them.

- [9] The applicant avers that the De Vos judgment is misplaced, in that the applicant is not executing against the intervening party in the main application. That the Tshidada's order relates to capital costs and legal costs owed to the claimants and not the applicant. It is the applicant's contention that the issue of the applicant's fees has got nothing to do with the intervening party.
- [10] The test to be applied in an application for intervention in the proceedings is whether the party applying to intervene has a direct and substantial interest in the subject matter of the litigation, that is a legal interest in the subject matter of the litigation which may be affected by the decision of the court. (See *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*¹). In *Judicial Service Commission v Cape Bar Council*² Brand JA said:
- "It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned...The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that the other parties should have been joined to the proceedings, has thus been held to be a limited one".
- [11] The first, third and fifth respondents are the applicant's clients. The applicant and the respondents have entered into contingency fee agreements. It is trite that where a client and his/her legal representative have entered into the contingency fee agreement, the legal representative is not entitled to recover fees of more than 25% of the total amount he/she had successfully claimed on behalf of his/her client. It seems the intervening party and the LPC are having

¹ 2015 ZACC at para 56

² 2013 (1) SA 170 (SCA) at para 12

issues with the applicant. The Tshidada's order was meant to protect the interest of the respondents or other claimants in such a way that pending the finalisation of the disputes between the intervening party, LPC and the applicants, the respondents or other claimants are not prejudiced. As per Tshidada's order the intervening party is required to pay 75% of the money successfully claimed by the applicant on behalf of the respondents against the intervening party directly into the respondents' personal bank accounts. The first, third and fifth respondents were part of the applicants in the matter that came before Tshidada J.

[12] Paragraph 4 of the Tshidada's order provides as follows:

"Pending the finalisation of an audit exercise by RAF, to determine the costs Ntshosa Madiba Inc is entitled to recover from each of the first to sixth applicants, and the finalisation of the Legal Practice Council's (LPC) application to strike off Mr Ntshosa Madiba from the roll of attorneys, the RAF is authorised and directed to retain 25% (twenty-five percent) of the capital costs and legal costs owed to first to sixth applicants".

[13] As per the Tshidada's order, the intervening party has been authorised and directed to retain 25% of the capital costs and legal costs owed to first to sixth applicants of which these six applicants are inclusive of the first, third and fifth respondents in the current matter. Ordinarily, the intervening party was supposed to have paid the whole amount successfully claimed into the applicant's trust account where the applicant would have deducted an amount not exceeding 25% from the total amount paid into its trust account by the intervening party. In the case at hand, the 25% retained by the intervening party was meant for the 25% which the applicant under normal circumstances should have deducted from the money which would have been paid into its trust account by the intervening party.

- [14] From the wording of the Tshidada's order, two conditions have to be fulfilled before the applicant may be paid the fees due to him by the intervening party. The first condition is for the intervening party to finalise an audit exercise to determine the costs Ntshosa Madiba is entitled to recover from the respondents. The second condition was the finalisation of the LPC's application to strike off Ntshosa Madiba from the roll of attorneys. The applicant in its answering affidavit did not state whether these two conditions have been met, and that the intervening party instead of paying it its fees directly to it, has paid the remainder into the respondents' personal bank accounts.
- [15] As long as the two conditions have not been met, and the intervening party has not released the 25% directly into the personal bank accounts of the respondents, any fight about the fees due to the applicant should be between the applicant and the intervening party. By disregarding the Tshidadas order and going directly to the respondents had the potential to render Tshidada's order moot and not achieve the purpose it was meant for. Further the respondents' payment will be reduced to less than 75% as envisaged by the order. By rendering Tshidada's order moot will be prejudicial to the intervening party as its audit exercise will also be rendered moot.
- [16] Even though the applicant and the respondents have entered into contingency fee agreements, payment of fees due to the applicant in the matters involving the three respondents is been regulated by the Tshidada's order, and the applicant's fees must be paid from the 25% retained by the intervening party, unless the intervening party decide to pay the amount retained into the respondents personal bank accounts, which is not the case in the matters at hand. The intervening party is a necessary party to the proceedings and had

also direct and substantial interest which may be affected prejudicially by the judgment of the court in these proceedings. The intervening party has met the requirements to intervene in these proceedings.

- [17] In an *ex-parte* application the applicant obtains an order without the affected party been given an opportunity to be heard. The applicant is therefore required to act with utmost good faith and place all relevant material facts before court. The applicant is also required to place any defence which he/she is aware that the affected party might raise which might influence the court. On good faith, in *Makwakwa and Others v Minister of State Security*³ Makgoka JA said:

"[19] Since *Schlesinger v Schlesinger*, _ (*Schlesinger*) it is settled that in *ex parte* applications all material facts which might influence the court in coming to a decision must be disclosed. The non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty or rescission. The Court, apprised of the true facts, has a discretion to set aside the interim order or to preserve. The discretion that the court must exercise in this regard, is one in the true sense...

[20] In *Phillips v National Director of Public Prosecutions*, this Court set out the factors which a court should consider in exercising its discretion where there is non-disclosure as including: (a) the extent of the non-disclosure; (b) whether the first court might have been influenced by the proper disclosure; (c) the reasons for the non-disclosure and the consequences of setting the provisional order aside".

- [18] The applicant's failure to join the intervening party and to disclose the Tshidada's order to Naude-Odendaal J was deliberate and intentional. The applicant was well aware that its 25% fees in terms of the contingency fee agreements have been retained by the intervening party, there were conditions to be met before those fees can be released, and those conditions have not yet been met. For

³ [2024] ZASCA 41 (5 April 2024) at paras 19 and 20

the applicant to have disclosed the Tshidada's order, that might have influenced the first court not to have entertained the applicant's application without the intervening party been a party to the proceedings. The applicant was aware that had it joined the intervening party to the proceedings, what defence was the intervening party going to raise, as the applicant was already involved with the intervening party in other similar related matters wherein the intervening party has been consistently raising the same defence. Despite that knowledge, the applicant has failed to disclose that defence in its papers. It was not the first time the applicant was met with an issue of failure to disclose material facts relevant to matter. That happened in the matter that came before Phatudi JP, but the applicant did not learn any lesson out of that, and continued with the pattern of not acting with utmost good faith.

- [19] Since the affected party is not there to answer for himself or herself when the *ex-parte* application is heard, it is therefore not for the applicant to determine which facts are relevant or not, but to place all material facts which might influence the court. It will be up to the court hearing the matter to decide with the facts placed before it what orders to grant. There was no plausible explanation by the applicant why the intervening party was not joined to the proceeding and also why the Tshidada's order was not disclosed to the first court. The applicant was well aware of the consequences of joining the intervening party and also of disclosing the Tshidada's order, yet it deliberately and intentionally failed to do what is right. The first court would not have granted the interim order had the applicant disclosed the Tshidada's order. On the basis that the applicant has failed to act with utmost good faith when it obtained the interim order on *ex-parte* basis, and also that per Tshidada's order the applicant's fees had been retained by the intervening party and the applicant

was well aware of that order, the interim order granted by Nauade-Odendaal J stand to be discharged. It follows that costs follow the result.

[20] In the result the following order is made:

20.1 The Road Accident Fund is granted leave to intervene and oppose the applicant's *ex parte* application as the Seventh Respondent.

20.2 The Rule Nisi issued on 7th August 2024 by Naude-Odendaal J is hereby discharged and the applicant's application is dismissed.

20.3 The applicant to pay the seventh respondent's costs on party and party scale B.



 KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH
 AFRICA, LIMPOPO DIVISION,
 POLOKWANE

APPEARANCES:

Counsel for the intervening party	: Adv R Tshetlo & Adv S Mashiane
Instructed by	: Malatji & Co Attorneys
Counsel for the applicant	: N Madiba
Instructed by	: Ntshosa Madiba Inc
Date heard	: 8th May 2025
Electronically circulated on	: 23rd June 2025