



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

SIGNATURE
DATE 7/07/2025

Case Number: 2022/045994

SIMON MATLESHE SEIMA N.O.

First Applicant

TARYN JANE NEIZEL N.O.

Second Applicant

NURJEHAN ABDOOL GAFAAR OMAR N.O.

Third Applicant

SIBUSISO NDUNA N.O.

Fourth Applicant

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG

First Respondent

NTUWISENI NETSHITAHAME N.O.

Second Respondent

WIAN STANDER

Third Respondent

ZARCO FORMWORK AND SCAFFOLDING CC

Fourth Respondent

SUNHILL CAR WASH CC

Fifth Respondent

SUNHILL LIQUORS CC

Sixth Respondent

Coram: Sawma AJ

Heard: 24 April 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 7 July 2025

JUDGMENT

Introduction

- [1] On the 11th of October 2023 Crutchfield J issued a *Rule Nisi* order calling upon Samnakay Attorneys Incorporated ("SA Inc") to advance reasons, if any, on or before the 7th of February 2024, why it should not be ordered to pay the costs of this application jointly and severally with certain of the respondents on a punitive scale as between attorney and own client, including the cost of two counsel where so employed (the "*Rule Nisi* Order"). The same order declared that the application for removal of the applicants as trustees of the insolvent estate of Mr Martin Ashley Levick was a nullity and set it aside. It also directed that the third to sixth respondents (the "Opposing Respondents") pay the costs of the application jointly and severally on a punitive scale as between attorney and own client, including the cost of two counsel where so employed.
- [2] What now arises for consideration is whether the *Rule Nisi* Order should be confirmed, which in turn requires consideration of, amongst other matters, the reasons advanced by SA Inc in an affidavit delivered on its behalf (the "SA Inc Affidavit") as to why such an order should not be made final.
- [3] To understand the context in which the *Rule Nisi* Order was made and within which the cost order requires adjudication, it is necessary to briefly sketch the background to the application.

Background

- [4] The first to fourth applicants (the "Trustees") are the duly appointed trustees to the insolvent estate of Mr Levick (the "Estate"). The first respondent is the Master of the High Court of South Africa, Gauteng Division Johannesburg (the "Master"). The second respondent was the designated official at the Master's office that presided over both the first and second meeting of creditors of the estate (the "Presiding Officer").
- [5] Mr Levick's estate was provisionally sequestrated on the 23rd of April 2019 and placed into final sequestration on the 4th June 2019. The provisional sequestration arose in consequence of an urgent application instituted by a certain Mr Segal and Segal Supra (Pty) Ltd, who alleged that Levick was

indebted to them collectively in significant amounts and the application was ultimately supported by two other creditors who intervened and who alleged that Mr Levick had misappropriated substantial funds from them. After the sequestration order was granted a number of other creditors came forward claiming that they too had been the victims of fraud

- [6] The first meeting of creditors was held on the 5th of May 2021 and at that time, of the 54 claims submitted to proof, only those of the Opposing Respondents, and that of one Xaba (in an amount of R1668.23) were admitted to proof. In total the claims of the opposing respondents constituted R749 424.40.¹The balance of the 49 claims were rejected.
- [7] A number of the rejected claims were re-submitted for proof at the second meeting of creditors², but they were all rejected by the Presiding Officer. The trustees were of the view that the rejected claims (which included a claim by the South African Revenue Services) ought to have been admitted to proof as they were *prima facie* in order and *bona fide*. The second meeting of creditors, however, rejected the requisite resolution that would have empowered the Trustees in their discretion to compromise or admit claims against the estate. The available minutes of the first meeting of creditors and the available minutes and transcript of the second meeting reflect that Mr Mohammed Samnakay (Mr Samnakay) of SA Inc represented creditors at times although it is not clear that he was present at each of its sittings.
- [8] Ultimately a number of these rejected claims were established against the estate (either by way of litigation or as a result of a special meeting of creditors that was convened to that end), this in the combined sum of R157 436 092.92 and this included the claims of Segal Supra (Pty) Ltd in the amount of US\$1 072 780,00 and SARS in the amount of R28 490 710,86, amongst others. The application papers reveal that action proceedings remain outstanding in respect of other creditors for an amount in excess of R545 million including the

¹ At the time of this application for confirmation of the *Rule Nisi* Order, the third respondents claim had, after an interrogation of the third respondent, been disallowed whilst the claims of the fourth and sixth respondents had become expunged. Although the claim of the fifth respondent remained pending, the deponent to its claim is still to be interrogated concerning its veracity.

² Which was convened over a number of days having been adjourned several times.

claim of Mr Segal for an amount exceeding US\$26.7 million³.

- [9] One of the creditors that established its claims by way of action proceedings was Calculus Capital (Pty) Limited ("Calculus"). It procured judgment in respect of its claims (which exceeded R15 million) on the 26 of October 2022. It thus became the majority creditor in value of proven claims in the Estate and that was the situation when the application proceedings in this matter first arose.
- [10] Shortly prior to judgment in respect of the claims of Calculus and on 3 October 2022, the attorney firm then newly representing the Trustees, ENS Africa Incorporated ("**ENS**") wrote to SA Inc, who was then representing all of the Opposing Respondents, advising of the fact that it had commenced acting for the Trustees. ENS recorded that the claims of other creditors exceeded R100 million and advised that the initially proven claims were to be subjected to investigation in terms of Section 45 of the Insolvency Act⁴.
- [11] What followed shortly thereafter was an application for the removal of the Trustees, deposed to by the third respondent with supporting confirmatory affidavits by the fourth to sixth respondents (the "Removal Application"). The covering email to the removal application was on the letterhead of SA Inc, paragraph 1 of which recorded that it acted on behalf of the Opposing Respondents as creditors in the estate. That application was lodged with the Presiding Officer on the 12th of October 2022 and was provisioned to the Trustees for comment.
- [12] The immediate response by the Trustees, communicated through ENS on the 13th of October 2022, was to write to the Presiding Officer complaining that the application was, amongst other matters, at the instance of creditors friendly to Mr Levick but at variance with the interests of arm's length creditors (in fact prejudicial to their interests) and an abuse. This communication also referenced minutes of the second meeting of creditors that had been attached to the Removal Application, observing that the enclosed minutes were incomplete and made no sense (and that was clearly the case as they were in fact incomplete and made no reference to the rejection of any claims re-submitted to proof) and

³ Or at least that was the case at the time of the filing of the supplementary affidavits by the Trustees.

⁴ Act 24 of 1946

it requested the Presiding Officer to provide “...a proper minute of the second meeting”.

[13] The Presiding Officer first adopted the position, by way of a letter bearing a date stamp of 14 October 2022, that the minutes of the second meeting reflected that there were no claims proven or rejected but rather that the meeting was postponed. ENS, in its written response on the 17th October 2022 directed to, amongst other, the Presiding Officer, the Master (Mr Maphaha) and his deputy, (Mr Mafojane), recorded that this position on the part of the Presiding Officer was, to his knowledge, incorrect and, *inter alia*, referred to correspondence emanating from the Presiding Officer himself dated the 28th of January 2022 referencing his decision at the second meeting of creditors to reject the claim of Grindrod Bank Limited and indicating that his reasons for that rejection would follow.

[14] On the 18th of October 2022 ENS again addressed the Presiding Officer (copying the Master, the deputy master and SA Inc), requesting a complete set of the minutes for each session of the second meeting with particular emphasis on the minutes that recorded the rejection of claims and also requesting the correspondence to creditors whose claims were rejected and in which reasons were furnished for the rejection of those claims. A request was simultaneously made for the minutes of every session of the first meeting of creditors and the correspondence that was sent to creditors furnishing the reasons for the rejection of their claims at that meeting.

[15] Yet a further letter was sent by ENS to the Presiding Officer, copying the Master and his deputy, this on the 21st of October 2022, recording that the requested documents had not been produced and that Presiding Officer’s stance that no claims were rejected at the second meeting of creditors was not only false, but it was also a serious misrepresentation. The letter required the Presiding Officer to provide an explanation for why the minutes did not record what had transpired at the second meeting of creditors and again requested proper and accurate minutes of the second meeting, detailing every claim that was rejected as well as the reasons therefore. The letter culminated by asserting that it had become evident that the Presiding Officer was not suited to the determination of the

removal application and that unless the Master confirmed that a different official would take charge of the file, the Trustees would approach a Court for urgent relief.

[16] By way of an e-mail dated the 21st October 2022, addressed to ENS, the Master, the deputy master and others (including SA Inc), the Presiding Officer changed tack, recording, *inter alia*, that “... *The second meeting of creditors was held and closed. Claims were lodged and all were rejected at the second meeting.... Creditors whose claims were rejected at the second meeting requested reasons. Reasons were furnished within the prescribed period and were [sic] advised of their right to review the Master's decision... The copy of the minutes you referred to correctly reflect what happened at the meeting...The proceedings were electronically recorded as required by the law and there is no misrepresentation at all.*”

[17] This caused the Trustees to complain in an email transmitted by ENS on the 21st October 2022⁵ that: “... *You confirm that claims were rejected at the second meeting... Your minutes record that no claims were rejected nor were any claims not allowed. Your certification of the minute of 28th October was clearly wrong and is misleading... You leave our clients with no alternative other than to apply to Court for the relief referred to in previous correspondence...*”.

[18] The Presiding Officer responded to this email on the 24th of October 2022⁶ asserting that it was clear that there was a misunderstanding as there were several sittings of the second meeting of creditors and stating that he would send transcripts to ENS.

[19] On the 7th of November 2022 ENS again addressed the Presiding Officer⁷ and, amongst other matters, recorded the Trustees disquiet with the Presiding Officer, including his ongoing failure to produce accurate minutes of the second meeting of creditors. The letter also addressed a perceived prioritisation of the interests of Mr Levick in preference to those of creditors, explaining why it had not been possible for the Trustees to lodge an L&D account, reasons that

⁵ Addressed to the Presiding Officer, the Master, the deputy master and SA Inc amongst others.

⁶ Copying the Master, the deputy master Sa Inc and others.

⁷ Copying the Master and the deputy master.

included the fact that SARS as the preferred creditor had requested a special meeting be convened to prove its claim, and the need to ensure that the L&D account included the claims of other creditors. The letter asserted that the only inference that could be drawn was that the Presiding Officer had not conducted his control and oversight over the insolvent estate impartially in the interests of the vast majority of creditors but was instead advancing the interests of the insolvent himself through the friendly creditors. The letter recorded that the Trustees had no confidence in the Presiding Officer's impartiality.

[20] In the founding affidavit to the urgent application the first Applicant confirmed that the Presiding Officer had not produced complete minutes, nor had he furnished ENS with the correspondence to Creditors whose claims had been rejected, as requested. It bears mention that even as late as the 14th November 2022 (that is even after the Urgent Application had been launched) ENS was addressing correspondence to the Presiding Officer, recording that he still had not furnished ENS with a complete set of minutes of the second meeting, notwithstanding the repeated requests.

[21] In short, therefore, the position adopted by the Trustees was that in the prevailing circumstances, there were reasonable grounds to question the impartiality of the Presiding Officer, thus justifying the relief that was then sought by the Trustees in the application proceedings that followed.

[22] That relief was given expression in a two-part application at the instance of the Trustees. Part A was an urgent application (the "Urgent Application") seeking to interdict and restrain the Presiding Officer from determining the Removal Application pending the final determination of the relief sought in Part B. The part B relief (the "Declaratory Application") sought an order in prayer B1 to declare the Removal Application a legal nullity and to set it aside⁸. The Trustees also sought relief in the Declaratory Application to the effect that, should the Master determine to investigate the (alleged) conduct of the Trustees for the purpose of considering their removal, the Master then be required to appoint a

⁸ Which was acceded to by the Court at the time of the issue of the *Rule Nisi* Order. The basis of this relief was that, whilst the Section 60 of the Insolvency Act permits the Master to enquire into and bring about the removal of trustees, it does not permit of an application at the Instance of Creditors to remove the trustees.

different assistant Master to that end.

[23] The third respondent deposed to an answering affidavit for the purpose of resisting the Urgent Application with the fourth to sixth respondents having filed confirmatory affidavits thereto (the "Answering Affidavit"). They were again represented by SA Inc. The Opposing Respondents reserved the right to deal with the content of the Declaratory Application at a future time but ultimately no such resistance eventuated. The Urgent Application was resolved, not by argument, but instead by way of an order made by consent between the parties which provided that, pending the adjudication of the relief sought in the Declaratory Application, the Presiding Officer was interdicted and restrained from determining the Removal Application, the costs of the Urgent Application being reserved for determination in the Declaratory Application.

[24] Consequent to the issue of that order the Trustees summoned the third respondent to an interrogation⁹ at which he was represented by SA Inc, during the course of which the third respondent testified that he had no personal knowledge of the content of the removal application or answering affidavit, each of which had been prepared by Mr Samnakay of SA Inc. He testified that that Mr Samnakay had approached him, agreeing to act on his behalf on a no fee basis. The third respondent specifically testified that he had paid not one cent to SA Inc. The affidavits, so he testified, had been prepared and presented to him and he merely signed both the removal application and the draft answering affidavit that had been placed before him by SA Inc. The third respondent testified that he had no regard to the serious and defamatory allegations that were being made under oath against the Trustees.

[25] In light of the significant events that had transpired since the launch of the application, which included;(i) the evidence given by the third respondent at the enquiry alluded to above: (ii) the additional claims of creditors either proven or admitted to proof; and (iii) the expungement of claims of certain of the Opposing Respondents that had by then occurred, the Trustees caused a supplementary affidavit in support of the Declaratory Application to be filed and which was deposed to by Mr Katz of ENS and supported by confirmatory affidavits deposed

⁹ Now presided over by a different assistant master.

by the Trustees (the “First Supplementary Affidavit”). That affidavit not only appraised the Court of the intervening events that had transpired, but it also gave notice of an application to strike out the Opposing Respondents answering affidavit. It also (again) addressed the allegations that had been made against the Trustees.

[26] A further supplementary affidavit (the “Second Supplementary Affidavit”) was filed on behalf of the Trustees (again deposed to by Mr Katz of ENS), the specific purpose of which was to, firstly, appraise the Court of the fact that SA Inc had sought to withdraw as attorney of record on behalf of the Opposing Respondents and, secondly, to give notice of the cost order that would be sought against SA Inc at the hearing of the matter. What followed was the hearing of the matter at which time the *Rule Nisi* Order issued.

[27] Subsequent to the issue of the *Rule Nisi* Order the SA Inc Affidavit was filed (deposed to by Ms Fatima Samnakay) for the purpose of opposing confirmation of the cost order against it.

The issue of costs against SA Inc

[28] As the Constitutional Court has observed,¹⁰ the imposing of punitive costs on the one hand and costs *de bonis propriis* on the other, are two different issues.¹¹ The tests for these two types of costs orders may however overlap¹² but they are extraordinary in nature and should not be awarded “willy-nilly” but rather only in exceptional circumstances.¹³

[29] Punitive costs serve to convey a Court’s displeasure at a party’s reprehensible conduct and is justified where that conduct is extraordinary and deserving of the Court’s rebuke.¹⁴ A *de bonis propriis* costs order on the other hand is made where there has been a gross disregard for professional responsibilities and where the acts are both inappropriate and egregious.¹⁵

¹⁰ In *Ex Parte Minister of Home Affairs and Another* 2024 (2) SA 58 (CC).

¹¹ *Ibid* at 93H [91] and the law there referred to.

¹² *Ibid* at l.

¹³ *Ibid* at 93I-94A [91] and the law there referred to.

¹⁴ *Ibid* p 94B at [92].

¹⁵ *Ibid* p 94E at [93].

[30] An officer of the Court may not simply convey allegations to a Court where there is good reason to believe that they are not truthful or factually based and this duty becomes more acute where imputations of dishonesty are conveyed.¹⁶ The standard that is required has been expressed in these terms;

*"...I say 'all he honourably can' because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court."*¹⁷

[31] Before applying these legal principles to the facts, the status of the First and Second Supplementary Affidavits requires consideration. That is because, at the hearing counsel representing SA Inc¹⁸ submitted that, due regard being had to the general rule regarding the number and timing of affidavits in motion proceedings, the Court ought not to take into account four sets of supplementary affidavits (being the First Supplementary Affidavit, the Second Supplementary Affidavit, the SA Inc affidavit and the Trustees' affidavit in reply thereto. That was the case because, so it was submitted, they were not yet before Court.

[32] The difficulty with this submission relating to the First Supplementary Affidavit and Second Supplementary Affidavit is they served before Crutchfield J antecedent to the grant of the *Rule Nisi* order, and it was plainly issued on the strength thereof. That could only have been the case if the Court, in issuing the *Rule Nisi* order, considered those affidavits to in fact be before Court. In any event this rule of practice at issue is not one cast in stone and is subject to the exercise of a judicial discretion, due regard being had to the administration of justice. That is particularly the case, of course, where new information has come

¹⁶ *Sepheka v Du Point Pioneer (Pty) Ltd* [2018] JOL 40493 (LC) Case No. J267/18 at [10] citing *De Lacy and Another v South African Post Office* 2011 (9) BCLR 905 (CC) at [120]

¹⁷ *Van der Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA) ([2007] ZASCA 16 at [16] quoting from *Rondel v Worsley* 1967 (1) QB 443 (CA) at 502

¹⁸ In fairness to counsel representing SA Inc it requires mention that he was newly brought into the matter in the week preceding argument.

to light and where it is appropriate to appraise the Court of that information.¹⁹ That is the case here in regard to both the First Supplementary Affidavit and the Second Supplementary Affidavit. What is more it was appropriate that the Trustees give proper notice to SA Inc of the nature of the cost order that would be sought against it, and it matters not that this was brought about by way of the Second Supplementary Affidavit, particular regard being had how concise that affidavit is.

[33] SA Inc was, moreover, afforded the opportunity of responding to each of those affidavits. It did not object at the time that these affidavits were not before Court and thus required no response. To the contrary, it in fact took advantage of that opportunity and filed the SA Inc Affidavit. It would in these circumstances not be in the interests of justice to ignore either the First Supplementary Affidavit, the Second Supplementary Affidavit or indeed the SA Inc Affidavit, particularly in circumstances where the Court is required to exercise oversight in respect of the conduct of officers of Court, including SA Inc²⁰.

[34] The thrust of the complaint made against SA Inc in the Second Supplementary Affidavit was, inter alia, that the Answering Affidavit was replete with incorrect and false allegations and that SA Inc were aware that those allegations were both incorrect and false.

[35] In adjudicating that complaint sight must not be lost of the Trustees' apprehension of bias on the part of the Presiding Officer, the factual basis for which has already been set out in this judgment, which caused the launch of the Urgent Application, and which appears to be perfectly reasonable.

[36] On the affidavits it was common cause that the Presiding Officer had rejected the claims of other creditors both at the first meeting of creditors and at the second meeting of creditors. The Answering Affidavit did not place in dispute the multiple attempts by ENS to procure both complete minutes and reasons for the rejection of the claims of creditors. Instead, the Answering Affidavit took the position that, because the Presiding Officer had already advised the Trustees

¹⁹ See *General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122 (GP) at 136I-137C [32-33]

²⁰ *Mavundla v MEC, Department of Co-Operative Government and Traditional Affairs, KwaZulu-Natal* 2025 (3) SA 534 (KZP) at 545 [24]

as far back as the 14th October 2022 that he had provided complete minutes to them²¹, they accordingly ought to have known that he had become "*functus officio*". The Answering Affidavit went so far as asserting that the claims submitted by creditors at the second meeting were in fact not in order and that, as the transcripts are said to demonstrate, there was "*robust and complex legal argument*" placed before the Presiding Officer which ultimately resulted in his decision to reject certain claims and admit others. In purported substantiation of this allegation the Answering Affidavit adduced what is said to be the transcript of the second meeting of creditors.

[37] The transcript so adduced does not, however, bear out the allegations made in the Answering Affidavit. Instead, the transcript reflects no rejection of claims at all, nor does it reflect the admission of any claims. It is extraordinary that the answering affidavit should contain, or that SA Inc as the attorney of record should permit them to contain, allegations of that nature which, if the transcript is to be accepted as reflecting the events at the second meeting of creditors, are then untrue.

[38] But in any event, even if the transcript reflected the rejection of claims, that would not be relevant to the question of whether the Presiding Officer had provided complete minutes or a transcript to the Trustees. That is particularly the case against the backdrop of the correspondence from ENS. If in truth there was a complete transcript or complete minutes that had been provisioned to the Trustees one would have expected cogent evidence to be adduced to demonstrate that and to gainsay the content of the ENS correspondence on this score and the evidence to the converse in the Founding Affidavit. But there is no such evidence. And it is SA Inc, not its lay clients, that would be aware of these facts.

[39] The answering affidavit did not rest with the contention that the Trustees were possessed of complete minutes. It also sought to ascribe malfeasance to the Trustees vis-à-vis their requests for minutes, asserting that "*The initial and subsequent request for the minutes could only have been made for the purpose of delaying the Master so that the applicants could come up with a scheme to*

²¹ That is not what the letter recorded - see para 12 above.

prevent the Master from adjudicating the removal application altogether, which then manifested in this interdict application being launched ...” (emphasis provided).

[40] So stated SA Inc. permitted the filing of an answering affidavit opposing the urgent application premised on an incorrect factual matrix that then ascribed wrongdoing to the Trustees premised thereon, when in truth the central facts upon which the Urgent Application was based²² were really not open to challenge at all, something that SA Inc ought to have known.

[41] But that is not where the matter ends because the Answering Affidavit also complained that the Trustees were not seriously concerned about obtaining the minutes for the purpose of responding to the removal application, nor were they worried about the Presiding Officer being seized with the matter as, so it was alleged, if the Trustees had been seriously concerned about these issues they would have escalated the matter to the Deputy Master or Chief Master. Yet, as already observed, that is precisely what the Trustees had caused ENS to do. What is more, the letters at issue had already been adduced in these proceedings’ antecedent to the filing of the answering affidavit. As emerges from the background facts, certain of them included SA Inc as an addressee. A mere perusal of the founding affidavits to the Urgent Application makes this clear.

[42] It is accordingly inexplicable that the answering affidavit should have contended for the converse or that SA Inc should have permitted it to do so. On this issue, in the first supplementary affidavit Mr Katz observed that not only are these allegations false, but they are also false to the knowledge of SA Inc. How could it be otherwise where one of the attorneys at SA Inc (presumably Mr Samnakay) would have been required to peruse the founding affidavits in preparing a response thereto. However, it was for SA Inc to explain the matter to this Court. In light of this reality what must be asked is what explanation is provisioned in the SA Inc Affidavit concerning these allegations made in the Answering Affidavit and justifiably described by the Trustees as false. The simple answer is that the issue is not addressed. That is because SA Inc in its affidavit adopted the

²²Being the presiding officer’s repeated failure or refusal to provision proper minutes and related documentation reflecting the basis for the rejection of claims and the rationale therefor, leading to the reasonable apprehension of bias.

position that all allegations implicating SA Inc come from the third respondent himself, which in the circumstances, is no explanation at all.

[43] The imputation of dishonesty on the part of the Trustees is also not limited to the two instances identified above. Within the body of the removal affidavit there is a complaint identified as “*MATTER 6*”, which advances serious allegations against the Trustees, all of which essentially complain that it was not any of the Trustees directing the affairs of the estate but rather one Ms Khammissa who, it appears is the sister of the third applicant. On the basis of these allegations the affidavit proceeded to submit “...*that the trustees had left their duties to Ms Khammissa...*” speculating that the third applicant was merely a front for Ms Khammissa and that this demonstrated negligence on the part of the Trustees who were communicating with, and taking instructions from, a non-trustee whose interest in the matter was said to be unknown. The affidavit queries whether Ms Khammissa was billing the estate for unappointed services at the cost of creditors and even queried whether the third respondent in fact existed or was in the country. The removal application proceeds to assert that it appeared as if the Trustees were “*clueless*” as to who was administering the estate, accusing the Trustees of not acting in the interests of the general body of creditors, of having misused funds and of having benefited attorneys and law firms to the detriment of the Opposing Respondents. Crucially, however, each of the complaints are said to have been ascertained “*through the offices of our attorneys*”.

[44] The Answering Affidavit itself accuses the Trustees of breaches of trust and dishonesty and asserts that the proceedings commenced by them reflects “...*their desperation and worry about the masters decision...*”, is not one intended to serve the interests of the estate but “...*it is patent that it is their own financial interests and reputation that they are striving to protect*”, and describes the proceedings as a “*tactic*”. The First Supplementary Answering Affidavit describes these allegations as false, cynical and reckless, observing that they are unsupported by any evidence, that the third respondent has distanced himself from them and that they have been contrived by “...*attorneys such as Samnakay*”

- [45] The SA Inc Affidavit, aside from asserting that the grievances are those of the third respondent arising from many consultations, does not seek to address the issue at all. As already observed, SA Inc appears to adopt the position that, because it asserts that the instructions emanated from the third applicant, it was not necessary for it to demonstrate that these serious allegations were otherwise cognisable and supported by any proper evidence. That approach of course ignores the duty resting upon SA Inc, the blame ascribed to it and the fact that the *origin et origo* of many of the allegations are expressly said to be SA Inc, this in an affidavit prepared under the watch of SA Inc itself.
- [46] These matters alone would, in light of the principles applicable thereto justify both a punitive and *de bonis propriis* cost order. But there are additional grounds that militate for the same outcome.
- [47] A striking feature of the removal application (especially when then seen within the context of the third respondent's evidence at the enquiry), is that in paragraph 5 thereof it is said that "*the first meeting of creditors was convened to be held on 10 February 2021 and was adjourned from time to time and closed on 5 May 2021. Our clients are amongst the 5 claims that were proven and numbered as...*" (emphasis provided). Paragraph 44 of the affidavit, to the same effect, proclaims that "*at the first meeting of creditors our clients voted for the appointment of...*" (emphasis again provided).
- [48] These allegations support the proposition that SA Inc had a greater role in crafting the Removal Application than merely capturing their clients' version and that is true also of the Answering Affidavit from the content itself. That is, of course, precisely what the third respondent testified to at his interrogation.
- [49] Before considering the response on the part of SA Inc to the evidence of the third respondent at his interrogation, it is first necessary to mention that counsel representing SA Inc, reliant upon the judgment in *Langham and Taylor, NNO v Milne*,²³ contended that the evidence given by the third respondent at the interrogation constitutes hearsay evidence and is inadmissible unless confirmed by the third respondent under oath in these proceedings. It was also quite

²³ 1961 (2) PH C 19 (NPD)

correctly contended that due regard must be taken of the fact that the third respondent had deposed to each of the affidavits in the removal application and urgent application respectively and thus, in giving the evidence that he did at the inquiry, he was contradicting his prior evidence given under oath.

[50] As to the hearsay evidence issue, our law has moved on from the principles expressed in the *Langham* judgment²⁴ in that, as explained by Mullins AJ in the matter of *Premier FMCG (Pty) Ltd v Baker*,²⁵ the question of admissibility of such evidence is now regulated by section 3 of the Law of Evidence Amendment Act²⁶ and might be of such a nature as to persuade a Court in appropriate cases to permit a litigant to rely thereon if it would be in the interests of justice to do so²⁷.

[51] Bearing in mind that the relevance of the evidence of the third respondent as it applies to these proceedings, relates to the conduct of an officer of this Court, that SA Inc has already been specifically called upon to account for its conduct by this Court (by way of the *rule nisi* order which in turn would have taken into account that very evidence) and the fact that SA Inc accepted the invitation, it would not be in the interests of justice for the Court to “close its eyes” to the evidence by excluding it on the basis that it is hearsay.

[52] An important factor in considering a costs order is the nature of the response on the part of SA Inc to the evidence given by the third respondent. The first notable aspect to the SA Inc Affidavit is the fact that it was deposed, not by Mr Samnakay²⁸, but rather by Fatima Samnakay. Why that is the case, absent a confirmatory affidavit by the person apparently involved, is not explained in the SA Inc Affidavit.

[53] Of equal consequence is that, although the SA Inc Affidavit asserts that the content of these affidavits was the result of multiple consultations, including consultations with the third respondent he having given his approval for its

²⁴ *Supra*

²⁵ 2023 (5) SA 279 (GP)

²⁶ Act 45 of 1988

²⁷ Fn 25 *supra* at 285 E-G [14.4]

²⁸ Who, as observed, was the attorney that attended at certain of the first and second meetings of creditors and who was identified by the third applicant as being responsible for both the removal application affidavit and the Answering Affidavit, and who was also identified as the source of the “MATTER 6” allegations.

content, no specificity is provided, the affidavit instead being premised on bald uncorroborated allegations.

[54] Particularly concerning is the fact that SA Inc has evasively addressed the third respondent's evidence that he was approached by Mr Samnakay, and it has not addressed the third respondent's evidence that he was to be charged no fees and has in fact paid not a single cent. As to the former issue, all that the SA Inc Affidavit says is that, prior to the second meeting of creditors, an unnamed representative of the third respondent, who had already proven a claim at the first meeting of creditors, approached SA Inc to represent the third respondent. As to the latter issue, counsel representing the respondent was constrained to refer to Annexure "SF5" to the SA Inc affidavit which, so it was argued, implied that the third respondent did enjoy liability for costs. That annexure constitutes a WhatsApp exchange that does not identify the participants to it. The SA Inc affidavit simply alleges that it was an exchange between the third respondent on the one hand and "*our offices*". There is not even an identification of when, where and why the exchange took place. Its content simply communicates that the cost of engaging Senior Counsel would be more than the claim, without identifying who would be liable for those costs or what litigation, and against whom, was then contemplated.

[55] It is also noteworthy that, whilst the SA Inc affidavit asserts in paragraph 17 that the third respondent provided SA Inc with an affidavit of his grievances that was initialed and signed by him (it being asserted that not even in attending to the *ad jurat*, was SA Inc involved), in paragraph 22 and in contradistinction the allegation is advanced that its content was compiled during consultations and that the third respondent was given a copy for his approval. This contradictory stance is not explained.

[56] Whilst it is most unfortunate that the Court should arrive at this conclusion, the unexplained conduct of SA Inc in this matter leaves the Court with little choice. On the affidavits before me the conduct is such that it is deserving of a punitive costs order. It is indeed extraordinary and deserving of rebuke. SA Inc have not only permitted affidavits to be deposed communicating factually untrue matters to the Court, but there is also every reason to believe that the attorney

at issue involved at the material time would have been aware thereof. No endeavour has been made by SA Inc to contend for the converse. Serious allegations of impropriety have been made which, in the case of the minutes simply cannot withstand scrutiny, and in the case of "MATTER 6" despite challenge and despite the allegations being predicated upon attorneys at SA Inc, have not been addressed. Absent a proper explanation, there is good reason to believe that the role that SA Inc played in this litigation went well beyond that of an attorney simply representing a client, yet SA Inc essentially paid lip service to these matters, depositing an affidavit in answer that was bald, vague and evasive.

[57] The urgent application was driven by a perfectly understandable concern at the conduct of the presiding officer. Whether or not that conduct can be explained by the Presiding Officer,²⁹ no such explanation was proffered by the Opposing Respondents and instead SA Inc permitted the Opposing Respondents to bring about opposition to the urgent application on an unwarranted basis.

[58] This conduct, at one and the same time, constitutes a serious disregard by SA Inc of its professional responsibilities and is inappropriate and egregious.

The Order

[1] I Accordingly made an order in the following terms.

1. The *Rule Nisi* issued on the 11th of October 2023 is confirmed.
2. Samnakay Attorneys are directed to pay the costs of this application, jointly and severally with the third to sixth respondents on a punitive scale between attorney and own client, including the cost of two counsel where so employed.


AG SAWMA AJ
JUDGE OF THE HIGH

²⁹ It is notionally possible that the presiding officer is possessed of an acceptable explanation but if so none emerges from the affidavits

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