

REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

Case No.: 53972/2012

Date: 17 OCTOBER 2014

Not reportable

Not of interest to other judges

In the matter between:

WYCLIFFE THIPE MOTHULOE t/a MOTHULOE

ATTORNEYS

Applicant

and

KGAFELA KGAFELA II

1st Respondent

BAKGATLA-BA-KGAFELA

TRIBE

2nd Respondent

SHERIFF OF THE HIGH COURT,

JOHANNESBURG NORTH

3rd Respondent

STANDARD BANK OF SOUTH AFRICA LTD

4th Respondent

THE LAW SOCIETY OF THE NORTHERN PROVINCES

(incorporated as the Law Society of Transvaal)

5th Respondent

In re:

KGOSIKGOLO KGAFELA KGAFELA II

1st Applicant

BAKGATLA-BA-KGAFELA TRIBE

2nd Applicant

and

WYCLIFFE THIPE MOTHULOE t/a MOTHULOE

ATTORNEYS

1st Respondent

MOTHULOE ATTORNEYS, NOTARIES AND

CONVEYANCERS

2nd Respondent

THE LAW SOCIETY OF THE NORTHERN PROVINCES

(incorporated as the Law Society of Transvaal)

3rd Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] The applicant sought relief on the following terms:

1.1 that the non-compliance with the prescribed forms and service in terms of the Rules of Court, be and is hereby condoned and it be and is hereby ordered that the matter be disposed of as one of urgency in terms of Rule 6(12) of the Rules of Court.

1.2 That the attachment in execution by the third respondent on 27 August 2013, purportedly in terms of the *rule nisi* issued out of the above Honourable Court under case number 53972/2012 on 12 November 2012 and which rule was confirmed and made final on 30 July 2013, without a warrant of execution first having been obtained from and issued by the Registrar of the above Honourable Court, be and is set aside.

1.3 That the purported attachment by the third respondent, referred to in prayer 1.2 above , of "all the

second applicant's (sic) right, title and interest in and to funds held by applicant (sic) in trust acc no: 001651765 as per court order" on 27 August 2013 be and is hereby set aside.

1.4 That the first, second, third and fourth respondents be and are hereby ordered to uplift any attachment alternatively any "hold" imposed on applicant's trust account number 001651765 with immediate effect and restore applicant's right to operate freeiy on the said account.

1.5 That the first, second, third and fourth respondents be and are hereby ordered jointly and severally to pay applicant's costs of this application, such costs to be taxed on the scale applicable as between attorney and client and to include the costs incurred in employing Senior Counsel.

[2] The fourth respondent has not entered an appearance to defend and the third respondent will abide by the order of the court. No relief is sought against the fifth respondent. Should applicant be successful, it is seeking a costs order against the first to fourth respondents.

[3] In view of the urgency of the matter as it relates to the trust account of an attorney, on 15 October 2013 I granted an order in terms of prayers 1.1 to 1.5 and the issue of the rescission of the order granted on 30 July 2013 and costs were reserved.

[4] These proceedings arise from a *rule nisi* obtained by the first and second respondents on 20 September 2012 against the applicant and his law firm. The order was confirmed on 20 September 2013. The *rule nisi* was issued on the following terms:

"2.1 that the sheriff be ordered and authorised to attach any and all funds

2.1.1 held by

2.1.1 **WYCLIFFE THIPE MOTHULOE**, a duly admitted attorney, practising as such under the name and style of **MOTHULOE ATTORNEYS, NOTARIES AND CONVEYANCERS'** or **MOTHULOE INCORPORATED'**;

2.1.1.2 A firm of attorneys trading under the name and style **MOTHULOE ATTORNEYS, NOTARIES AND CONVEYANCERS'** or **'MOTHULOE INCORPORATED'**;

2.1.2 for and on behalf of the Bakgatla-Ba-Kgafela Traditional Council, Bakgatla-Ba-Kgafela Traditional Authority, Bakgatla-Ba-Kgafela Traditional Administration, **NYALALA JOHN MOLEFE PILANE** in his capacity as the (former) Kgosi of the Bakgatla-Ba-Kgafela traditional community at Maruleng/Saulspoort, the Bakgatla-Ba-Kgafela Tribe, and/or any one

or more the companies listed on Annexure "A" hereto;

2.1.3 in the trust account in the name of '**MOTHULOE ATTORNEYS TUST ACCOUNT**', Account Number [...], Killarney Branch of Standard Bank, any other trust account, held by '**MOTHULOE ATTORNEYS, NOTARIES AND CONVEYANCERS**' or **MOTHULOE INCORPORATED**' or '**MOTHULOE INC.**' with any registered bank in South Africa (the "Trust Account(s)").

2.2 That

2.2.1 **WYCLIFFE THIPE MOTHULOE**, practising under the name and style of '**MOTHULOE ATTORNEYS, NOTARIES AND CONVEYANCERS**' or '**MOTHULOE INCORPORATED**' and

2.2.2 A firm of attorneys trading under the name and style '**MOTHULOE ATTORNEYS, NOTARIES AND CONVEYANCERS**',

be interdicted from passing any debits on, make payments from or cause any debits to be passed on, or payments to be made from the Trust account(s).

2.3 That paragraphs 2.1 (inclusive of paragraphs 2.1.1 to 2.1.3) and 2.2 (inclusive of paragraphs 2.2.1 and 2.2.2) of this order shall operate as an interim order pending the finalisation of an action or application to be instituted by the Applicants against the First Respondent within 30 days from the confirmation of this order in terms of paragraph 3 below, inter alia for:

2.3.1 The rendering of accounts (inclusive of all client files, invoices, vouchers, proof of payments, cheques stubs, bank statements in any manner relating to the matters stated in **Annexure "B"** hereto), and debatement thereof;

2.3.2 payment of such amount that is found to be owing by First Respondent to Bakgatla-Ba-Kgafela Traditional Council, and/or the Bakgatla-Ba-Kgafela tribe;

2.3.3 Costs

failing which Applicants shall pay the costs of this application.

3. That the First Respondent be ordered to provide reasons before the return date of the rule nisi being 2 October 2012 at 10h00 or as soon as the matter can be heard thereafter, why the order in terms of paragraph 2 (inclusive of paragraphs 2.1, 2.2 or 2.3) above, should not be made final.

4. That the costs of this ex parte application be costs in the cause of the application or action referred to in paragraph 2.3 above."

[5] It is common cause that:

5.1 on 27 August 2013 the third respondent, on the instructions of the first and second respondents' attorneys sought to execute the order.

5.2 the applicant had through its trust account received an amount of R 766 309.00.

5.3 at the time the third respondent sought to execute on the order, the rule issued on 30 July 2013 had not been served on the applicant nor was a writ of execution issued by the Registrar.

5.4 pursuant to the actions of the third respondent, the fourth respondent placed an embargo on the applicant's trust account.

[6] It has been submitted on behalf of the applicant that a punitive costs order should be imposed on the first to third respondents in that the application to interdict the applicant against it utilising its trust account and the execution of the order was done with malicious intent on the following grounds:

6.1 the first and second respondents were aware that the applicant held no funds on their behalf. It was contended on

behalf of the applicant that the amount of R 766 309.00 which appears to be in dispute was payment for fees and disbursements which were due after the respondents (first and second) had been invoiced;

6.2 that the first and second respondents, if they had issues with the manner in which the applicant had billed them, should have laid a complaint with the fifth respondent who is statutorily empowered to deal with such matters;

6.3 that the order sought and granted was deliberately couched widely so as to disable the applicant from dealing with its trust account even in relation to its other clients;

6.4 that the first and second respondents' attorneys and the sheriff acted in contravention of section 78 (7) of the **Attorneys Act** 53 of 1979 ("the Act") which provides, *inter alia*, that no amounts in credit in an attorney's trust account may be attached on behalf of any creditor of the attorney. It was submitted that the attorneys in particular ought to have known about this prohibition;

6.5 that the third respondent had acted contrary to the provisions of Rule 45(8) of the rules of Court

which requires a writ of execution to be issued by the Registrar after notice has been given to all interested parties. The applicant was neither notified nor served with a writ.

[7] Furthermore, it was submitted on behalf of the applicant that the order authorising the restraining of the applicant's trust account should be rescinded in terms of Rule 42 in that it was granted as a result of a mistake common to both parties.

[8] On behalf of the respondents it was argued that a punitive cost order against the respondent was not called for in that the moneys deposited into the applicant's trust account were not his but monies belonging to the respondent. Furthermore it was argued that Rule 45(8) it was not necessary for the Registrar to have issued a writ in execution. With regard to the request by the applicants that the order of 12 November 2012 be rescinded in terms of Rule 42, it was submitted on behalf of the respondents that it was not necessary for the order to be rescinded.

[9] The provisions of section 78 (7) are peremptory. The respondents' attorneys, as officers of this court, must have been aware of the prohibition against the restraining of an attorneys trust account under any circumstances except as provided for in the Act. The respondents' attorneys in instructing the sheriff to execute against the applicant's trust account contrary to the provisions of the Act cannot be countenanced. Even if the respondents had a claim against the applicant, their attorneys should have advised them that once their alleged monies are in the applicant's trust account, their only route to seek relief would be through the fifth respondent who are empowered to deal with such matters. From the way the respondents acted it is clear that they had malicious intent, particularly as they had already been invoiced by the applicant when the money was paid to the applicant. At the hearing of this matter not much opposition was put on behalf of the respondents to the order finally made. This to my mind is indicative of the fact that they should not have sought the order granted, moreover an order as wide as the one granted, thereby incapacitating the applicant from conducting business with its other clients. I am satisfied that the applicant has shown sufficient cause for the relief it is seeking with regard to the costs of this application. Furthermore, I am satisfied that the use of senior counsel was necessary in this matter.

[10] I can find no fault in the manner in which the third respondent acted in this matter. The writ he was expected to execute did not specify the amounts which were allegedly held by the applicant on behalf of the respondents. His brief was to restrain the trust account of the applicant. I therefore do not see any reason why it should be held responsible for costs. Furthermore, the fourth respondent has not opposed this application and therefore a cost order against it would not be justified.

[11] With regard to the issue of whether this court should rescind the order of 12 November 2012, I am of the view that it is not necessary to deal with the issue of the rescission of that order in that the order granted in

this matter cancels the previous order.

[12] Accordingly the following order is made:

'The respondents are ordered to pay the costs of this application on an attorney and client basis, including the costs of senior counsel, jointly and severally the one paying the other to be absolved.'

NP MNGQIBISA THUSI

Judge of the Gauteng High Court

Appearances:

For the Applicant: Adv DPT Rossouw

Instructed by: Friedland Hart Solomon Nicholson

Counsel for Respondents: Adv CAC Korff

Instructed by: Maponya Inc