IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓
22.1.2016
DATE SIGNATURE

CASE NO: 53333/2010

DATE: 22/1/16

IN THE MATTER BETWEEN

DIPHALA ASNATH NTWAMPE	1ST APPLICANT
NTWAMPE JUSTICE NTWAMPE	2ND APPLICANT
THE ROYAL FAMILY OF MAGADIMANA NTWENG (MATIBIDI GROUP)	3RD APPLICANT
AND	
THE ROYAL FAMILY OF MAGADIMANA NTWENG (MAMPURU GROUP)	1ST RESPONDENT
SEGOPOTJE SCARA MAMPURU	2ND RESPONDENT
NKAHOLENG JOHANNES NTWAMPE	3RD RESPONDENT
MANYAKU MARIA THULARE	4TH RESPONDENT
MASHUPJE HANS NWAMPE	5TH RESPONDENT
MORWAMOCHE ANDREW NTWAMPE	6TH RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] This is an application seeking "an order setting aside the judgment granted by the honourable court on the 28th August 2014" and "an order that respondents' attorneys J M Rampora Attorneys pay punitive costs on an attorney and client scale *de bonis propriis*". The application is opposed.

BRIEF BACKGROUND FACTS

[2] The rescission of judgment applications by the Premier of the Limpopo Province and the Royal Family of Magadimana Ntweng Mampuru Group were consolidated by the court on 14 June 2012. The applications became an action as set out in the order of the court. The first and second plaintiffs were ordered to pay the costs as set out in paragraphs 12 and 13 of the court order. Respondents' attorneys then issued a warrant of execution on 12 September 2012. The taxed costs appear to have been in excess of R90 000,00. Respondents then brought an application to have the warrant of execution suspended pending the finalisation of the main case. The respondents, on 28 August 2014 and on an unopposed basis, took the order which was granted by my brother Bam J. My brother Bertelsmann J ordered the consolidation of the two applications on 14 June 2012. Applicants contend that respondents ought not to have taken the order by default as it, at the time, had become clear that the application had been opposed. Applicants have now brought this application to have Bam J's order reversed. The application is opposed. The respondents served their answering affidavits out of time and did not appeal the order of Bertelsmann J nor file heads of argument.

[3] The issue that the court has to determine is whether the order that was taken by default was competent.

[4] The matter is based on the notice of motion annexure "NM" to the founding affidavit. The notice of motion sought an order suspending the warrant of execution issued by the attorney on 12 September 2012. According to the notice of motion, the applicants in this matter, were to notify the respondents' attorneys in writing on or before 5 August 2014 if they intended opposing the application. They were then, on or before 19 August 2014, to file their answering affidavit if they so chose.

[5] The respondents contended that they received no notification that the applicants were defending the application. They further contended that they also did not receive the answering affidavit. On that basis an order was then taken by default. They, as a result, should not be blamed for what happened.

[6] Applicants' version is that respondents' attorneys were duly notified that the application was opposed. Indeed applicants' notice of intention to oppose was served on respondents' correspondents' attorneys on 4 August 2014 as is evidenced by their stamp dated the same date. Applicants' answering affidavit was served on the same correspondents on 21 August 2014 as is evidenced by their date stamp on page 52 of the papers. Applicants, as a result, contend that respondents' attorneys were then aware that the matter was duly opposed. This appears to be the case.

[7] Applicants contend that respondents' attorneys, aware of this position, proceeded to instruct counsel to move the application on the unopposed basis. It is respondents' attorneys' contention that they were unaware that the application was opposed when the order was taken. Applicants contend that the court was misled when the order was taken and that respondents' attorneys' conduct in misleading the court had been unethical and unprofessional.

[8] The court has to answer whether respondents' attorneys' conduct was indeed below par.

[9] Applicants contend that instead of being given 15 days within which to file their answering affidavit they were given 9 days. Their further contention is that the Practice Directive was not complied with in that the notice of motion set the matter down on a Thursday instead of a Tuesday. The contentions, in my view, appear correct.

[10] It is clear that the notice of intention to oppose and the answering affidavits were served on respondents' attorneys' correspondents on 4 August and 21 August 2014. This was enough to inform respondents' attorneys of the status of the application. It was the respondents' correspondent attorneys' duty to duly inform their instructing attorneys of the status of the application. The documents, in my view, were duly served on the respondents' attorneys. The matter became opposed.

[11] Respondents' attorneys contend that service of the documents on their correspondents was not communicated to them. It may well be so. However, does that make the application unopposed? I think not.

[12] Respondents' attorneys contend that applicants' attorneys' letter to their attorneys dated 27 August 2014 did not expressly state that the matter was to be postponed and that they believed that applicants were intending to ask for a postponement in court in order to file their opposing papers. Should respondents' attorneys, upon receiving the letter of 27 August 2014, have contacted applicants' attorneys they surely would have been informed that the matter had become opposed. The contents of the letter clearly show that there was something wrong with respondents' application. This should have alerted respondents' attorneys to the fact that the matter was possibly opposed. They ought to have enquired from their correspondents if the matter indeed was unopposed. This they did not do.

[13] It may well be so that respondents' attorneys instructed their counsel to first verify if indeed the application was unopposed by establishing if opposing papers were in the court file. This, however, does not change the fact that a notice of intention to oppose and the answering affidavits had been served on their correspondents. Applicants share no blame for this.

[14] Applicants' attorneys ensured that the important documents were served. Respondents' correspondent attorneys were the right people to receive the documents. There is nothing else that applicants' attorneys should have done. The fact that the documents were not in the court file might not have been as a result of fault on the part

of applicants' attorneys. The court, in my view, would not have granted the order by default had it known the exact state of the matter.

[15] Respondents in paragraph 23 of their opposing affidavit state that:

> "The respondents have tried to find an expedient way on (*sic*) the best interest of justice to solve the matter by addressing a letter hereto attached and marked annexure 'LET07'. The letter offered to abandon costs of the 28th August 2014 and leave the matter to proceed to hearing on (*sic*) February 2014 where the total balance of costs would be reached as this main case has now been set down for the 25th February 2014 and unfortunately the suggestion was unacceptable."

One can understand the reason for the applicants not accepting the suggestion. The warrant of execution remains suspended in circumstances where applicants had done everything that they were supposed to have done. This, in my view, led applicants to pursue this application as they were justified.

[16] Applicants threatened to bring an application to have respondents' answering affidavit struck out. This did not happen and one can only assume that the idea was abandoned. Applicants did not file their replying affidavit and this leaves respondents' attorneys' averments in their answering affidavit intact. It therefore cannot be said that the version is not correct. According to the deponent to the affidavit they were unaware that their correspondents had been served with the notice of intention to oppose and the answering affidavit. This is not denied. It is also not denied that the documents were not in the court file when the application was heard. This simply means that

their correspondents were lax in their handling of the matter. To impute this blame to respondents' attorneys, in my view, will not be proper. It therefore cannot be said that the court was misled and that the conduct was fraudulent. Respondents' attorneys have apparently had to change their correspondents.

[17] Having said this the issue remains whether the order, in light of the facts of the matter as they now stand, is competent. The simple answer is that applicants cannot be blamed for what happened. Neither can one blame their attorneys. The notice of intention to oppose and the answering affidavit were served on their behalf. The service of the notice of intention to oppose on 27 August 2014 has, in my view, been satisfactorily explained by the applicants' attorneys as an error. At any rate it has not been denied that service of the notice of intention to oppose and the answering affidavit took place on 4 August and 21 August 2014. Had the court, on 28 August 2014, been aware of the exact state of affairs it would, in my view, not have granted the order in the absence of the applicants.

[18] Given the explanations of the deponent to respondents' answering affidavit, it will not be fair and just to order that respondents' attorneys J M Rampora pay punitive costs on an attorney and client scale *de bonis propriis*. However, it will be prudent to order the respondents' attorneys, JM Rampora, to pay the costs of the application. It will also not be proper to refer the matter to the Law Society of the Northern Provinces.

[19] The application, in my view, should succeed. In any event, Mr Manasoe for the respondents conceded that the order was erroneously taken.

[20] The order I make, in the result, is as follows:

1. An order setting aside the judgment and order granted on 28 August 2014 is granted.

2. Respondents' attorneys J M Rampora Attorneys are ordered to pay the costs of the application *de bonis propriis*.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

53333-2010

HEARD ON: 27 JULY 2015
FOR THE APPLICANTS: MR THOBEJANE
INSTRUCTED BY: BOTHA MASSYN & THOBEJANE
FOR THE RESPONDENTS: ADV MANASOE
INSTRUCTED BY: J M RAMPORA ATTORNEYS