IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 50385/2013

Date: 15/9/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

15.9.16 .....
DATE SIGNATURE

In the matter between:

OFFICE OF THE PUBLIC PROTECTOR	**APPLICANT**
AND	
BAIBANGA OTSHINGA, SIMON	**FIRST RESPONDENT**
MINISTER OF HOME AFFAIRS	**SECOND RESPONDENT**
McKAY, J N.O.	**THIRD RESPONDENT**
SHERIFF OF THE HIGH COURT, PRETORIA SOUTH EAST	**FOURTH RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The Applicant (the Public Protector) brought an application against the First Responded (Mr Otshinga) setting aside a writ of arrest in respect of the Head of the Office of the Public Protector and setting aside a Court order granted by Madiba AJ on 10 December 2015 under case number 50385/2013 in terms of Rule 42(1)(a). The Public Protector also seeks a punitive costs order against Mr Otshinga.

[2] At the hearing before me the Public Protector was represented by senior counsel and Mr Otshinga appeared in person. The second Respondent and the third Respondents' counsel were merely present to observe and indicated that they support the application by the Public Protector.

[3] The application was divided in a Part A and Part B. Part A of the application was brought on an urgent basis on 11 March 2016. The Public Protector on that date obtained an order inter alia suspending a writ of arrest in respect of the Head of Office of the Public Protector, Adv Madonsela, pending the finalisation of Part B and suspending with immediate effect in terms of Rule 45 A, the execution of the Court order granted on 10 December 2015 by Madiba AJ under case number 50385/2013 pending the finalisation of part B.

[4] In terms of the court order of 10 December 2015 the Court found the Office of the Public Protector in contempt of a Court order dated 30 June 2014 and directed that the Head of Office be committed to jail for a period of 90 days, suspended for 14 days, subject to compliance with the Court order of 30 June 2014.

[5] This Court has to determine Part B of the proceedings.

[6] In August 2013 Mr Otshinga, launched an application requiring the second Respondent (The Minister of Home Affairs) and the third Respondent (Mr McKay) to consider his and his family members' applications for permanent residence with exemption.

[7] On 20 August 2013 the Court granted such an order. After that and on 19 February 2014 Mr Otshinga was advised by the Minister of Home Affairs to apply for a permanent residence permit in the usual manner as Home Affairs was of the view that he does not qualify for an exemption.

[8] Mr Otshinga then applied for a variation of the Court order and on 30 June 2014 an order was granted against the Minister of Home Affairs and Mr McKay to consider Mr Otshinga's application for permanent residence for him and his family with exemption. The application had to be considered within 30 days from the granting of the order and the Public Protector had to furnish the Applicant with the findings about the

conduct of the Minister of Home Affairs and Mr McKay regarding the Applicant's application for permanent residence with exemption. No time limit was given in the order as to when the Public Protector had to comply with the Court order.

[9] On 11 April 2015 Mr Otshinga instituted contempt of Court proceedings against the Public Protector, the Minister of Home Affairs and Mr McKay for an alleged failure to comply with the Court order of 30 June 2014. The Public Protector filed a notice of opposition in these proceedings on 13 May 2015.

[10] On 4 June 2015 Mr Otshinga's attorneys of record at the time, Christian Pieters Attorneys and Mr Molver, the attorney for the Public Protector, agreed to suspend the time period for filing answering affidavits pending a response to the Public Protector as to whether Mr Otshinga intends persisting with the contempt application despite the letter of the Minister dated 19 February 2014.

[11] On 8 June 2015 the State Attorney, representing the Minister of Home Affairs and Mr McKay addressed a letter to Mr Otshinga, advising him that there was compliance with the Court order of 20 August 2013 and that the compliance was conveyed to him in the letter dated 19 February 2014. He was also advised that the Minister of Home Affairs and Mr Mckay were unaware of the order granted on 30 June 2014 as that order was not served on them.

[12] On 14 August 2015 the notice of appointment as attorneys of record for the Public Protector was served by email on Mr Otshinga and on 19 August 2015 it was served per sheriff on Mr Otshinga's son at his residence.

[13] On 30 November 2015 Mr Otshinga served a notice of appointment of B M Kolisi Inc Attorneys (BMK) as his attorneys of record, together with a notice of set down of the contempt application for hearing on the unopposed motion roll of 10 December 2015.

[14] The attorneys of the Public Protector then directed a letter to BMK advising them that the set down was irregular as the matter was opposed and informed the attorneys that the parties agreed during June 2015 to suspend the further filing of affidavits. BMK was also advised of the irregularity that the notice of set down and the appointment of BMK had been served on the Public Protector despite the fact that Adams and Adams was on record as the attorneys of the Public Protector.

[15] On 4 December 2015 BMK delivered a notice of removal of the application from the unopposed roll of 10 December 2015 to Adams and Adams.

[16] Mr Otshinga, without the knowledge of BMK, personally attended to the re-enrolment of the matter on the unopposed roll of 10 December

2015. He appeared personally and obtained default judgment on the same date. No notice was given to the other parties about the re-enrolment of the matter nor was BMK informed thereof. Mr Otshinga did not disclose to the Court that the matter was opposed and that his attorneys had removed the matter from the roll and had notified the other parties thereof.

[17] On 21 December 2015 Adams and Adams advised Mr Otshinga that the order was improperly obtained and that the order would be challenged and a punitive costs order sought against him. He was also advised not to seek enforcement of the Court order pending steps to overturn it.

[18] Only on 22 December 2015 did Mr Otshinga's attorneys withdraw as attorneys of record.

[19] On 4 January 2016 the Office of the Public Protector issued the closing report in respect of Mr Otshinga's complaint regarding the delay by Home Affairs and Mr McKay in processing his application. The report is signed by an official of the Office of the Public Protector acting under delegated authority. A perusal of this report reveals that the Office of the Public Protector had been involved in the dispute between Mr Otshinga and Home Affairs since 2012 and various interventions occurred to resolve the complaint. Sec 6(4)(b) of the Act gives the Public Protector the authority to resolve a matter without conducting

an investigation and resolve a complaint through appropriate dispute resolution measures. According to the report the complaint was classified as an early resolution matter capable of resolution by way of a conciliation process in line with Sec 6(4)(b) of the Act. The investigators were of the view that the matter was resolved amicably and were therefore of the view that it did not require a report at the time. The communication with Mr Otshinga ceased when it came to the Public Protector's knowledge that Mr Otshinga instituted legal proceedings against the Public Protector. After this the closing report was issued.

[20] On 12 January 2016 Adams & Adams advised Mr Otshinga that the Office of the Public Protector had filed the closing report envisaged by the court order of 30 June 2014. Mr Otshinga was advised that the Office of the Public Protector had fully complied with the court order of 30 June 2014 (and consequently the court order of 10 December 2015), in terms of which it was required to furnish him with *"the report on its findings in relation to his application for permanent residence with exemption"*, and that as a result of such compliance, no further steps could be taken against the Office of the Public Protector, based on the order of 10 December 2015.

[21] The aforesaid did not satisfy Mr Otshinga and on 10 March 2016 he advised Adams & Adams by e-mail that three writs of arrest have been issued, one of which was in respect of Adv Madonsela, the Head of

Office of the Public Protector, and that these writs of arrest would be executed on 14 March 2016.

[22] On 10 March 2016 Adams & Adams sought an undertaking from Mr Otshinga not to proceed with the execution of the writ of arrest for the Head of the Office of the Public Protector.

[23] This undertaking was not forthcoming and on 10 March 2016 at 18:19 Mr Otshinga was advised that an urgent application would be brought on 11 March 2016 for the suspension of the writ of arrest of the Head of the Office of the Public Protector. The urgent application was served electronically on 11 March 2016 at approximately 01:15.

[24] On 11 March 2016 an opposed hearing took place in the urgent Court before Legodi J and an order was issued under Part A of the Application suspending both the writ of arrest of the Head of Office of the Public Protector and the Court order of 10 December 2015, pending the setting aside of the writ and the order under Part B of the application.

[25] The writ of arrest was signed by Legal Aid South Africa, Johannesburg Justice Centre, but on 17 March 2016 Legal Aid South Africa withdrew as attorneys for Mr Otshinga.

[26] This Court has to determine Part B of the application which deals with the setting aside of the writ of arrest and the Court order of 10 December 2015.

[27] It must be noted that the facts are for the most part common cause. Mr Otshinga's case is that his attorneys were not mandated to firstly agree to the suspension of filing of answering affidavits in the contempt application and secondly to remove the matter from the unopposed motion roll. He states that he was unaware of the agreements and did not give instruction to that effect. He also took issue with the fact that the report filed by the Office of the Public Protector was not signed by Adv Madonsela herself but by Ms Mogaladi a staff member and executive manager appointed by the Public Protector. If I understand him correctly this supports his submission that the Public Protector is in contempt of the Court order of 30 June 2014.

[28] The Public Protector contends that the Court order was erroneously sought and granted and should be set aside in terms of Rule 42(1) of the Uniform Rules of court. Rule 42(1)(a) empowers a court to rescind or vary a court order erroneously sought or granted in the absence of a party. Once a Court finds that the order was erroneously sought or granted the order must be rescinded without any further enquiry[1].

[1] Erasmus, Superior Court Practice, sec ed, vol 2; Van Loggerenberg D567

[29] Mr Otshinga's view is that he was entitled to act as he did as the Public Protector didn't file opposing affidavits within the prescribed time periods and his attorneys did not act in accordance with his instructions when they agreed on the suspension of the filing of affidavits and removal from the unopposed motion roll.

[30] It is common cause that Mr Otshinga's attorneys came to the aforementioned agreements with the attorneys of the public Protector and the issue is whether he is bound by the actions of his attorneys.

[31] In **MEC for Economic Affairs, Environment and Tourism, Easter Cape v Kruizenga and Another**[2] the following was said by Cachalia JA:

"[20] I accept that in this matter, by agreeing to the settlement, the State Attorney not only exceeded his actual authority, but did so against the express instructions of his principal. As opprobrious as this conduct was, I cannot see how this has any bearing on the respondents' estoppel defence. The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way, it matters not whether the attorney acting for the principal exceeded his actual authority, or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority, and has no

[2] 2010(4) SA 122 (SCA)

reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents did, that the attorney who is attending the conference clothed with an 'aura of authority' has the necessary authority to do what attorneys usually do at a Rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes the State Attorney quite clearly had apparent authority. "

[32] In **Hlobo v Multilateral Motor Vehicle Accidents Fund**[3] the SCA found that it is open to a litigant to expressly limit the implied authority of his attorney or counsel to agree to a compromise of the case. Counsel for the Public Protector argued that just as any other principal who may be liable for the acts of his agent, despite limitations placed on the agent's authority, a litigant may be bound to a compromise entered into, or a judgment or order consented to, by his legal representative despite instructions to the contrary. The reason therefore lies, so it was argued, in the fact that an agent's implied authority and his apparent or ostensible authority normally coincide, and the act of representation does not merely operate between the client and his representative, but also between the client and his opponent who deals with the representative. Unless the limitation of authority is communicated to the litigant's opponent or his legal representative, or it is implicit from what the litigant does or the surrounding circumstances, he may be estopped from relying on the

[3] 2001(2) SA 59 (SCA) at 65 D

absence of or excess of authority. A litigant can therefore not by secretly or by way of private instructions to his legal representative curtail the latter's authority as far as third persons are concerned.[4]

[33] The attorneys for Mr Otshinga was "clothed with an aura of authority" as described above and were entitled to act on the ostensibly authority of the legal representatives of Mr Otshinga.

[34] There is nothing to indicate that the Public Protector's attorneys had any reason to doubt the authority of Mr Otshinga's attorney to enter into these agreements. If there was any limitation of authority the Public Protector's attorneys were clearly unaware of it. No limitation of authority was communicated to the Public Protector's attorney, consequently Mr Otshinga is bound by the actions of his attorneys. Mr Otshinga's attorneys, in respectively agreeing to suspend the filing of further affidavits, and to remove the 10 December 2015 application from the unopposed roll, did not act in a manner requiring a special mandate.

[35] As far as the re-enrolment on the unopposed roll is concerned Mr Otshinga was obliged to inform the attorneys of the Public Protector that he was going to re-enrol the matter. He was also duty bound to reveal to the Court hearing the application that the matter was opposed. He misled the Court and it is certain that the order would not

[4] LAWSA, par 194 at 190 – 1; Glofinco v Absa Bank Limited (t/a United Bank) 2002(6) SA 470 (SCA) at 482 (B)

have been granted if the presiding Judge was aware of the opposition and the circumstances surrounding the re-enrolment. I am of the view that there is no doubt that the order of 10 December 2015 was erroneously sought and granted in the absence of the Public Protector as envisaged by rule 42(1).

[36] Mr Otshinga also persists with the allegation that the Public Protector is in contempt of the order of 30 June 2014. As already stated the Public Protector had been mediating between Home Affairs and Mr Otshinga since 2012 and was of the view that the matter was resolved and on 4 January 2016 the closing report pertaining to his complaint was issued. The delivery of the aforesaid closing report constituted compliance with the order of 30 June 2014. On 12 January 2016 the attorneys for the Public Protector advised Mr Otshinga that the report had been provided to him.

[37] It seems that Mr Otshinga takes issue with the fact that the closing report was not signed by Adv Madonsela herself. Mr Otshinga contends that he was entitled to a report from the Public Protector personally. The respondent, cited by the applicant, is the Office of the Public Protector. The closing report was signed off by Ms Mogaladi, being the Executive Manager: Administrative Justice and Service Delivery Branch, who along with other executive managers of the Office of the Public Protector, has a standing delegation in terms of sec 3(3) of the Act to issue closing reports on behalf of the Public

Protector in such matters. In the light of the fact that she acted in terms of a proper delegated authority she was clearly entitled to sign off on the report. Consequently Mr Otshinga's complaint in this regards must also be rejected.

[38] Despite the fact that Mr Otshinga was advised on 12 January 2016 that there was compliance with the Court order of 30 June 2014 and therefore also with the order of 10 December 2015, he persisted on 10 March 2016 to obtain a writ of arrest in respect of Adv Madonsela. In the light of the fact that the Public Protector was not in contempt of Court Mr Otshinga was not entitled to obtain a writ of arrest.

[39] The Public Protector asks for a punitive costs order based on the way that Mr Otshinga obtained the order as well as his persistence to insist on executing on the warrants despite the circumstances of the case. Mr Otshinga, not only enrolled the matter on the unopposed roll well knowing that it was opposed, but also misled the Court. After that, despite the fact that the report was filed he persisted with obtaining a writ of arrest and the contempt application. In my view his actions in the light of all the circumstances were not in good faith and were vexatious. Consequently a punitive cost order is appropriate.

[40] I make the following order:

41.1 The court order granted by Madiba AJ on 10 December 2015 under case number 50385/2013 is set aside; and

41.2 All writs of arrest issued pursuant to the above order are set aside;

41.3 The first respondent is ordered to pay the costs of the application of the Applicant on a scale as between attorney and own client, such costs to include the costs in terms of Part A. The costs will include costs of senior counsel.

R G TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING:	4 AUGUST 2016
DATE OF JUDGMENT:	15 SEPTEMBER 2016
ATTORNEY FOR APPLICANT:	ADAMS & ADAMS
COUNSEL FOR APPLICANT:	ADV W LUDERITZ (SC)
ATTORNEY FOR 1ST RESPONDENT:	IN PERSON
ATTORNEY FOR 2ND & 3RD RESPONDENT:	STATE ATTORNEY
NO APPEARANCE	