IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 73302/2017

Heard on: 28 August 2019

Date of judgment: 19 September 2019

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

19/9/19
DATE

SIGNATURE

In the matter between:

MAHLANGU, MABUSE JAN	First Applicant
MAHLANGU, FATHER MOSES	Second Applicant
MAHLANGU, CHRISTINAH SUZAN	Third Applicant

and

MAHLANGU, DINA	First Respondent
MASTER OF THE HIGH COURT	Second Respondent
ABSA QUAGGA CENTRE	Third Respondent

KOWANE, OFENTSE VICTOR	**Fourth Respondent**
MOLOBELA, DESIREE	**Fifth Respondent**
O.O. OLIFANT	**Sixth Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] This is an urgent application in which applicants seek an order declaring the will of their mother Anna Mahlangu ("the deceased") dated 26 October 2016 invalid, and that her estate be dealt with on an intestate basis. Applicants furthermore seek an order that first respondent be removed as executrix in the deceased estate.

[2] The facts are briefly the following:

2.1 The deceased was the applicants' and the first respondent's mother. She passed away on 8 June 2018 at the age of 97 years. At the time of her passing, the deceased was the owner of an immovable property in Atteridgeville, Pretoria.

2.2 During September and October 2018 the Mahlangu family held meetings to discuss the division of the deceased's belongings. At one of the meetings held on 14 October 2018 first respondent produced a will which purported to be that of the deceased in which the deceased bequeathed her entire estate to first

respondent. It is that will that is now under attack in this application.

2.3 It transpired that in the deceased's latter years first respondent, a nurse by profession, had regularly tended to her mother, seeing to her needs and ensuring that she took her medicine. On 26 October 2016 the deceased asked first respondent to take her to the offices of the third respondent. First respondent dropped her off and went shopping. The deceased requested third respondent's employees to assist her with the drafting of a will. Once the will was drafted it was executed by the deceased, and witnessed by fourth and sixth respondents. By the time that first respondent returned to collect the deceased, the will had already been executed.

2.4 ABSA Trust Ltd was nominated as executor of the estate. Upon the death being reported to the Master of the High Court's office, ABSA Trust declined the appointment and first respondent was appointed as executrix in ABSA's stead.

URGENCY

[3] This matter came before me as one of urgency. In my view there is no urgency to the application. Applicants have known about the existence of the will since October 2018. Ten months later, on 12 August 2019, applicants launched this application. There is no evidence that the applicants have done anything in the meantime to attack the validity of the will. They served the

application on first respondent on 13 August 2019 giving her two days to oppose the matter and a further four days to file an answering affidavit. In other words, the application was brought as one of extreme urgency.

[4] In support of the allegation that the matter is urgent, applicants allege that on 3 August 2019 first applicant ascertained that first respondent had put the property's municipal account into her own name. The allege further that first respondent regards the property as her private asset, locking bedroom doors and retaining the keys to the house. Finally, they allege that first respondent should not be allowed to be the executrix of the deceased estate, and that she might attempt to transfer the property into her name.

[5] Before launching an urgent application, a legal practitioner is obliged to consider whether the matter is urgent, and if it is, to what degree it is urgent. The legal practitioner is required to consider the facts of the matter unemotionally and carefully. The application must clearly demonstrate that an applicant will not receive appropriate redress if the application is brought on the normal opposed roll. Such facts are sorely lacking in this application.

[6] The application begs the question why applicants have waited from October 2018 to August 2019 to attack the will. They surely knew that first respondent was going to execute her duties as executrix, which would mean that the property would be transferred to her, and the services account would be changed to first applicant's name. They have been forewarned that first respondent regards herself as the owner of the property. On their own version, first respondent is keen to remove them from the property and she has locked

the main bedroom and has kept the keys with her. They knew what first respondent intended to do with the property. Nevertheless, applicants have done nothing to pursue their claim for some ten months. Even if there were urgency, which there is not in my view, such urgency is self-created.

[7] There have been many judgments handed down on the issue of urgency. In the often quoted, but also as often ignored judgment of ***Luna Meubel Vervaardigers v Makin and another 1977 (4) SA 135 (W.L.D.)***, the Court set out the various degrees of urgency on which an application can be brought, but pointed out (at 137 A) that the first point of departure is whether the matter is of such urgency that it at all justifies a departure from the normal time limits prescribed by rule 6 (5) (b) of the Uniform Rules of Court.

[8] As recently as 2012 Wepener J, in ***In re Several Matters on the Urgent Court Roll 2013 (1) SA 549 (GSJ)*** wrote as follows:

> *"An abuse of the process regarding urgent applications has developed (in all likelihood with a hope that the respondents would not be able to file opposing affidavits in time). This practice must be addressed in order to stop matters being unnecessarily enrolled and to clog a busy urgent court roll. In these matters, sufficient time should be granted to the respondents to file affidavits and they can rarely do so when papers are served less than a week before a matter is to be heard. That week includes a weekend when State machinery normally comes to a standstill. Practitioners will be well advised to be realistic and to afford the State departments a more reasonable time to file affidavits. No*

doubt there are matters which require urgent attention on shorter notice but amongst the thirty or so applications by foreigners to be released from custody on the roll today, I am struggling to find a single one that justifies a hearing urgently today. If there are such matters, the affidavits generally fail to set out the urgency of the matter as required by the Practice Manual and Rule 6.

Urgency is a matter of degree. ***See Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers) 1977 (4) SA 135(W).*** *Some applicants who abused the court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondents to file affidavits should in my view similarly be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved.*

Those matters that do not comply with the Rules and Practice Manual will not be afforded a hearing in this court. They fall to be struck from the roll with costs where appropriate."

[9] Despite these authorities, and many other judgments on urgency since 2012, the urgent roll is still plagued with matters which are not urgent. This application is simply a more egregious example of a non-urgent matter that has found its way to the urgent Court.

MERITS

[10] As I have found that the matter is not urgent, it should be struck from the roll. However, something should be said about the merits, or rather, about the lack of merit to the application.

[11] Applicants' contentions are that since 2015 first respondent spent a lot of time caring for the deceased and she saw to it that the deceased regularly took her medicine. It is in this time, applicants allege, that first respondent influenced the deceased to make the will. Applicants' allegations are that first respondent spent time with the deceased in order to "*unduly influence her through threats, promises, duress and coercion*....." They also allege that the will is not that of the deceased. A further allegation is that first respondent drove the deceased to ABSA's offices where first respondent allegedly issued instructions to ABSA under the pretext that the instructions originated from the deceased.

[12] Applicants' allegations are not supported by any evidence whatsoever. Upon reading the application one is left wondering:

12.1 What threats were made to the deceased?

12.2 What promises were made?

12.3 How was the deceased placed under duress, or how was she coerced to make a will?

12.4 On what evidence do the applicants make the allegation that first respondent issued instructions to ABSA?

[13] There is simply no factual basis to applicant's claims. Applicants have not paid any heed to the difference between the *facta probanda*, and the *facta probantia* of the matter, and have not provided any evidence to substantiate their allegations. Even more absurd, having alleged that the deceased in fact executed the will, albeit under duress or coercion, applicants further allege that the deceased lacked the mental capacity to understand the legal implications of the will. These contentions are contradictory: Either the deceased knew what she was executing but she did so under duress or coercion or as a result of threats, or she did so without understanding what she was doing.

[14] First respondent alleges that first applicant's marriage was of great concern to the deceased, and that she feared losing her house to, what she regarded as, "outsiders". She also says that first applicant often harassed the deceased in order to have her (first respondent) evicted from the home. First respondent alleges that the very thing that the deceased feared, namely that applicants would attempt to take her house, is what is now playing out in this application. First respondent denies that she influenced the deceased in any manner. She states that they had a normal mother-daughter relationship.

[15] There is always in an application such as this, the likelihood of conflicting versions, and applicants' legal team could not but have realized that this is not the type of matter to bring by way of motion proceedings. They should have foreseen the likelihood of a dispute of fact, and should have brought the matter to Court by way of summons.

[16] In summary, the application is not urgent. Secondly, no evidence is presented to justify the conclusion that applicants wants the Court to arrive at. Thirdly, this matter should never have been brought by way of motion proceedings given the virtual certainty that a dispute of fact would arise.

COUNSEL'S CONDUCT

[17] This matter was called at 10h00 on Tuesday 27 August 2019. Applicants themselves were present, but their legal representatives were not. I asked first respondent's counsel, Ms. Granova, to ascertain where applicant's counsel was. Ms. Granova reported that applicant's counsel had told her that he apparently had a headache and could not come to court. I was told that applicant's attorney was present outside the court room, and he was asked to explain why his counsel was not present. Applicants' attorney, Mr. Mashifane, explained that his counsel was Adv. Simphiwe Mngomezulu. Mr. Mashifane had been unable to reach Adv. Mngomezulu by telephone and could not explain why he was not at court. The matter stood down for applicants' attorney to find Adv. Mngomezulu. When I stood the matter down I indicated that, having read the papers, I was of the *prima facie* view that there was no merit to the application, that there was no also no urgency to it, and I requested Mr. Mashifane to alert Adv. Mngomezulu to the fact that I was considering granting a costs order *de bonis propriis*.

[18] When applicants' counsel could still not be found later that day, I stood the matter down until 28 August 2019, with the same request: that applicant's counsel should be prepared to address me on punitive costs.

[19] On 28 August 2019 at 10h00 applicant's counsel was still absent, and once again I had to ask Mr. Mashifane (who was outside) to come into court. I was told that Adv. Mngomezulu was not answering his cellular telephone and could not be reached. I stood the matter down for another counsel to be appointed to act for applicants, and at 11h30 Adv. Maqetuka appeared on behalf of the applicants. He had been briefed shortly before and I stood the matter down until 14h00 to allow him to prepare, with the request that he should address me on punitive costs *de bonis propriis*.

[20] Upon the resumption at 14h00 Adv. Maqetuka immediately conceded that the matter was not urgent and he sought an order that the matter be removed from the roll, in order to be enrolled on the normal opposed roll. That application was denied. Adv Maqetuka then conceded, to his credit, that there was no merit to the application, and that applicants would abide the Court's decision. Clearly, given the absence of any merit to the application, it should be dismissed. The question is what should be done as far as costs are concerned?

[21] During the course of the urgent roll for this particular week, I struck a number of matters from the roll for lack of urgency, as did, I understand, my colleague in the other urgent court. I understand from speaking to other judges that there is an ongoing problem that matters are placed on the urgent roll when they are not urgent, and matters are often struck from the roll with applicants being ordered to pay the costs of the application.

[22] Clients who approach an attorney are, in most instances, not legally qualified, do not they have knowledge of civil procedure. They are reliant on the

attorney to advise them of their prospects of success, and whether a matter should be placed on the urgent roll or on the normal roll. The same applies to counsel who is instructed in such a case. It is required of both counsel and the attorney to consider the case properly and dispassionately. Only when a matter is truly urgent should it be so enrolled. Careful consideration should also be given as to the degree of urgency.

[23] The difficulty in this matter is that neither applicant's attorney nor their counsel seem to have considered either the merits of their case or whether it is urgent. They also did not consider whether motion proceedings were the appropriate manner of bringing the matter to Court. The result is that on the one hand their clients are out of pocket for what was inevitably a lost cause, and on the other hand the first respondent was forced to defend the application at substantial cost, even though it was devoid of any merit.

WHEN ARE PUNITIVE COSTS *DE BONIS PROPRIIS* APPROPRIATE?

[24] In ***Waar v Louw 1977 (3) SA 297 (O.P.A.)*** M.T. Steyn J pointed out that the attorneys' profession (and by implication that of counsel) is a responsible one. An attorney is required to show great skill and knowledge in the performance of his duties. Where an attorney or counsel have made a mistake, it should not be easily disregarded. However, one must also take cognisance of the fact that the legal profession is a difficult one, and even the most experienced of practitioners can make mistakes. Therefore, one should not have too much of a lenient attitude towards mistakes which result in unnecessary costs, but one should also not apply the whip too strenuously.

[25] In ***Waar*** (supra) the learned judge went on to remark that *de bonis propriis* orders should only be made in exceptional circumstances, for example in cases of dishonesty, malice or serious negligence. It was, however, held in ***Rautenbach v Symington 1995 (4) SA 583 (O) at 588 A – B***, that the aforesaid list is not exhaustive, and orders of this nature can be made where the order is justified by special circumstances or considerations.

[26] In ***Webb and others v Botha 1980 (3) SA 666 (NPD)*** the Court was faced with an appeal that was opposed without any prospect of successful opposition. The Court remarked that the respondent's attorney had on a number of occasions been involved in frivolous appeals of a purely procedural nature. He had been warned in two previous judgments that should he continue pursuing such appeals, and that a punitive costs order may follow against him personally. Kriek J had no hesitation in ordering respondent's attorney to pay the costs personally on an attorney/client scale.

[27] In ***Ntuli and others v Smit and another 1999 (2) SA 540 (LCC)***, a matter where the attorney was found to have launched unjustified litigation, and where the founding affidavit had been deposed to by the attorney who did not have personal knowledge of the facts deposed to, the Court considered granting a costs order against the attorney. The Court found the attorney's work to be slovenly, and reflective of muddled thinking. It was submitted in mitigation by the attorney that he had been forced to launch the application without proper time for reflection. The particular firm was the only one to accept legal aid work in that particular area, and it had been inundated with cases. In this case, Gildenhuys J accepted the attorney's *bona fides*, and followed the example of

Webb (supra) by warning the attorney of the possibility of a personal costs order should he again produce papers that are patently defective or should he pursue a matter which has no prospect of success.

[28] In ***Darries v Sheriff, Magistrate's Court, Wynberg, and another 1998 (3) SA 34(SCA)*** the Court held that the appellant's attorney had shown "flagrant and gross" disregard for the rules of court, and he was ordered to pay the costs of the appeal personally.

[29] It is clear from the quoted cases, that costs orders *de bonis propriis* are reserved for serious cases of misconduct or abuse of the processes of court. One should also remember that an attorney may well be emotionally invested in his client's case and that he could form a more rosy picture of his prospects of success than the facts justify. It is fitting that an attorney should show concern for his client's interests, and it may well be that an attorney commences litigation with the best of intentions, but when the matter is considered in the cold light of day it may be completely without merit:

> *"There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."*
>
> ***(See: In re Alluvial Creek Ltd 1929 CPD 532)***

[30] However, an attorney and counsel are required, as I have stated, to set aside their emotions and to consider the case dispassionately.

[31] Adv. Maqetuka submitted that Mr. Mashifane should not be mulcted in costs. It seems that Mr Mashifane was swayed by the views of Adv. Mngomezulu on the matter. Due to Adv. Mngomezulu's absence from Court, my registrar addressed a letter to him asking him for reasons why a costs order should not be made against him personally. He replied by email that he had personally been involved in the final drafting of the application, and that he had advised Mr. Mashifane regarding the merits. Adv. Mngomezulu stood by his belief that applicants' version was the "more probable", even though there is absolutely no evidence to support his client's version. His views are apparently influenced by his concern that his clients may be deprived of what they regard as their inheritance. He admitted that it was his "call" to enrol the matter on the urgent roll, although he does not make any submissions why he believed that the matter was urgent. He simply says: "I humbly believe that the call that I made in this regard is still correct."

[32] Had the matter been enrolled on the normal opposed roll I might not have considered an order *de bonis propriis*. It is obvious that both Mr. Mashifane and Adv. Mngomezulu fervently believe in their client's case, even though that belief is not founded in fact. However, the lack of merit is compounded by the matter being enrolled on the urgent roll, and the inevitability of a dispute of fact. The gratuitous disregard for the well-known principles relating to urgency and the launching of motion proceedings instead of issuing a summons, justify, in my view, an order against the legal practitioners personally.

[33] Finally I must address Adv. Mngomezulu's conduct in the matter. It is required of an officer of Court to conduct himself professionally. If counsel falls ill, the least that can be expected of him or her is to communicate that fact to the attorney, or to the judge's registrar. Adv. Mngomezulu was alerted to the fact that he was required to be at court when Ms. Granova telephoned him on Tuesday morning. Notwithstanding, Adv. Mngomezulu remained absent, and even more alarmingly, he still did not communicate with his attorney. In his explanatory email he simply states that he did not attend court because he was ill. He tenders no further explanation, nor does he apologize for disrupting the court proceedings. Adv. Mngomezulu has also made no attempt to explain why he did not communicate to his attorney that he was ill. He simply stayed away from court. In my view his standard of conduct was less than what is expected from an officer of Court, and I will request the Registrar to transmit this judgment to the Legal Practice Council for consideration.

[34] There is no reason why either the applicants, who relied on professional and proper advice from their legal team, nor the first respondent, who had to defend a meritless application, should be out of pocket for the costs of the application.

[35] In matters such as these courts have, in some instances, disallowed all or part of the fees recoverable by the offending legal practitioners (**See: *Mdlulu v Delarey and others [1998] 1 ALL SA 434 (W)*; *Wenum v Maquassi Hills Local Municipality and Others [2016] JOL 35824 (LC)***). In appropriate cases both sanctions, a costs order *de bonis propriis*, and an order that no fees shall

be recovered by the attorney/ counsel may be granted. In my view this is such a matter.

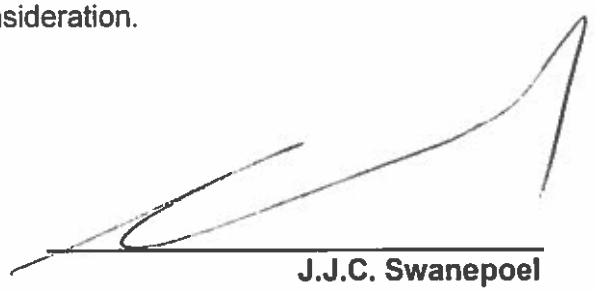
[36] I therefore make the following order:

36.1 The application is dismissed;

36.2 Applicant's attorney and counsel, Mr. Mashifane and Adv. S Mngomezulu are ordered to pay the costs of the application *de bonis propriis*, on an attorney/client scale jointly and severally, the one paying the other to be absolved.

36.3 Applicant's counsel and attorney may not recover any fees from applicants relating to this application, and they are ordered to repay any fees already paid to them to the applicants.

36.4 The Registrar is requested to refer this judgment to the Legal Practice Council for consideration.



J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria