REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: B4251/22

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

22/11/ 2022 .....

In the matter between: -

MESHACK THEMBINKOSI SILINDA N.O.	**1st Applicant**
SIMEON NGOMANE N.O.	**2nd Applicant**
LAZARUS TIKI ZITHA N.O.	**3rd Applicant**
AND	
MAKHOMBO FARM MANAGEMENT (PTY) LTD	**1st Respondent**
(IN LIQUIDATION)	
DANIEL TERBLANCHE N.O.	**2nd Respondent**
HILMI DANIELS N.O.	**3rd Respondent**

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 22 November 2022.

1. On 13 July 2021 Meshack Thembinkosi Silinda N.O. ('Silinda'), Simeon Ngomane N.O. ('Ngomane') and Lazarus Tiki Zitha N.O. ('Zitha') (collectively, where appropriate, 'the applicants') brought an application against Makhombo Farm Management (Pty) Ltd (in liquidation) ('Makhombo') and Daniel Terblanche N.O. and Hilmi Daniels N.O. (collectively 'the respondents') seeking urgent relief to review and set aside a warrant issued by the Clerk of the Court of Johannesburg and also certain interdictory relief against the second and third respondents from issuing further warrants relating to the attachment of certain monies at an organisation called RCL Foods, pending the dispute regarding the ownership of that money. I will refer to this as the "main application". No official from the Magistrate's Court was cited.

2. The main application was brought as a matter of urgency and set down for 3 August 2021.

3. The matter was unilaterally removed from the 3 August 2021 hearing date[1] without the consent of the respondents and contrary to the provisions of rule 41. It was then unilaterally set down for 17 August 2021 on the urgent roll. Justice Tolmay postponed the main application for want of compliance with the practice directives and reserved the issue of costs[2].

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[1] CaseLines 018-1

[2] CaseLines 014-1

4. For the reasons which follow, a consideration of the facts that underpinned the launching of the main application is irrelevant. The main application is dismissed on a different basis, as becomes evident in my judgement.

5. The attorney that represented the applicants in the main application is the same Ngomane that is cited as the second applicant. He is from the firm S Ngomane Inc. At the proverbial eleventh hour Ngomane withdraws as the attorney of record. The notice is dated 10 November 2022. It is a simple withdrawal and, on the face of it, does not comply with the prescripts of the rules of how a withdrawal is done.

6. On 11 November 2022 a certain Gideon Magnificent Mahlalela ('Mahlalela') brought an application to intervene in the main application and that he could be joined as the fourth applicant. He also sought that the main application which had been set down be postponed *sine die*. The attorney for Mahlalela was Ntabeni Attorneys of Pretoria and he was represented by Advocate Mandla Ntshangase.

7. After some debate with Mr Ntshangase as to the appropriateness of the application to intervene, I permitted him to make all of his submissions on the intervention. Without going into the merits of the intervention application, in short, Mahlalela contends that he is a beneficiary of the trust represented by the applicants in the main application, that he therefore has a direct interest in the matter and the necessary *locus standi* to intervene. Mr Ntshangase submitted that the applicants had, because of the fact that the attorney of record had withdrawn, literally abandoned the litigation and that Mahlalela was entitled to be joined as a party and to continue with that litigation.

8. I heard arguments from both parties, I dismissed the intervention application and advised Mr Ntshangase that I will provide my reasons for the dismissal in this judgment. Mr Ntshangase advised that he is only briefed in respect of the application to intervene, and that he has no brief in respect of the merits of the

main application. He nevertheless decided to remain in court when the main application was argued.

9. I, immediately, after the main application was heard, dismissed it and made an order that the costs are to be paid on an attorney and client scale, *de bonis propriis* against all three applicants as well as by the attorney firm S Ngomane Inc. that had represented the applicants until the late withdrawal as the attorney of record. I also made an order that a copy of this judgment be provided to the Legal Practices Council and that the conduct of Ngomane, the second applicant and the erstwhile attorney of record in the main application, be investigated. On the strength of the papers before me, *prima facie*, Ngomane has acted in a flagrant disregard of a court order and, to exacerbate matters, without bringing the order to the attention of the court. His conduct in this matter fills me with no confidence that he is a fit and proper person to be an attorney and an officer of this court and it is my considered view that the manner in which he has conducted this case should be the subject of a serious investigation by the Legal Practices Council. This will become apparent from my judgment.

10. When I read the application in preparation for the hearing, the issue that immediately perked my interest was that no trust deed was attached to the founding papers and no letters of authority. In fact, I could not even distil the name of the trust from the founding affidavit. I found this unusual because, experience has taught me, that it is probably that which should form part of the first annexes to such an affidavit.

11. The respondents are represented Van der Merwe & Associates, also of Pretoria. The answering affidavit was deposed to by a certain Mr Gert Thomas van der Merwe ('Van der Merwe'), the attorney actually representing the respondents and responsible for these proceedings.

12. I was not surprised that the respondents filed a notice in terms of rule 7 in which they disputed the authority and mandate of S Ngomane Inc to act as

attorneys of record for the applicants. The notice required proof of the mandate supported by:

'(1) A duly signed resolution by all the trustees of the trust;
(2) A copy of the letters of authority appointing the trustees;
(3) A copy of a Trust Deed;
(4) Any additional document on which the said attorney relies for authority'.

13. When the respondents filed their answering affidavit, there had been no response to the rule 7 notice. It was probably prepared in haste in order to deal with the urgent application that was set down on 3 August 2022.

14. On 30 July 2021 a response to the rule 7 notice was uploaded on CaseLines. It had apparently been served on the respondents' attorneys on 28 July and, on the face of it, it is dated 20 July 2018. It is a document which reads as follows:

'CONFIRMATORY OF AUTHORITY

We, the undersigned, Meshack Thembinkosi Silinda, Simeon Ngomane and Lazarus Tiki Zitha hereby confirm that:

(1) We are the trustees for the time being of the Mjejane Trust (IT 6335/04) appointed as such by a court order dated 20 May 2009.

We have instructed and authorised Simeon Ngomane of the firm Messrs Ngomane Inc. to act on behalf of the Second, Third and Fourth respondents in this matter under case no. 91791/2018 which has been instituted at the Johannesburg Magistrates Court.

THUS SIGNED AND EXECUTED AT NELSPRUIT ON THIS THE 20TH DAY OF JULY 2018'.

Below that is a space for the three persons to sign, which on the face of it they did.

15. This, self-evidently, is an unsatisafactory response. First, it is an authorisation for S Ngomane Inc. to act in a matter in the Magistrates Court and not in respect of this urgent application. There is no reference to the court case in

terms of which they were appointed and no copy of the court order. There is no letter of authority from the Master.

16. The replying affidavit deals with this issue as follows. First, at paragraph 14 it states:

> 'It is correct that the respondents served the Rule 7 notice. A response thereto was furnished by the applicants on 29 July 2021 incorporating a confirmation of the mandate of S Ngomane Incorporated Attorneys by the applicants, a copy of which is attached hereto as annexure 'W2'. It must be noted that the confirmation of authority empowers the applicants' attorneys to act in the matter relating to the application in terms of section 69 of the Insolvency Act, which is the object inextricably linked to the warrant in question in this matter'.

17. What then follows is the fact that the respondents filed a rule 30 notice in respect of the response to the Rule 7 notice. There seems to have been some debate as to whether or not this was an irregular step. Be that as it may, the applicants then state at paragraphs 16 and 17 of the replying affidavit:

> '(16) As the respondents do not seem to pursue their Rule 30 notice, there is no longer any objection against the authority of the applicants' attorneys as the respondents had elected to deal with that aspect under the rule 30 notice.
> (17) Further, the respondents' Rule 7 notice went far beyond the scope of Rule 7. Rule 7 is confined to proof by an attorney of his authority to act for a party. The documents requested by the respondents in the Rule 7 notice go far beyond such purpose. All that was required was for the applicants' attorneys to provide a document such as the confirmatory authority, on which they rely to prove their mandate to act for the applicants in these proceedings. The above Honourable Court (not necessarily the respondents) ought to be satisfied with the confirmatory of authority that such mandate exists'.

18. For the reasons which I have mentioned above, I am not satisfied that this proves that the attorney of record and the second applicant had the authority to act. Far from it. What was filed in response to the Rule 7, in my view, falls woefully short of that which is required. Challenging the authority of an attorney to act in a particular matter is not something which is lightly done. It

places a serious question mark on the conduct of a litigating party and also on the attorney representing that party. It is a challenge laid down by the opposing party which may or may not strike at the heart of the *bona fides* and credibility of a litigating party and an attorney. Such a document should be treated with the seriousness it deserves. Attaching a document dated four years before the institution of the main application and which makes reference to court proceedings in the Johannesburg Magistrates Court does not satisfy me that the relevant authority has been demonstrated.

19. For that reason I decided to dismiss the main application. There is simply no evidence to demonstrate that S Ngomane Inc. has the necessary authority to act in this regard. The challenge was made and the response failed the test.

20. Regrettably, the matter does not end there.

21. What emerges from a supplementary affidavit deposed to by Mr van der Merwe on 12 August 2021 is the following.

22. On 11 August 2020, some two years before the institution of the main application, Justice Tuchten under case no. 43599/19 in this division made an order appointing a certain Mr Zeelie as the interim administrator of the Mjejane trust and also suspended all of the applicants as trustees and interim trustees of the Mjejane Trust. Importantly, the court order of Justice Tuchten reveals that there is, in fact, apart from these three applicants in this matter, an additional trustee; namely Mpoyana Lazarus Ledwaba, a party that was not cited as an applicant in this application. He seems to have disappeared like mist before the morning sun. Furthermore, in yet a further supplementary affidavit, filed on 5 October 2022 by Mr van der Merwe, it is, for the first time, that one sees the letters of authority signed by the master of the high court. That also reveals a fourth trustee, Mr Ledwaba.

23. Justice Tuchten's order further states in paragraph 8 that:

'[8] Each of the first to seventh respondents[3] inclusive is hereby interdicted, pending the determination of the relief in Part B of the notice of motion, from:

8.1 holding himself out as entitled to represent the trust;

8.2 involving himself in any business or affairs of the trust;

8.3 (not relevant)'.

24. I find it, to say the least, disturbing that in the face of that order, the main application was launched. Moreover, none of this was disclosed in the founding affidavit. On the face of it, all of the applicants in this matter, and more disturbingly, the second applicant and the attorney of record, were acting in flagrant contempt of the interdict granted by Justice Tuchten. I can think of no other conclusion.

25. The applicants in the application that served before Justice Tuchten then approached this court on an urgent basis in terms of section 18(3) of the Superior Courts Act 10 of 2013. The reason for this application is because the respondents in the matter before Justice Tuchten (the applicants in the main application) failed to comply with the court order as there was a pending application for leave to appeal. The matter came before Justice Hughes.

26. The suspended trustees, or rather, three of the four namely Silinda, Ngomane, Zitha, were the applicants in the section 18(3) application. Justice Hughes found that the order of Justice Tuchten is not suspended pending the decision of the appeal proceedings instituted by these three individuals. Justice Hughes in paragraph 3 of her order declared these individuals to be in contempt of court and ordered them to purge their contempt. They were ordered, in their individual capacities, to pay the costs of the section 18(3) application, including the costs of two counsel. Justice Hughes, on the same day, under the same case number extended the powers and duties of the interim administrator, Zeelie. This included, in paragraph 1.11 of her order, an order 'to institute and/or defend all legal proceedings in the interests of the Trust and the protection of the recovery of the Trust's assets'. Once more, these three individuals were ordered to pay the costs personally.

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[3] Which include the applicants in this case

27. In an affidavit filed by Ngomane in the main application titled 'Applicants' answering affidavit to Respondents' supplementary affidavit' he states in paragraph 9, *inter alia*, 'that the court orders do not prohibit the suspended interim trustees from approaching court and report any fraud committed in regard to Mjejane Trust funds'[4]. This affidavit is dated 13 August 2021. There can be no merit in that interpretation of the court orders which served before Justices Tuchten and Hughes.

28. The flurry of paper continued and in an affidavit dated 5 October 2022 deposed to by Van der Merwe, titled 'Respondents' further supplementary affidavit' he attaches a letter from the attorney firm Murphy Kwape Maritz Attorneys which was addressed on behalf of Zeelie. The letter indicates that the interim trustees (the applicants in the main application) were finally removed from office on 7 March 2022[5].

29. On 12 November 2022 Mr van der Merwe addressed a letter to S Ngomane Inc. referring to the withdrawal of him as attorney of record on 11 November 2022. The letter indicates that counsel has been briefed for the matter which had been enrolled for 14 November 2022[6]. He was also advised that the letter will be used in support of the *de bonis propriis* and punitive cost orders[7].

30. The response of S Ngomane Inc. was dismissive. *Inter alia*, it stated that Mr van der Merwe should be well aware that there was an application for intervention by 'the fourth applicant'. He also indicates that according to his understanding the applicants will have new attorneys of record before 17 November 2022 and he indicated that he will be uploading this letter to CaseLines so that the court hearing the matter will be aware of 'our position in this matter'. There

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[4] CaseLines 012-6 to 012-7

[5] CaseLines 024-5

[6] This being the original date for enrolment

[7] CaseLines 018-12

were no new attorneys of record for the first three applicants and no counsel appeared.

31. It is the aforesaid facts that have further confirmed my view that a costs order *de bonis propriis* against the erstwhile trustees in their personal capacity is an appropriate one. It is also the reason that I ordered that the attorney firm S Ngomane Inc. is also to pay the costs *de bonis propriis* jointly and severally. It is a punitive costs order because of their conduct and it should be paid on the attorney and client scale. All of the applicants, including the instructing attorney, were aware that this costs order would be sought, yet none of them appeared before court.

32. The facts which are currently before me leave me with the overwhelming impression that Ngomane, in his capacity as an attorney, acted, not only in contempt of the court order of Justice Tuchten but also in a dishonest manner. It is inconceivable that he did not think it necessary to disclose these facts. He has provided no explanation for his conduct. It leaves serious question marks on whether attorneys that act in this manner are fit and proper people to hold that office and to be an officer of the court. It is for that reason that I request the registrar to provide a copy of this judgment and order to the Legal Practices Council in order that it can do a thorough investigation into the conduct of S Ngomane Inc. and Ngomane himself.

33. That brings me back to the application to intervene.

34. I cannot grant it, simply because there is no case to intervene in. It is a case in which the attorney had no authority to act and it should never have seen the light of day. It is also for that reason that I did not consider the merits of the application and dismissed the application only on the basis of a want of authority. That would give the applicant for intervention an opportunity to launch a fresh case, should he so wish in which the merits can properly be placed before court for consideration, without me, perhaps, compromising his position by making decisions on the facts of the main application. I put this to

Mr Ntshangase and he made no submissions to me that my proposition was incorrect.

35. I am not aware of the financial position of the applicant for intervention. Litigation is an expensive exercise and without in any way and without in any way wishing to affront him I have to consider the possibility that he might not necessarily be in a financial position to bear an adverse costs order. I am worried that should I grant one, it might affect his ability to institute proceedings and this might, practically, affect his ability to approach the court. I do not wish to saddle him with that unnecessary financial burden and shut the doors of the court on him. In any event, both matters were heard on the same day and, apart from the papers which the respondents had to read, I do not believe that warrants an adverse costs order against him. I therefore decided to make no costs order in respect of the application to intervene.

36. I consequently make the following order:

Order

37. The application is dismissed.

38. The applicants and S Ngomane Attorneys are ordered to pay the costs *de bonis propriis* jointly and severally on the scale as between attorney and client, which costs shall include the wasted costs of 3 and 17 August 2021.

39. The Registrar of this Court is requested to bring this judgment and order to the attention of the Legal Practice Council for further investigation into the conduct of Simeon Ngomane (the second applicant and attorney of record for the applicants in the main application).

REINARD MICHAU

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 17 November 2022

Date of judgment: 22 November 2022

Appearance

On behalf of the Applicant	Adv H Wessels
	Cell: 060 528 6860
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	No appearance for the first – third applicants
On behalf of Applicant to intervene	Adv Ntshangase
Instructed by	Mtadeni Attorneys
On behalf of the Respondents	
Instructed by	Van der Merwe and Associates
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