IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Application number: 4373/2021

In the matter between:

PULENG MARIA MOKOENA	1st Applicant
REMASOEU PULENG FUNERAL HOMES (PTY) LTD (Reg. no.: 2020/625672/07)	2nd Applicant
REMASOEU THATO FUNERAL (PTY) LTD (Reg. no.: 2020/625369/07)	3rd Applicant

and

MARIA MPOTSENG NHLAPHO-MASOEU	1st Respondent
LYDIA MOSIDI MASOEU THAELE	2nd Respondent
MATSHEPO SARAH MASOEU-LECHE	3rd Respondent

IN RE:

MARIA MPOTSENG NHLAPHO-MASOEU	1st Applicant
LYDIA MOSIDI MASOEU THAELE	2nd Applicant
MATSHEPO SARAH MASOEU-LECHE	3rd Applicant

and

PULENG MARIA MOKOENA 1st Respondent

REMASOEU PULENG FUNERAL HOMES (PTY) LTD
(Reg. no.: 2020/625672/07) 2nd Respondent

REMASOEU THATO FUNERAL (PTY) LTD
(Reg. no.: 2020/625369/07) 3rd Respondent

MASTER OF THE HIGH COURT, BLOEMFONTEIN 4th Respondent

CORAM: VAN ZYL, J

HEARD ON: 20 OCTOBER 2022

DELIVERED ON: 27 MARCH 2023

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[1] This is an application in terms whereof the applicants are seeking an order that the first to third respondents be found to be in contempt of the court order dated 27 January 2022, issued under the above case number. They are also seeking the following consequential relief:

> "1.2 That the respondents be imprisoned for a period of one month, alternatively, that this court impose upon them such sentence as it considers appropriate.
>
> 1.3 Imposing a fine, such as deemed appropriate by this court, on the first to third respondents, jointly and severally.

1.4 Directing the respondents to pay the costs of the application, jointly and severally, on the scale as between attorney and client."

Background:

[2] I will refer to the parties as in the present application.

[3] On 23 September 2021 the first to third respondents approached court on an urgent basis for interdictory relief. On the said date Loubser, J issued the following order:

"1. The application is found and held to be urgent and the applicants' non-compliance with the requirements of the Rules of Court relating to service and time periods is waved and/or condoned.

2. The first respondent (and second and third respondents as the case may be) is/are hereby interdicted and/or restrained from dealing in and/or transferring and/or disposing of and/or in any manner alienating the estate of any of the proceeds therefrom, forming part of the joint will (attached here marked "A") of the late Tlala Doctor Masoeu (Id. no. 550616 5307 084) and Rachel Motsilisana Masoeu (Id. no. 600110 5325 084); and

3. The first respondent (and second and third respondents as the case may be) is/are hereby interdicted and/and restrained from dealing in and/or transferring and/or disposing of and/or in any manner alienating any part of the estate be it forming part of a will and/or any other testamentary document by and/or any community estate (if any) between the first respondent and the late Tlala Doctor Masoeu...; and

4. The relief set out in paragraphs 2 and 3 above is granted [to] operate as *interim* orders with immediate effect pending the final determination and outcome of Part B of this application.

5. The applicants are hereby ordered and directed to forthwith serve on the respondents:

5.1 ....

5.2 ....

5.3 ....

6. Calling on the first and/or the [second and third] respondents to show cause on 28 October 2021 at 9h30 or soon thereafter as the matter may be heard why the *interim* orders in paragraph 2 and 3 should not be made final, and why the respondents should not be ordered to pay the costs of the application."

[4] The late Mr Tlala Doctor Masoeu ("Mr Masoeu") is the first applicant's late husband.

[5] On the return date of the abovementioned rule *nisi* the matter served before Litheko, AJ and on 27 January 2022 he discharged the rule *nisi* in the following terms:

"1. The rule *nisi* issued on the 23rd September 2021 is hereby discharged.

2. The applicants are ordered to pay the costs of the application, inclusive of the costs of 28 October 2021."

The founding affidavit:

[6] The first applicant made, *inter alia,* the following allegations in the founding affidavit:

"24. The respondents have failed to restore to me the control of the business as I was interdicted and/or restrained from dealing in any part of the estate, be it forming part of a Will and/or any other testamentary document by and/or any community estate (if any) between myself and the late Tlala Doctor Masoeu. Inadvertently, the second and third applicants form part of such estate.

25. These entities are business which I conducted/established alongside my deceased husband and since the rule *nisi* was issued, I have not been able to oversee the business and the respondents continue to obstruct my access to such entities.

26. The first respondent has ten (10) percent shares in Remasoeu Funeral Home with registration number 2005/099191/23, however me and Thato have 45 % shares each in Remasoeu Funeral Home ... This Honourable Court is referred to paragraphs 3 and 3.1 of the revoked Joint Will dated 22 January 2019 marked annexure 'B' to the application before this court and paragraph 3.1.6 of the latest Joint Will dated 8 June 2021 marked annexure 'PNM4'.

27. The only reason I refer the court to these paragraphs is to demonstrate the extent of restraint imposed by the rule *nisi* and the extent of my continued prejudice by the respondents' failure to comply with the court order dated 27 January 2022.

28. Furthermore, the communal home where I resided with my deceased husband is subject to the joint estate ... and I have similarly been disposed of my access to the house and my encompassing personal objects since September 2021.

29. The rule *nisi* has since 27 January 2022 been discharged; thus, I see no further reason why I should be restrained from dealing in any of the contents the estate."

The answering affidavit:

[7] In their answering affidavit the first to third respondents pointed out that the urgent interdictory application which served before Loubser, J and Litheko, AJ also contained a Part B to the notice of motion in terms whereof the first to third respondents sought an order in the following terms:

"1. That the terms and provisions [of the] joint will (attached herein marked 'A') of the late Rachel Motsilisana ... and late Tlala Doctor

Masoeu ... are valid, upheld and a true reflection of the last will and testament of the testators.

2. That the estate in the joint will reference in paragraph 1 above is not part of and is specifically excluded from the community estate between the first respondent and the late Tlala Doctor Masoeu.
3. In addition to, and/or as a consequence of the above exclusion, the right of accrual as referred to in the Matrimonial Property Act 88 of 1984 as between the first respondent and the late Tlala Doctor Masoeu is hereby specifically excluded from any inheritance received and/or specified in the joint will above.
4. Directing the first and second respondent or any other person who is or may be in possession of the joint will mentioned above, to immediately return same to the joint estate above." (*sic*)

[8] According to the first to third respondents Litheko, AJ was requested in a letter of their erstwhile attorneys to also grant an order in respect of Part B of the Notice of Motion and to provide reasons for such an order. They are still awaiting the response from Litheko, AJ.

[9] The first to third respondents further deny that they are in contempt of the court order dated 27 January 2022.

[10] The first to third respondents furthermore stated as follows in their answering affidavit:

"39. The applicants' conduct in bringing this contempt application is an abuse of the Honourable Court's process and is done to intimidate the respondents.

40. The applicants are fully aware that the order they seek to rely on for the application, does not with respect, addressed itself to their allegations of contempt."

[11] They further stated as follows:

> "34. In amplification, it is denied that the respondents ever obstructed the applicants from accessing any of the entities mentioned therein. It is noted that the applicant does not mention how, when any of such obstruction, if any, was ever done by the respondent.
>
> 35. It is further denied that the applicant was ever prevented from accessing the family home and accessing her personal belongings. It should be noted that no basis is provided on how and when this was alleged to have happened."

Replying affidavit:

[12] In the replying affidavit the applicants alleged that the discharge of the *interim* order has far-reaching consequences for them, more specifically for the first applicant and the uninterrupted operation of the entities. Therefore, it is of paramount importance that the first to third respondents comply with the court order and release the apparatus of the business and also, importantly, grant the first applicant access to the marital home which she occupied with her deceased husband.

[13] The applicants further point out in their replying affidavit that before the replying affidavit could be filed, the applicants were necessitated to approach court by means of an urgent application under case number 2039/2022 on 4 May 2022 to interdict and restrain the first to third respondents from their various attempts to dissipate and depose of the Estate Late Tlala Doctor Masoeu's assets. According to the applicants, *"all the more reason why these contempt proceedings are called for"*.

[14] It is furthermore stated that the first to third respondents took over branches of Remasoeu Funeral Home CC on 10 September 2021, which was shortly after the first applicant's late husband's burial. According to the first applicant the first to third respondents had instructed all the branch managers of Remasoeu Funeral Home CC to give the first respondent all the premium instalments paid by the clients from all the branches. The Marquard branch has been closed down and the third respondent informed the employees that she is taking over.

[15] Furthermore, the following is stated in paragraph 29 of the replying affidavit:

> "The respondent(s) had also removed and replaced the branding of the Remasoeu Funeral Home CC from all its branches and replaced with their own company branding. In addition to this, the respondent(s) have begun removing or uninstalling the refrigerators that form an integral part of the business and which house the corpses. This is an act of destroying the business and the dispossession of the contents of the estate."

Condonation:

[16] The applicants are seeking condonation for the late filing of their replying affidavit.

[17] A detailed explanation which led to the delay is set out in the replying affidavit.

[18] I am satisfied with the explanation and considered in the interest of justice that the late filing of the replying affidavit be condoned and condonation is granted accordingly.

Legal principles:

[19] It is trite that the requirements for a finding of contempt of court are the following:

1. The order by the court.
2. Service of the order on the respondents and/or knowledge of the order by the respondents.
3. Non-compliance of the order by the respondents.

See **Fakie N.O. v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at para [42].

[20] In my view it is important in the circumstances of this application to first consider the nature of the court order. Not every order of court can be enforced by committal for contempt. The order must be one *ad factum praestandum* before the court will enforce it in that manner. Orders *ad factum praestandum* are orders to do or abstain from doing a particular act. In **Fakie**, *supra,* at para [7] the following is stated in this regard:

> "The form of proceeding CCII invoked [contempt of court] appears to have been received into South African law from English law and is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not to do something (*ad factum praestandum*), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order."

[21] In **Metropolitan Industrial Corporation v Hughes** 1969 (1) SA 224 (TPD) at 227E the principle was stated as follows:

> "... because it is well settled that a committal for contempt of court by reason of a failure to comply with an order of court is proper only when that order was *ad factum praestandum*."

Consideration of the merits of the application:

[22] The *interim* order in this matter was issued against the first to third applicants. In terms thereof it is the first to third applicants who were interdicted and restrained from certain conduct.

[23] The effect of the discharge order is consequently that the first to third applicants are no longer interdicted and restrained as provided in the *interim* order. The result of the discharge order is therefore that the first to third applicants may now (again) perform the actions which were previously prohibited by the *interim* order.

[24] The fact that the *interim* order was discharged, in my view, did not and does not place any obligation on the first to third respondents to perform any actions and/or to refrain from performing certain actions and/or to conduct themselves in a certain manner. The fact that the three applicants may now (again) perform the actions which were previously prohibited by the *interim* order does not have the corresponding result that the first to third respondents are now prohibited to perform the type of actions described in paragraphs 2 and 3 of the *interim* order.

[25] The wording of the *interim* order did not grant any rights or relief to the first to third respondents which they now have to undo or may no longer do as a result of the discharge order.

[26] In my view it is extremely important to pay attention to the wording of the *interim* order. It is the applicants' case in the founding affidavit and in the replying affidavit that they, and especially the first applicant, *inter alia,* lost control over the business entities and the marital home which she occupied with her deceased husband. However, the *interim* order did not grant the first to third respondents the right or the entitlement to take control of the business entities or to live in the marital home, with the first to third applicants having been "evicted" from the said properties by means of the *interim* order. Had that been so, the discharge order would have had the effect that the first to third respondents would be compelled to move out of the respective properties and to restore the first to third applicants control and possession thereof. However, in terms of the wording of the *interim* order it did not grant any rights or relief to the first to third respondents which they now have to undo or no longer do as a result of the discharge order.

[27] The discharge order, consequently, does not constitute an order *ad factum praestandum.* It does not place any obligation to do something or not to do something on the first to third respondents.

[28] The first to third respondents can consequently not be considered to be in contempt of court.

[29] The application consequently stands to be dismissed.

Costs:

[30] This application first served before me on 28 July 2022 in order to be heard concurrently with the return date of the urgent application which the first to third applicants instituted under case number 2039/2022, which was also referred to in the applicants' replying affidavit.

[31] On 28 July 2022 I dealt with the interdict application under application number 2039/2022, but for reasons which will become evident I had to postpone the present application to 20 October 2022. In addition to the postponement, I made the following order:

> "2. The respondents are ordered to file their heads of argument in accordance with the rules of practice.
> 3. The wasted costs of today occasioned by the postponement stand over for adjudication simultaneously with the hearing of the application.
> 4. For purposes of the determination of the reserved costs, leave is granted to the applicants and the first to third respondents to file an affidavit in respect of the relevant background events which led to today's postponement of the application, should they wish to do so."

[32] Mr DH Murray of Lovius Block Attorneys, the first to third applicants' attorney of record, filed an affidavit, dated 5 October 2022, in response to my aforesaid order. In the said affidavit he set out the history of the two applications, the facts of which are also evident from the two court files and some of which facts

are already to my knowledge due to my handling of both the applications. I will now deal with the relevant facts.

[33] The present contempt of court application was launched on 2 March 2022 and was opposed by the first to third respondents on 4 March 2022. They filed their answering affidavits on 11 March 2022 and the applicants filed their replying affidavit, together with a condonation application, on 13 May 2022.

[34] In the meantime, on 4 May 2022, the applicants filed an urgent interdictory application against, *inter alia,* the first to third respondents, under application number 2039/2022. A rule *nisi* was issued by Chesiwe, J with return date 2 June 2022. On 2 June 2022 the first to third respondents appeared in person in the unopposed motion court and I extended the rule *nisi* until 28 July 2022 to the opposed roll, with specific dates for the filing of the answering affidavits and the further papers in the said application. I ordered the wasted costs of the day to stand over for later adjudication.

[35] In the said interdict application, application number 2039/2022, Mpakathi Inc Attorneys formally came on record as the first to third respondents' attorney of record, on 31 May 2022. However, as indicated above, Mpakathi Attorneys did not appear on behalf of the first to third respondents on the return date of the rule *nisi* in 2039/2022 on 2 June 2022, but instead sent the respondents in person to request a postponement.

[36] On 28 July 2022 the interdict application in application number 2039/2022 was indeed argued before me.

[37] The said affidavit of Mr Murray set out the following relevant facts with regard to the background events which led to the postponement of the present application on 28 July 2022:

"17.

On the 11th of May 2022, we received a letter from Mpakati Inc ("Mpakati"), the respondents` current attorneys of record, which was addressed to the respondents' erstwhile attorneys of record – Mjobi & Associates.

18.

In such letter which is annexed hereto as annexure 'C', Mpakati informed Mjobi Attorneys that their mandate had been terminated and that their (Mjobi & Associates) offices had been appointed 'to act on behalf her (respondent's) family'. The letter does not make any mention to either of the applications, and I accepted same to mean that they were going to come on record in respect of both matters. [I accept that Mr Murray meant to say in this paragraph that Mpakati Inc offices had been appointed at that stage and not Majobi & Associates].

19.

Already at this stage of proceedings, the respondents in their personal capacities, as well as their erstwhile attorneys of record, were fully of both the contempt of court application as well as the *interim* interdict order against them, as Majobi Attorneys were in receipt of both applications and they drafted opposing papers on the contempt application.

20.

After receiving the letter dated 11 May 2022 and on the 12th of May 2022, I wrote an e-mail to the respondents' new attorneys of record (Mpakati) wherein I requested that they formally come on record.

21.

I furthermore requested dates as to when their counsel would be available to argue the content of court application and suggested the dates of 9 or 23 June 2022. A copy of such e-mail is annexed hereto as annexure 'D'.

22.

On 30 May 2022, Mpakati Inc e-mailed us an unsigned copy of their appointment as attorneys of record in respect of the interdict matter and requested that we provide them with copies of both the interdict application as well as the contempt of court application. A copy of such e-mail is annexed hereto as annexure 'E'.

23.

On the very same day, I replied to Mpakati Inc with a copy of the interdict papers and once again requested if their offices were available to argue the contempt of court application on the 23rd of June 2022. A copy such e-mail is annexed hereto as annexure 'F'.

24.

After discussing the date of 23 June 2022 with my counsel, I was reminded that such date fell within the recess period and would thus not be suitable. I then decided that the matter should be set down on the opposed motion court day of the 28th of July 2022.

25.

On the 2nd of June 2022 and as stated above, the respondents, despite having attorneys on record, appeared in person to have the interdict application postponed. The matter was then postponed to 28th of July 2022.

26.

On the very same day, I once again e-mailed Mpakati Inc informing them of our intention to place the contempt of court application on the same day as the interdict application, to wit 28 July 2022, and once again requested that they formally come on record, failing which the notice of set down would be served via sheriff on the respondents themselves. A copy of such e-mail is annexed hereto as annexure 'H'.

27.

I also proceeded to, upon their request, sent the entire contempt application to them in 4 (four) separate e-mails, copies of which are annexed hereto as annexure 'I'. I submit that by requesting such documents, Mpakati Inc was already creating an impression that they were going to be the firm handling such application on behalf of the respondents, alternatively already had an instruction to act on behalf of the respondents in respect of the contempt application as well.

28.

Due to the fact that Mpakati Inc had still not come on record with regards to the contempt of court application, such notice of set down was served per hand on the erstwhile attorneys of record to wit, Mjobi & Associates, c/o Maroka Attorneys, and Mjobi & Associates, c/o Hattingh Attorneys on the 27th of June 2022. The sheriff also personally served the set down on the respondents on the 11th of July 2022 as per annexures 'J1' – 'J3'.

29.

Shortly after receiving the set down and on the 29th of June 2022, Maroka Attorneys withdrew as attorney of record. ...

30.

On 6 July 2022, Mpakati Inc sent us a letter requesting an indulgence for the late filing of the opposing papers in the interdict application. I responded to them and requested that they also confirm their appointment for the contempt of court application. They confirmed on the very same day that they are on record for the contempt of court application. This confirmation in fact came directly from the firm's director, Mr Thembalani Mpakati. In this regard I refer the court to annexures 'K1' – 'K3'.

31.

31.1 On the 14th of July, exactly two weeks before the mattes were to be argued, Mpakati Inc, once again directly from Thembalani Mpakati, e-mailed us requesting the contempt of court application to be sent despite me personally sending same on the 2nd of June 2022.

31.2 In such letter they stated that they confirmed receipt of the notice of set down for the contempt of court application and requested such copy in order 'for our office to prepare and brief counsel accordingly'.

31.3 We accepted that they were once again acting in good faith and were on record for such contempt application and my secretary, Debra Tait duly sent such documents to them again. A copy of such letter and our response is annexed hereto as 'L' and 'M' respectively. A confirmatory affidavit of Mrs Tait is annexed hereto as 'N'.

34.

I accepted these confirmations in good faith and proceeded to brief counsel and prepare for the matter as if Mpakati Inc were formally on record, at no point did Mpakati Inc withdraw their confirmation or that they were no longer acting in both matters.

35.

Mpakati Inc served their heads of argument with regards to the interdict application late on our offices on Wednesday, 27 July 2022. I immediately e-mailed them enquiring as to the whereabouts of their heads of argument with regards to the contempt of court application. A copy of such email is annexed hereto as annexure 'P'. Mpakati Inc did not respond to such e-mail.

36.

On Thursday, 28 July 2022, when we enquired from the respondents' counsel, ... as to the whereabouts of their heads of argument in respect of the contempt of court application, he responded by saying that 'he will address the respondents' position to the court' but would not elaborate further.

37.

It was only when court proceedings commenced that we learnt that Mpakati Inc were not acting on behalf of the respondents in the contempt of court application and were only on instruction for the interdict application. This would however be in direct contradiction to how they acted when dates for the postponement of this matter were discussed and in contradiction to the engagements preceding the hearing.

38.

Whilst I can accept and acknowledge that no formal notice of appointment was received by our offices from Mpakati Inc in respect of the contempt of court application they, on no fewer as four different occasions either outright confirmed that they were on record via e-mail, alternatively implied same by requesting such papers. At no point did they withdraw such averment that they were acting and on record for both matters.

39.

When court proceedings commenced, counsel for the respondents informed the court, and by virtue thereof, ourselves, that they only had financial instruction to act on behalf of the respondents in the interdict

matter and held no instructions for the contempt matter. They also denied ever coming on record in the contempt of court application.

40.

Furthermore, when it became clear that the court was going to postpone the matter, Mpakati Inc were heavily involved in the discussions and allocations of the new date, being 20 October 2022, in respect of the content application, although they all along maintained they had no instruction in this regard. I submit that their conduct in discussing a new date was in direct contravention of them not being on record as alleged.

38.

I submit that as attorneys, and more importantly, officers of the Court, it is our duty to act with the utmost integrity, honesty and good faith towards colleagues.

39.

Mpakati Inc, and more importantly its director, Thembalani Mpakati, grossly misrepresented themselves to our offices in that they acknowledged and confirmed that they were on record for the contempt of court application. At no point prior to court proceedings of 28 July 2022 did they advise us that they did not have financial instructions to act on behalf of the respondents.

40.

I submit that Mpakati Inc's conduct since coming to the fore in these matters can be construed as nothing but *mala fide* and unethical. It has not only been greatly prejudicial to my clients whose matters were not finalised on 28 July 2022 as was envisaged, but also in that they now must suffer further costs occasioned by the postponement of the contempt application. Further, I submit that their, Mpakati Inc's own clint, have been prejudiced by their conduct as they will have to carry costs of a further appearance.

41.

... both applications could have been disposed on the same day.

42.

I furthermore submit that the respondents, as lay people, could not fully understand or comprehend the actions of their attorneys together with the cost implications of having this matter postponed to a further date.

43.

...

44.

I submit that Mpakati Inc, and in special reference to its director, Thembalani Mpakati, have acted grossly unethically, *mala fide* and not in the manner befitting an officer of the court. They grossly mislead themselves (*sic*) by stating that they were on record for this matter when they clearly had no intention of proceeding with same. The undeniable effect of such conduct is that the applicants also have to carry the costs of another court appearance to finalise the contempt application. Had it been known to us that Mpakati was not instructed to deal with the contempt application, we could have engaged further to ascertain a date which would be suitable to argue both matters, prior to the hearing date of 28 July 2022, to curb costs. Resultantly, our clients should not be saddled with the costs of such conduct and the respondents ought to pay the costs.

45.

As such, I submit that it will be grossly improper for the applicant to be burdened with costs of such postponement as the applicants did everything in their power to ensure that the matter could proceed on the 28th of July 2022.

46.

I furthermore submit that it would be grossly improper and not I the interest of justice for the respondents to personally carry the costs of this postponement as I am quite certain that they were unaware of the severe impact such postponement would have on them financially.

47.

I further submit that had their attorneys acted in their best interests, it would have merely been a case of filing an extra set of heads of argument and arguing the matter on the same day as the interdict application was adjudicated. Or, at the very least, they could have timeously informed our offices that they were, despite informing us to the contrary, no longer acting in this matter. This would have, at the very least, mitigated our clients' costs.

48.

Mpakati Inc (as well as the respondents under oath) have on numerous occasions attested to the poor financial standing of the respondents. I am of the view that considering the respondents admitted poor financial status, coupled with the facts leading up to the hearing of this matter, to wit, Mpakati Inc unwilling to inform our offices timeously, or at all, that they will not proceed with the contempt of court application, it would be grossly unfair and not in the interests of justice for the respondents to be held liable for these costs s I am of the view that the blame falls squarely at the feet of their attorneys.

49.

As such, I humbly submit that the only just, fair and equitable cost order under these circumstances would be a costs order, inclusive of the costs of this affidavit and further heads of argument, be made *de bonis pripriis* against Mpakati Inc and its director, Thembalani Mpakati, as they have placed the good name and standing of our honourable profession in jeopardy and were clearly acting *mala fide* in the handling of this matter as far back as May 2022.

50.

To make matters worse, as at the time of deposing to this affidavit and on 16 September 2022, we received a Notice of Withdrawal as Attorneys of Record from Mpakati Inc attorneys. The date of 20 October 2022 was discussed and agreed to with Mpakati to argue the contempt application ..."

[38] The aforesaid affidavit was served on the local correspondent attorneys who, at the time, dealt with the matter on behalf of Mpakati Inc on 5 October 2022. On 17 October 2022 Mr Thembelani Mpakati sent an e-mail to the secretary of Mr Murray with a letter from Mr Mpakati. The heading of the letter makes reference to the present parties and also the present case number 4373/2021 and reads as follows:

"1. We refer to the above matter and your founding affidavit in respect of costs dated 5 October 2022.
2. On your founding affidavit you made serious allegation and accusation against our firm and our Mr T Mpakati in particular.
3. We are going to oppose these baseless and malicious claims against Mpakati Inc attorneys.
4. We have noted that the affidavit makes reference to annexures that have not been attached to it.
5. Kindly send us the annexures so that our office can fully respond to your affidavit.
6. We shall await your response herein."

[39] The aforesaid letter was handed to me during the postponed hearing of the application on 20 October 2022. I was advised from the Bar by Ms Macakati that in terms of her instructions, no further documents had been received by Mr Murray from Mr Mpakati. I have also not received any further documents from Mpakati Inc. If any further documents had in the meantime been filed at court, same have not been handed to me.

[40] It is trite that subject to certain crystalised general principles, the awarding of costs is in the discretion of the court, which discretion has to be exercised judicially.

[41] In the present matter I am considering the possibility of making a costs order *de bonis propriis* against Mpakati Inc Attorneys and/or or Mr T Mpakati with regard to the wasted costs of the postponement on 28 July 2022, including the consequential costs of the affidavit of Mr Murray which has already been filed and the costs of further affidavits which may be filed, if any. Although the respective attorneys have already been granted an opportunity to file an affidavit pertaining to the said costs as

per paragraph 4 of my order of 28 July 2022, I deem it necessary and in the interest of justice to grant the relevant attorneys a further opportunity to file affidavits, if they so decide, in view of the following facts and circumstances:

1. The affidavit of Mr Murray which was filed at court, does not contain the annexures referred to in the affidavit. It is evident from the letter of Mr Mpakati that he did not receive the affidavits either. Irrespective of whether such annexures have in the meantime been provided to Mr Mpakati, I deem it necessary to also have sight of the said annexures.

2. The allegations and submissions contained in the affidavit of Mr Murray are very serious in nature and therefore, I deem it necessary that Mr Mpakati be granted an opportunity to respond thereto, should he so wish.

3. There is a risk that Mr Mpakati may already have filed a response to the affidavit at court, but that such response has, due to administrative problems, not been provided to me. I do not want to risk making a costs order I circumstances where it may be that I am not in possession of all the relevant documents which have been filed at court in this regard.

[42] In order to ensure that no misfiling takes place, I intend ordering that the filing should take place by e-mail and that my registrar be copied in the said process.

[43] With regard to the other costs of the application, excluding the wasted costs of 28 July 2022, I intend to reserve same until such time as I give judgment on the costs of 28 July 2022. I do not deem it appropriate to consider costs on a piecemeal basis.

Order:

[44] The following order is consequently made:

1. The application is dismissed.
2. The costs of the application are reserved, subject to the following:

    2.1 Mr D. Murray ("Mr Murray") of Lovius Block Attorneys is ordered to email a copy of this order to Mr T. Mpakati ("Mr Mpakati") of Mpakati Inc Attorneys, Pretoria on or before Tuesday, 28 March 2023.

    2.2 Mr Murray is ordered to email a copy of the annexures referred to in the affidavit of Mr Murray, dated 5 October 2022, to Mr Mpakati on or before Thursday, 30 March 2023.

    2.3 Mr Mpakati and/or any other duly authorised representative of Mpakati Inc Attorneys is granted leave to file an affidavit, should he/she so wishes, in response to the affidavit of Mr Murray, dated 5 October 2022, which filing is to take place via email on or before Friday, 14 April 2023.

2.4 Mr Murray is granted leave to file an affidavit, should he so wishes, in response to the aforesaid affidavit of Mr Mpakati and/or on behalf of Mpakati Inc Attorneys, if such an affidavit is indeed filed, which filing is to take place via email on or before Friday, 28 April 2023.

2.4 The aforesaid emails are also to be filed at court via email addressed to my registrar, Mr H van Vuuren, at hvanvuuren@judiciary.org.za.

2.5 The judgment on costs will be handed down within 10 days after the date for filing of the affidavit in reply, if any.

C. VAN ZYL, J

On behalf of the applicants: Adv. I. Macakati
Instructed by:
Lovius Block Attorneys
BLOEMFONTEIN

On behalf of the 1st – 3rd respondents: No appearance