

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 2021/55545

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED NO |

16 March 2023

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SIGNATURE

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DATE

In the application between:

NGWANAMALEFO JEANETT MAWELA

Applicant

and

NBC HOLDINGS (PTY) LIMITED

First Respondent

MATHEBE DAVID MAWELA

Second Respondent

CAPITEC BANK LIMITED

Third Respondent

JUDGMENT

TURNER AJ

Heard: 17 January 2023

Delivered: 16 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 16 March 2023.

Summary: *Costs de bonis propriis* - against applicant's attorney – pursuing application after disputes resolved – clear warning given - where purpose was for attorney's benefit, attorney bears the obligation to pay the additional costs incurred.

[1] This application relates to liability for costs and is pursued only between the applicant and the first respondent. The issues as between the applicant and the remaining respondents have been resolved. The applicant seeks an order for costs against the first respondent and the first respondent seeks a punitive costs order against the applicants. The primary relief sought by the first respondent is an order *de bonis propriis* against the applicant's attorney and, in the alternative, it seeks an order for costs on a scale as between attorney and client against the applicant herself.

[2] The matter started life as an *ex parte* application, launched by the applicant on 24 November 2021 and heard on 25 November 2021. It focussed on the applicant's interest in the funds being paid out by the second respondent's pension fund. (The second respondent is the applicant's ex-husband.) The applicant contended that, in terms of their 2002 divorce order, she was intended and entitled to receive an amount equal to 50% of the second respondent's net pension interest, calculated as at 14 August 2002.

[3] In the founding affidavit, the first respondent was identified as "*the administrator of Toyota South Africa Provident Fund, the fund on which the second*

respondent holds the pension interest". The Toyota South Africa Provident Fund itself was not joined.

- [4] When the applicant's attorney found out that the pension interest had in fact been paid out on 25 November 2021, the applicant launched a second *ex parte* urgent application, seeking relief against the second respondent and Capitec Bank, being the bank to which the pension funds had been paid and where the second respondent held his bank account. This second application was heard on 26 November 2021.
- [5] The orders granted *ex parte* by Wright J on 25 and 26 November 2021 were framed as rules *nisi* returnable on 17 March 2022.
- [6] Shortly before the *ex parte* applications were delivered and heard, the applicant's attorneys, Mawzeka Nkogatsi Attorneys Inc, had exchanged correspondence with the first respondent, NBC Holdings. In that correspondence, NBC Holdings noted that it was writing to the applicant's attorneys "*on behalf of the Toyota South Africa Provident Fund (the Fund)*". NBC Holdings did not indicate that the pension fund administrator was a different NBC entity. In the email correspondence exchanged on 25 November 2021, the person sending the correspondence and allegedly "*finalising the retrenchment benefit to the member*", is identified in the correspondence as being "*Loshni Naidoo, Senior Administrator : Team Leader*" employed by NBC Holdings (Pty) Ltd.
- [7] It was only after the 25 November 2021 court order was delivered to the first respondent that the first respondent pointed out that the "*section 13B Administrators of the Fund are NBC Fund Administration Services (Pty) Ltd*" not

NBC Holdings (Pty) Ltd, the first respondent. Later correspondence sent on 25 February 2022 is also signed-off by Loshni Naidoo but, this time, Loshni Naidoo is identified as representing NBC Fund Administration Services (Pty) Ltd.

[8] In my view, given the correspondence exchanged, the applicant (and her attorneys) cannot be criticised for having joined NBC Holdings as the first respondent given the names which appeared on the correspondence exchanged prior to the application being launched. However, this is where the reasonableness of the applicant's attorneys' conduct ends.

[9] In argument before me, the applicant's counsel insisted that the position taken by NBC Holdings in the correspondence preceding the 25 November application was wrong in law and so the applicants were entitled to pursue the application for costs. The argument was that NBC Holdings should pay all costs because they had been wrong in their correspondence and had precipitated the *ex parte* applications.

[10] Having regard to the orders granted by Wright J, the rule *nisi* would expire on 17 March 2022, if not extended. One must remember that the key relief sought by the applicant was a payment of money to her by the second respondent, in settlement of their divorce obligations. The citation of NBC Holdings and Capitec Bank were purely to enable the applicant to secure relief against the second respondent, there was no independent claim for a debt owed by NBC Holdings or by Capitec Bank. Importantly, by early 2022, the applicant's attorney knew that NBC Holdings was not the Fund and was not the administrator of the Fund and so the attorney would have known that even if

the relief had been enforceable, NBC Holdings could not have prevented payment out of the pension fund monies.

[11] At the hearing before me, it was common cause that the total amount owed by the second respondent to the first respondent was R35,694.67 (plus interest from 25 November 2021 to date of final payment). It appears that the applicant and her attorneys were only informed that this was the amount after the November orders had been granted. It seems clear that the legal representatives would have realised that they would not receive much (if any) from this pay-out to compensate them for the two urgent applications launched in November and their other attendances on the matter.

[12] On 10 March 2022, the second respondent signed a settlement agreement in which he undertook to pay this full amount to the applicant. The settlement agreement was signed by the applicant on 16 March 2022. There was no provision in the settlement agreement for the second respondent to pay the applicant's costs of the court applications. The settlement debt was paid to the applicant and the settlement agreement confirms that it is the "*whole agreement between the parties in respect of the matters dealt with*".

[13] The rule *nisi* return date was 17 March 2022 and, clearly, with the settlement agreement having been signed, it was anticipated that the matter could be resolved on that date. As it turns out, the applicant's attorney did not set the return day down in accordance with the Court's directives and so the application was not on the court roll for 17 March 2022.

[14] In my view, this should have been the end of the matter. There is no dispute that the Fund had paid out the second respondent's pension benefits to his

account at Capitec Bank on or about 25 November 2022. The amount owed by the second respondent to the applicant pursuant to the divorce decree was determined and agreed in the amount of R35,694.67 and the primary dispute giving rise to the proceedings had become settled between the applicant and the second respondent. That amount was paid by the second respondent. There was therefore no reason further to pursue an interdict against NBC Holdings and it appears that no further steps were required to be taken against Capitec Bank either.

[15] On 18 March 2022, NBC wrote to the applicant's attorneys asking whether those attorneys had instructions to proceed with the matter, imploring the applicant not to proceed, attaching an unreported decision in *Mapho Thoma v Pension Funds Adjudicator and others* (2015) and warning those attorneys that if they insisted on proceeding against NBC, NBC would seek a costs order *de bonis propriis* against the attorney.

[16] This was then followed by a WhatsApp conversation on Saturday 19 March 2022. On 22 March 2022, NBC wrote to the applicant's attorneys to confirm the "WhatsApp" conversation on Saturday 19 March 2022 and set out why it contended that the original application was bad in law and also why, as at 22 March 2022, it considered the proceedings to be moot and why enrolling the matter merely to obtain a costs order was not justified. NBC also warned the applicant's attorneys that they would be seeking a costs order *de bonis propriis* if the matter was set down merely to obtain a costs order.

[17] On 7 April 2022, Shepstone & Wylie Attorneys came on record for NBC and again requested the applicant to withdraw the application, failing which it would

deliver an answering affidavit and seek a punitive costs order. This indicates that, up to this point, NBC had not incurred external legal costs in dealing with the matter.

[18] On 12 April 2022, the applicant's attorneys responded to record that "*our instructions are, to make an application to the court for the extension of the rule ... and to proceed with the matter*". This then elicited the respondent's answering affidavit which was delivered on 17 May 2022.

[19] The following facts appear from the answering affidavit: NBC is the legal service provider of the Fund whereas NBC Fund Administration Services (Pty) Ltd is the Fund's administrator; by the time of the answering affidavit, the second respondent had made payment of 50% of the relevant pension fund to the applicant. The first respondent contended that pursuing the application when it was moot was unreasonable and justified a punitive costs order *de bonis propriis* against the legal representatives.

[20] Despite the letters received in March and the answering affidavit in April, the applicant delivered a replying affidavit and persisted with the application. In her replying affidavit, the applicant states that "*where I make any submission of a legal nature herein, know that I do so on the advice by my legal representatives, the advice which I believe to be correct*". Despite the call for an order *de bonis propriis* against the attorney, the applicant's attorney did not deliver an affidavit.

[21] The thrust of the replying affidavit rests on a series of legal assertions. The first is that the orders obtained by the applicant on 25 and 26 November 2021 remained in place and even if they were taken against the wrong NBC entity,

they are enforceable against the first respondent. The applicant argues that the only way in which the first respondent could have avoided the consequences of those orders was if it had applied to rescind the court orders. As these are legal submissions, one must accept that they were included by the applicant's attorneys (as stated in paragraph 2 of the applicant's replying affidavit).

[22] The basis for these submissions is fallacious for at least the following reasons:

22.1 The applications heard by Wright J on 25 and 26 November were heard *ex parte*.

22.2 No order for costs was made, save that the costs of the application were to be "costs in the main application".

22.3 It was common cause that the funds had been paid out on 25 November, before the orders (or even the existence of the applications) had been notified to NBC.

22.4 The first respondent was not required to anticipate the return date or to bring an independent application to rescind the original orders. It was entitled to wait until 17 March 2022 and to deal with the consequences then.

22.5 As a settlement had been reached between the main protagonists before 17 March 2022, there was no reason for NBC to remain involved in the application and there was clearly no basis on which an interdict could be confirmed against NBC where it was undisputed that the monies had already been paid out in November 2021.

[23] The applicant's attorneys also argue in paragraph 26 of the reply that the "general principle is that the costs should follow the cause which is why the first respondent should pay the costs in this application". In doing so, sight is lost of the fact that the original application was *ex parte* and the respondent did not have an opportunity to answer that case at the time. Moreover, the judge who heard that application did not grant an order for costs against the first respondent at that stage. As the monies had already been paid out by the Fund by the time the order was communicated, there was nothing further to be interdicted and so no further reason for the first respondent to remain a respondent in the proceedings. Further, as was undisputed, the wrong NBC company had been cited in those *ex parte* proceedings and so the applicant would not have succeeded on the return day in any event.

[24] Having regard to all of these circumstances, pursuing this application after 17 March 2022 was wholly unreasonable and unjustified. On a review of the answering affidavit, the replying affidavit and the relevant correspondence, it is clear that the basis on which this application was pursued after 17 March 2022 was on the basis of the advice and encouragement of the applicant's legal representatives. It seems that the only reason for the attorneys to do so was to attempt to recover some costs that would be paid to them. The applicant's attorney has not put up any version to contradict this.

[25] The attorney's conduct is, in my view, irresponsible and reckless and sufficiently egregious to justify me exercising my discretion in favour of granting an award *de bonis propriis*. (*Stainbank and another v SA Apartheid Museum at Freedom Park & another* 2011 (10) BCLR 1058 (CC) at [52]) A further factor

reinforcing this view is the fact that the conduct was motivated by the personal interest of the attorney as it would be him, not the applicant, that would be the beneficiary of any costs recovered through this extended process. (see *Pieter Bezuidenhout- Larochele Boerdery v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 236 F-G). The first respondent is entitled to recover its costs but, in my view, the applicant cannot be required to bear those costs personally. As the only reason the costs were incurred was because the applicant's attorneys chose to pursue the irresponsible and reckless course of prolonging the matter, I am compelled to order that those attorneys pay the costs, on a punitive scale.

[26] In the circumstances, I make the following order:

- (1) Each party shall bear its own costs in respect of the period up to and including 17 March 2022.
- (2) The applicant's attorneys are not entitled to recover fees or disbursements from the applicant in respect of any of the work done after 17 March 2022 in respect of this application, including the extensions of the rule.
- (3) The applicant's attorney, Mawzeka Nkogatsi Attorneys Inc, is liable *de bonis propriis* to pay the costs of the first respondent incurred after 17 March 2022 on the scale as between attorney and client.

TURNER AJ

Counsel for the applicants: Adv K I Boko

Instructed by: Mawzeka Nkogatsi Attorneys Inc

Counsel for the first respondent: Adv K Magan
Instructed by: Shepstone & Wylie Attorneys