REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 040016/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. Yes

……………………………… ……………………
SIGNATURE **DATE**

In the matter between:

MUDZUSI MOLOBELA ATTORNEYS	First Applicant
NOMAKHOSANA SIHUNU N.O. **(In her capacity as executrix of Estate Sihunu)**	Second Applicant

and

ABRAM R MOKHOANTLE	First Respondent
NKITI D SHUMENI MOKHOANTLE	Second Respondent
STANDARD BANK VANDERBIJLPARK BRANCH	Third Respondent
ABSA BANK VANDERBIJLPARK BRANCH	Fourth Respondent
FIRST NATIONAL BANK VANDERBIJLPARK BRANCH	Fifth Respondent

NEDBANK VANDERBIJLPARK BRANCH	Sixth Respondent
CAPITEC VANDERBIJLPARK BRANCH	Seventh Respondent
RADINGOANA ATTORNEYS	Eighth Respondent

JUDGMENT

LEECH, AJ:

1 On 3 November 2022 the applicants obtained an *ex parte* attachment, on an urgent basis and in the form of a *rule nisi*, of the first and second respondents' bank accounts. On a belated and extended return day, an opposed application for the confirmation of the *rule* served before me.

2 After hearing argument from the first and second applicants and the respondents' legal representatives, I dismissed the application thereby discharging the *rule*. At the time of doing so, I gave an *ex tempore* judgment setting out my reasons.

3 I subsequently received a request, in terms of the Uniform Rules of Court, for the reasons for my order. Unfortunately, the transcribers have been unable to retrieve or transcribe the *ex tempore* judgment.

4 The following written reasons therefore serve as the reasons for my judgment and order dismissing the application and discharging the *rule*.

5 The first applicant is a firm of attorneys. The second applicant is the *executrix* of the deceased Estate of Mr Sihunu, the second applicant's late husband, who prior to his death was a practising attorney. I refer to the first applicant as such and to the first and second applicants collectively as *the applicants*. I refer to the Late Mr Sihunu, where appropriate, to differentiate him from the second applicant.

6 The basis of the application lies in the assertion that first the Late Mr Sihunu and, after his death, the first applicant rendered legal services to the first and second respondents (*the respondents*) in a dispute between them and their employer. It is common cause that both respondents are—and, for some time, have been on an ongoing basis—managers employed by the Emfuleni Local Municipality (*the Municipality*).

7 The eighth respondent are still other attorneys. In the dying stages of the dispute between the respondents and the Municipality, they allegedly took over as the respondents' attorneys of record. Whatever else they may or may not have done, they allegedly received into their trust account monies paid by the Municipality in favour of the respondents arising out of the litigation between the two.

8 The third to seventh respondents are, as their erroneous citations reflect, the local Vanderbijlpark branches of various Banks operating in South Africa (*the respondent banks*). It is alleged that the respondents hold or may hold bank accounts with one or more of the respondent banks.

9 As I have indicated above, in the opening paragraph, the applicants obtained an order *ex parte* attaching any monies held by or on behalf of the respondents in bank accounts

operated by the respondent banks or in the eighth respondent's trust account. The attachment took the form of a *rule nisi* and, on the return day before me, the respondents opposed the confirmation of the *rule* and the order attaching their monies.

10 The respondent banks took no part in the proceedings before me; they abided its outcome. The eighth respondent indicated that any monies received had already been paid out to the respondents prior to the attachment order being served on it. No relief could therefore be obtained as against the eighth respondent, who also took no further part in the proceedings.

11 The founding affidavit contains the barest of allegations, but in summary the cause of action relied on by the applicants is as follows (all quotations are rendered verbatim):

11.1 The respondents allegedly concluded a contingency fee agreement with the Late Mr Sihunu, in terms of which he undertook to represent them (along with thirty-one similarly situated employees) in their dispute with the Municipality.

11.2 In return for his agreeing to represent them and in terms of the alleged contingency fee agreement, the respondents agreed that the Late Mr Sihunu could retain 25% of the proceeds of any award made in favour of the respondents as against the Municipality.

11.3 It is alleged, in the founding affidavit, that the respondents appointed the Late Mr Sihunu on 10 October 2016. It is said that the respondents, on a date not specified,

> concluded a fee agreement with the second Applicant. A copy of the said fee agreements is untraceable, however some of the applicant/employees in the

> same matter which the first and Second respondent are party to it are attached herein as annexure "MM3".

11.4 Annexure MM3 is a written agreement ostensibly concluded on 18 October 2016 between Conrad Netshivhale, Sihunu Attorneys, and an unnamed advocate. It is described, on the face of it, as a "Mandate and Contingency Fee Agreement in terms of the Contingency Fees Act No 66 of 1997".

11.5 Mr Sihunu died 'on or about the December 2020.' It is said, further, that:

> The First applicant was later appointed by the 33 managers to continue with the matter and then inherited the matter with the instruction of all parties involved and carry on with the matter until its finality on or about the 30th of July 2021.

11.6 An award was made in favour of the respondents on 30 July 2021 and

> on or about or during February 2022 the First applicant received payment from Emfuleni Municipality which the First and Second Respondent were beneficiaries, and their monies were subjected to deduction of our 25% as per Fee Agreement which was signed between them and the Second Applicant.

11.7 It appears, however, that at some stage thereafter the respondents appointed the eighth respondent to represent them, *inter alia*, for purposes of issuing a writ of execution against the Municipality for unpaid monies due to them. Furthermore, according to the founding affidavit, the respondents informed the deponent that they had received payment from the eighth respondent of amounts due to them.

11.8 The respondents declined, however, to pay anything to the first applicant (or, apparently, to the second applicant), which prompted the applicants to bring the application for the attachment of their bank accounts.

12 The founding affidavit made allegations of a wholly unsatisfactory nature regarding commercial urgency, the apprehension of irreparable harm if an order were not granted in the applicants' favour, and why the applicants could not obtain relief via an alternative remedy including possibly a damages action against the gainfully employed respondents.

12.1 Needless to say, these sparse averments do nothing to convert an already hopeless cause of action into a good one.

12.2 Even if a good cause of action had been made out, these allegations would have been insufficient to found an entitlement to an interdict in the form of an attachment, let alone on an *ex parte* or urgent basis.

12.3 Nor did the applicants seek the attachment pending some other relief or other proceedings to be instituted. The Notice of Motion was framed in the form of an attachment *per se*.

13 I marvel at the skills of the counsel who managed, in the face of these deficient pleadings, to persuade a court to issue the *rule nisi* that was granted on 3 November 2022.

14 I need not dwell on these aspects, however, because the absence of a validly made out cause of action is dispositive of the application and, with it, the outcome of the *rule*.

15 The case before me was founded on the alleged contingency fee agreement. There was no alternative cause of action made out on the papers to the effect that, as attorneys, the first applicant and the Late Mr Sihunu were entitled to their reasonable or taxed fees. There was no taxed bill or even a *pro forma* bill. There was no statement as to what work was

done, when it was done, by whom (whether the first applicant or the Late Mr Sihunu), or what work was done on behalf of the respondents as compared with the other employees.

16 As far as concerns the contingency fee agreement, it was accepted before me that section 3 of the Contingency Fees Act, 66 of 1997 requires such an agreement to be in writing in the prescribed form as a precondition to its being valid and enforceable.

17 No written agreement has been placed before me. The only allegations in the founding affidavit regarding the conclusion of such an agreement are those I have recorded and paraphrased above. To the extent that the deponent thereby attempted to prove, by secondary means, the existence of such an agreement, then his averments come nowhere near being sufficient. Apart from anything else, it is not even clear on what basis the deponent can depose to these averments, which would appear for all intents and purposes to be inadmissible hearsay.

18 Without belabouring the point, I am not told when the alleged contingency fee agreement was concluded by either or both of the respondents, that it took exactly the same form as the example given, or that it was signed on behalf of the Late Mr Sihunu. On that basis, I don't even need to get to the secondary question of whether or it is possible under the Act to rely on secondary proof of a contingency fee agreement in the absence of a copy of an actual signed agreement: the issue does not arise, because the applicants have failed even to meet that threshold of proof.

19 The position for the first applicant is even worse, because he does not assert that he was a party to the contingency fee agreement. He does not claim that he signed his own

contingency fee agreement with the respondents. As quoted above, he says that at some later date he was appointed by the thirty-three managers to continue with the matter and "inherited" the matter with the instruction of all the parties.

20 There are no statements made regarding section 2 of the Act, what the first applicant's usual fees are, what the Late Mr Sihunu's usual fees were, or whether the 25% claimed represents an amount that can permissibly be claimed under the Act. This despite the fact that the reasonableness of the fees was placed in issue.

21 It is impossible, on the strength of the allegations made in the founding affidavit, to conclude that there is any contingency fee agreement at all in favour of the first applicant, let alone an entitlement based on the original contingency fee agreement that allegedly arose as between the respondents and the Late Mr Sihunu. He has simply failed to make out a cause of action at all.

22 It is trite that applicants must make out their case in the founding affidavit and must stand or fall by those allegations. In the circumstances of this case, that would include making sufficient averments as would enable them to discharge the onus of proving the agreements on which they rely.

23 The applicants have failed, in the founding affidavit, to discharge the onus resting on them to allege and prove the contingency fee agreements on which they rely or to show that, arising from any such contingency fee agreement, the respondents are indebted to them such as would entitle the applicants to an order attaching all of the monies held in the respondents' bank accounts.

24 I accordingly made the following order:

1. The *rule nisi* issued forth on 3 November 2022 is discharged;
2. The application is dismissed;
3. The applicants are to pay the first and second respondents' costs.

B.E. LEECH
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the applicant: Mr M Tonyela
Instructed by: Mudzusi Molobela Inc.

For respondent: Mr Ike Motloung
Instructed by: Radingoana Attorneys

Date of hearing: 14 March 2023
Date of judgment: 14 March 2023