

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES:
No

Case No: HCGS390804
(2024-023552)

In the matter between:

HOMESTEAD ENTERPRISE (PTY) LIMITED

Applicant

and

L. G. NOGAGA INCORPORATED ATTORNEYS

First Respondent

LUYANDA NOGAGA

Second Respondent

REASONS FOR ORDER MADE ON 27 FEBRUARY 2024

Gilbert AJ:

1. On Tuesday evening, 27 February 2024 at 19h21, the applicant launched an urgent application for hearing at 21h00. I was informed that

at approximately 19h30 a copy of the application was emailed to the respondents.

2. What the applicant sought in this after hours urgent court application was an order directing the first, alternatively the second respondent to pay to him the sum of R924,500.00 and failing which the Sheriff was to take control of the relevant banking account of the respondents and to ensure the payment was made.
3. What is immediately evident is that the applicant sought final relief after hours on extremely short notice to the respondents.
4. The basis for the relief is, the applicant testifies under oath, that he erroneously paid the sum of money into the bank account of the first respondent in circumstances where he intended to transfer the money into another account. As far as can be ascertained from the papers, the applicant has no relationship at all with either of the respondents and therefore the payment was simply a payment made in *bona fide* error into the incorrect account.
5. This payment was made on Saturday, 24 February 2024. The applicant describes how over that day and the next, he managed to ascertain the identity of the holder of the bank account into which he had erroneously paid the money. It transpired that it is the bank account of an attorney practicing in Umtata, i.e. the first respondent. The second respondent is described as the sole director of the first respondent attorney's firm.

6. The applicant described how on Sunday, 25 February 2024 he was able to make contact with the second respondent and informed him of what had transpired. The second respondent was to have said that he would not make repayment as it was not his fault that the applicant had made an error.
7. It is therefore clear that by Sunday the applicant was aware of the respondents' stance. It follows that should the respondents have been inclined to appropriate monies that were not theirs, the respondents had had opportunity to do so from at least Sunday, which was over two days previously. I mention this, because if the respondents were inclined to have misappropriated the funds, then the horse would probably have already bolted.
8. The applicant explained that it was on Monday that he first went to his attorney, who addressed a letter of demand to the respondents demanding repayment. There was no response to that letter.
9. The applicant then changed attorneys. During the course of Tuesday, 27 February 2024, his new attorneys addressed a new demand for repayment.
10. When payment was not forthcoming, this application was launched later that day, as described above.

11. Having heard the applicant's attorney, I expressed my concern that the enrolment of the matter after hours constituted an abuse of the court process and struck the matter from the roll.
12. My reason as to why it constituted an abuse of the court process to enrol the matter on 90-minute's notice to both the court and the respondents after hours is that no valid reason was proffered as to why the matter could not wait until the next court day during ordinary court hours.
13. The best that the applicant could offer is that the matter was inherently urgent as the monies could be misappropriated at any moment. But, as explained above, should the respondents have had the intent to misappropriate the monies, they had had ample opportunity to do so by the time the matter was heard before me, and there did not appear to be any reason to suggest that had the respondents not appropriated the monies by the time the matter had been heard before me that night, that they would do so before the matter could be heard the next day.
14. The respondents are an attorney's firm and the attorney respectively. Should these identified respondents who are attorneys have misappropriated the monies, which would have been somewhat extraordinary given that they are attorneys, the applicant would have had ample recourse against the respondents as attorneys. At least on the papers before me no reason was set out as to why the monies could not be recovered from the attorneys.

15. I also expressed my concern that the relief that was formulated was final relief, and this the applicant was seeking on 90 minutes' notice. Notably, the applicant did not seek the usual interim interdictory relief "freezing" the monies in the relevant bank account until a determination could be made in the ordinary course as to the applicant's entitlement to those monies.
16. In the circumstances, the applicant's assessment of the levels of urgency to justify the hearing after hours on 90 minutes' notice both to the court and to the respondents as well as his formulation of the relief was over-ambitious.
17. Whilst the submission was made that the respondents were given opportunity to oppose the matter, in my view 90 minutes' notice given to appear in court after hours at night was tantamount to no notice.
18. To conclude, I found that the set down of the application on 90 minutes' notice after hours at night constituted an abuse in the circumstances described above.
19. Accordingly, the order that I made was that the application was struck from the roll. As there was no opposition, there was no order as to costs.

Date of hearing: 27 February 2024

Date of judgment: 2 March 2024

Appearance for the applicant: Mr Vittee (attorney)

Instructed by: Mayet Vittee Inc

Counsel for the respondents: No appearance