

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 730/2022

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO THE JUDGES: YES/NO
- (3) REVISED.

Signature

Date.....

In the matter between:

**BAPHALANE BA MANTSERRE BENEFICIARIES
APPLICANT
ASSOCIATION**

FIRST

**BASIMANE MARCUS MOHALE
APPLICANT**

SECOND

and

**THE MASTER OF THE HIGH COURT
(PRETORIA)**

FIRST RESPONDENT

**BAPHALANE BA MANTSERRE COMMUNITY
DEVELOPMENT TRUST**

SECOND RESPONDENT

**SHADRACK SELLO RAMOKOKA N.O
RESPONDENT**

THIRD

THABO SIMON SELEKE N.O	FOURTH RESPONDENT
ANNA MONALE RANGWETSI N.O	FIFTH RESPONDENT
ITSHEGENG ADELAIDE MAITSAPO N.O	SIXTH RESPONDENT
PINKY DINEO PETA N.O	SEVENTH RESPONDENT
BAPHALANE BA MANTSERRE INVESTMENT	EIGHTH RESPONDENT
BAPHALANE SIYANDA CHROME COMPANY RESPONDENT	NINTH
BAPHALANE SERVICE COMPANY RESPONDENT	TENTH
CHROMINET (PTY) LTD	ELEVENTH RESPONDENT
ACACIA TRADING (PTY) LTD	TWELFTH RESPONDENT
AUTOMATIC TRADING (PTY) LTD RESPONDENT	THIRTEENTH
OAKWOOD (PTY) LTD RESPONDENT	FOURTEENTH
BAPHALANE COMMUNITY MINERALS RESPONDENT	FIFTEENTH
STANDARD BANK NORTHAM BRANCH	SIXTEENTH RESPONDENT

JUDGMENT

MAKGOBA JP

[1] On 12 May 2022 I granted the following order and indicated to the parties that my written judgment will follow in due course:

1. The application is heard as an urgent application in terms of Rule 6(12) of the Rules of Court and that the rules relating to form, time periods and service are dispensed with.
2. The 16th Respondent (Standard Bank, Northam Branch) is directed and ordered to provide the Third to Seventh Respondents in their capacity as the Trustees of the Second Respondent with full access to the Second Respondent's Bank accounts held at the 16th Respondent's Northam branch pending the outcome of the application brought by the Applicants under the above case number.
3. The 16th Respondent is interdicted from providing the First and Second Applicants, including the Curator purportedly appointed in terms of an order of this Court dated 27 January 2022 with access to the Bank Accounts of the Second Respondent held at the 16th Respondent's Northam branch pending the determination of an application brought by the First and Second Applicants under the above case number.
4. The First and Second Applicants' counter-application is dismissed with costs.
5. The First and Second Applicants are to pay the costs of this application jointly and severally, such costs to include the costs of Senior Counsel.

- [2] What follows are my reasons for the order.
- [3] The Third to Seventh Respondents have launched an urgent application in terms of which they sought interdictory relief, including, *inter alia*, an order that the Standard Bank (16th Respondent) allow the Third to Seventh Respondents access to the bank account of the Second Respondent (“the Trust”).
- The Third to Seventh Respondents are the trustees of the Baphalane Ba Mantserre Community Development Trust, the Second Respondent in this application.
- [4] The Applicants have launched an urgent Counter-Application in terms of which they also seek interdictory relief, including, *inter alia*, that Mr. J F Baloyi be granted access to the bank account of the Trust, held with the Standard Bank, the Sixteenth Respondent.
- [5] For the sake of convenience I shall in both application and counter-application refer to the Third to Seventh Respondents as “the Trustees” and to the First and Second Applicants as “the Applicants”.

Factual Background

[6] On 24 January 2022 the Applicants launched an urgent *ex parte* application in terms of which they sought certain extensive and far-reaching relief, which relief impacted on the powers of the Trustees. On 27 January 2022 Mangena AJ granted all of the relief sought in terms of the Notice of Motion in the *ex parte* application. Of relevance to the present proceedings Mangena AJ granted *inter alia*, the following order:

- 6.1. The 3rd to 7th Respondents are suspended with immediate effect from their positions as Trustees of the 2nd Respondent and are interdicted from dealing with the Trust and its properties in any manner.
- 6.2. The banking account(s) of the Trust and all the companies of the Trust held by the 16th Respondent and any other bank are unfrozen and open to be utilised by the curator for the purposes of executing his duties.
- 6.3. The 16th Respondent (Standard Bank Northam) or any bank that holds the funds of the Trust and its companies, upon being served with this order, are interdicted from calling the suspended Trustees to change

the signatures and ordered to hand over the Trust account to the Curator.

- 6.4. The 16th Respondent is ordered, within two days of receiving this order, to consider the appointed Curator as a signatory of these banking accounts and allow him immediate access to the funds of the Trust and its companies without delay.
- 6.5. That Jimmy Frans Baloyi is appointed as *curator bonis* with the purpose of administering the affairs of the 2nd Respondent (the Trust) pending the adjudication of Part B Application.
- 6.6. The Curator is authorised to administer the Trust for a period up to the adjudication of Part B or up to the time when the current Trustees become removed or reinstated by order of this Court.
- 6.7. The Curator is authorised to operate the banking account of the Trust in order to discharge the existing obligation of the Trust.

[7] The relief granted, as shown above, impacted on the status of the Trustees and granted full access to the bank accounts of the Baphalane Ba Mantserre Community Development Trust (“the Trust”) to a person nominated by the Applicants, namely Jimmy Frans Baloyi.

The *ex parte* order granted by Mangena AJ is to the effect that the appointed Curator, Mr. Baloyi could utilise the monies held in the Trust’s bank account

and that the 16th Respondent (Standard Bank) is interdicted from allowing the Trustees access to the bank account.

[8] On 21 February 2022 the Trustees who are the duly appointed trustees of the Trust launched an application for the reconsideration of the Order granted by Mangena AJ in terms of Rule 6(12)(c) of the Uniform Rules of Court.

In the application for the reconsideration of the *ex parte* order the Trustees sought the dismissal of the *ex parte* application.

The Reconsideration Application was heard by Makoti AJ on 01 March 2022, and on 03 March 2022, Makoti AJ set aside the *ex parte* order granted by Mangena AJ and dismissed the *ex parte* application.

[9] On 04 March 2022 the Applicants filed a Notice of Appeal¹ against the order of Makoti AJ.

It is common cause that this Notice of Appeal was served and filed without the Applicants having first made an Application for Leave to Appeal.

The Applicants and their legal representatives believe, albeit incorrectly, that the filing of a Notice of Appeal suspended the order of Makoti AJ and therefore revived the order granted by Mangena AJ.

[10] In the midst of the two Court orders referred to above, the Standard Bank adopted a neutral and sensible approach and recorded that it would not allow

¹ See **Annexure FA7** to the Trustees' Founding Affidavit at page 51 of the paginated papers.

any transactions on the Trust's bank account or allow any party access to the bank account. Instead Standard Bank advised that any party that wished to gain access to the Trust's Bank Account would have to obtain a Court Order in such regard.

[11] On 11 March 2022 the Applicants launched an urgent application on an extremely urgent basis and set it down for hearing on 15 March 2022. The Trust Respondents were afforded less than a Court day and a half to oppose and file their opposing papers.

The urgent application was struck from the roll for lack of urgency by Pillay AJ on 18 March 2022.

It is common cause that the Applicants have not pursued such application in the ordinary course, despite the procedural fact that such application is still pending.

Interdictory relief sought by the Trustees

[12] In the present application the Trustees seek an order that the Standard Bank allow them access to the bank account of the Trust and further that the Standard Bank be interdicted from providing the Applicants with access to the Bank Accounts of the Trust.

Both orders are sought as interim orders pending the outcome of the application brought by the Applicants under the same case number, that is Part B of the Applicant's Notice of Motion dated 24 January 2022.

[13] For more than a century our law has authoritatively required an applicant seeking a final interdict to:

1. demonstrate a clear right;
2. show an injury in the form of irreparable harm actually committed or reasonably apprehended; and
3. the absence of an alternative remedy.

See ***Setlogelo v Setlogelo* 1914 AD 221 at 227.**

The fourth requirement, namely, the balance of convenience is applicable in the present proceedings as the order sought is of an interim nature.

The granting of an interim interdict pending an action is within the discretion of the Court. In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted.

The factors to be considered for interim relief are not considered separately or in isolation but in conjunction with one another in determining whether the

Court should exercise its overriding discretion in favour of the granting of interim relief.²

[14] The Trustees are the duly appointed trustees of the Trust, and accordingly have a clear right to act in the best interests of the Baphalane Ba Mantserre Community, including, when necessary, incurring expenses on behalf of the Community, which expenses are to be funded from the Trust's funds, which in this instance, are held with the Northam Branch of the Standard Bank. The Trustees not only have a clear right but also an obligation to act in the best interests of the Community. The Trustees have a clear right to perform their functions without hindrance or interference. Accordingly, the Trustees have shown that they have a clear right, or at the very least, a *prima facie* right to the relief sought.

[15] The Applicants have already stated in their papers that they intend to disburse monies from the Trust bank account.³ The Trustees have a real and reasonable fear that Trust's funds held in the Trust's bank account will be depleted if Mr. Baloyi is not interdicted from gaining access to such bank account. Mr. Baloyi is not a trustee but an outsider who is not even accountable to the Master of the High Court unlike the Trustees in the present

² *Eriksen Motors (Welkom) Limited v Protea Motors Warrington & Another* 1973 (3) SA 685 (A) at 691 E - G; *Spur Steak Ranches Limited & Others v Saddles Steak Ranch Claremont and Another* 1996 (3) SA 714 (C) at 714 D - F.

³ *Founding Affidavit*, paragraph 59, at page 20 of the paginated papers.

matter. In any event the appointment of Mr. Baloyi as a curator has been set aside by order of Makoti AJ on 03 March 2022.

In my view the Trustees have demonstrated that they have a well-founded apprehension of irreparable harm, should the relief sought, not be granted.

[16] The balance of convenience favours the granting of the relief sought in the present application. The trustees hold letters of authority issued by the Master and are therefore accountable to the Master in the administration of the Trust funds. Conversely, if Mr. Baloyi is granted access to the Trust's bank account, there is no guarantee that he would account to the Master or any authority for that matter.

There is no inconvenience to the Applicants as they are already beneficiaries that benefit from the conduct of the Trustees.

[17] I agree with the Trustees' Counsel's submission that there is no other remedy available to the Trustees that would protect the Trust's funds other than seeking the relief in this application. A damages claim would be hollow, even if a damages claim was available.⁴

[18] I make a finding that the Trustees have made out a case for the relief sought, hence I granted the order set out in paragraph [1] above, on 12 May 2022.

⁴ **Founding Affidavit**, paragraphs 78 – 81 at page 23 of the paginated papers.

Defence raised by the Applicants

[19] The Applicants raised a point *in limine* relating to the present Application being an abuse of process.

The allegations of abuse are based on the Applicants' contention that rather than opposing the urgency of the application launched by the Applicants on 11 March 2022 (which application was struck from the roll by Pillay AJ on 18 March 2022), the Trustees should rather have raised a Counter-Application.

There is no merit in this contention.

It is a fact that the Trustees opposed all the relief sought, and pointed out the lack of urgency as one of the grounds of opposition. In any event the Applicants did not provide the Trustees with sufficient time to launch a Counter-Application, even if the Trustees wanted to do so, given the unreasonable truncated time frames afforded to the Trustees in such urgent application.

[20] The Applicants contend that since they have filed a Notice of Appeal on 04 March 2022 such notice of appeal suspends the order of Makoti AJ in terms of Section 18 of the Superior Courts Act 10 of 2013.

The Applicants have been advised that the suspension of the Order of Makoti AJ revives the Order of Mangena AJ.

Such advice provided to the Applicants is clearly wrong in law.

[21] Firstly, the Notice of Appeal filed by the Applicants on 04 March 2022 is invalid. This is so because the Applicants proceeded to file a Notice of Appeal before they could apply and be granted leave to appeal by Makoti AJ. There is no Application for Leave to Appeal filed by the Applicants and granted by Makoti AJ.

In the circumstances there is no appeal pending against the Order of Makoti AJ to date hereof.

[22] Secondly, even if there were to be a proper and valid Notice of Appeal filed, this does not assist the Applicants as regards the suspension of the Order of Makoti AJ and the revival of the Order of Mangena AJ.

[23] In the matter of ***Quits Aviation Services Limited v Empire Engineerings (Pty) Ltd and Others***⁵ Van der Linde J considered the suspension and revival of an Order. The Court held that the filing of a Notice of Appeal against a

⁵ (202198/2016) [2016] ZAGPJHC 218 (17 August 2016) at paragraphs [7] to [13].

reconsideration order (like in the present case) does not suspend the reconsideration Order and accordingly does not resuscitate the *ex parte* order.

Also in the earlier matter of ***MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd***⁶ it was held that the filing of a Notice of Appeal against the reconsideration order setting aside an order obtained *ex parte* does not revive the *ex parte* order. The Court found that even the grant of leave to appeal would not revive such an *ex parte* order.

This decision was upheld by the Supreme Court of Appeal.⁷

See also: ***Chrome Circuit Audiotronics (Pty) Ltd v Recton European Holdings Inc*** 2000 (2) SA 188 (W) at 190 E – F;
and
Motor Vessel Asturcon v Afriline Denizcilik Veg EMI Kiralama Ltd 2015 JDR 2386 (WCC).

[24] In the circumstance it is trite that an application for leave to appeal or Notice of Appeal against a reconsideration Order (by Makoti AJ) that has set aside an order granted *ex parte* does not suspend the reconsideration order and does not revive the *ex parte* Order (by Mangena AJ).

⁶ 1996 (4) SA 1234 (C) at 1235 A – E.

⁷ See ***MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*** 2000 (4) SA 746 (SCA).

On this basis alone, the relief sought by the Applicants in their Counter-Application (to be dealt with hereunder) cannot be granted. There is simply no purpose in granting interim relief pending an appeal that cannot succeed.

Applicants' Counter-Application

[25] The Applicants brought a Counter Application against the Third to Seventh Respondents (the Trustees) as well as the Standard Bank Northam Branch. The latter is cited as the Eighth Respondent in such Counter-Application.

[26] Essentially the Applicants seek the following orders against the Respondents:

26.1. That the Third to Seventh Respondents remain suspended as Trustees of the Second Respondent pending the Applicants' appeal of the order granted in favour of the Trustees by Makoti AJ on 04 March 2022.

26.2. That the Third to Seventh Respondents be interdicted from communicating with the Bank and accessing the Trust Banking Account pending the adjudication of appeal in Case No: 730/2022.

- 26.3. That the Eighth Respondent (Standard Bank) be compelled to allow the appointed curator (Mr. Jimmy Frans Baloyi) access to the Trust Bank Account for the administration thereof as per court order granted on the 27th of January 2022 for the benefit of the community.
- 26.4. That the Curator be permitted by this Court to procure a service provider who will fix the water crisis of the beneficiaries of the Second Respondent immediately after the granting of this order.
- 26.5. That the Eighth Respondent be ordered to provide bank statements to the Curator for the period between the 1st of January 2022 and 27th of January 2022 within 5 days of receipt of this order.

[27] It is clear from the orders sought by the Applicants in the Counter-Application that they still rely on the existence of the *ex parte* order obtained on 27 January 2022. To that extent, the Applicants are misguided. As a matter of fact the *ex parte* order was reconsidered by Makoti AJ and their *ex parte* application was dismissed on 03 March 2022.

The purported Notice of Appeal against the dismissal of the *ex parte* application is invalid as stated earlier in paragraph [21] hereabove.

In any event their noting of the appeal against the order of Makoti AJ does not revive the *ex parte* order granted by Mangena AJ on 27 January 2022. This issue has been dealt with in paragraphs [22] to [24] of this judgment.

[28] Clearly, the appointment of Mr. Jimmy Frans Baloyi as a Curator has been set aside by virtue of the dismissal of the *ex parte* application by Makoti AJ on 03 March 2022.

Consequently, there is no basis for the Counter-Application in so far as same relates to Mr. Baloyi as a curator. Under no circumstances can this Court grant Mr. Baloyi access to the Trust's Bank Account.

[29] In addition to the relief sought in the Counter-Application, the Applicants seek to include further relief, by way of an intended amendment to the Notice of Motion, filed on 11 May 2022, a day before the hearing of this matter. In their intended amendment the Applicants seek to add a prayer as follows:

“3. Removing the 3rd to the 7th Respondents as Trustees for failure to account to the beneficiaries since 2017, and for conflict of interest.”

The Respondents/Trustees objected to the amendment. The intended amendment is refused/dismissed for failure to comply with Rule 28 of the Uniform Rules of Court.

[30] The relief sought by the Applicants in the Counter-Application is the same relief sought by the Applicants in the *ex parte* Application (which was

dismissed by Makoti AJ on 03 March 2022) and in the Urgent Application which was struck from the roll by Pillay AJ on 18 March 2022.

The dismissal of the *ex parte* order by Makoti AJ constitutes *res judicata*. Insofar as the Applicants have not finalised the Urgent Application of 18 March 2022, there is clearly pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. Therefore, a special plea of *lis pendens* applies in this matter and the relief sought in the Counter-Application cannot be pursued herein. The Respondents/Trustees have, correctly in my view, raised the defences of *lis pendens* and *res judicata*.

[31] In the matter of ***Nestle (SA) (Pty) Ltd v Mars Incorporated***⁸ it was stated as follows:

“The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between

⁸ [2001] 4 ALL SA 315 (SCA) at 319.

the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively)."

[32] In my view the whole Counter-Application brought by the Applicants is flawed and same is doomed to fail. It is on that basis that I dismissed the Counter-Application in my order of the 12th May 2022.

Conclusion

[33] It is for all the above reasons that I granted an order in favour of the Trustees and dismissed the Applicants' Counter-Application on the 12th of May 2022.

**E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION**

APPEARANCES

Heard on : **12 May 2022**

Order granted on : **12 May 2022**

Judgment delivered on : **19 May 2022**

For the Applicants : **Adv T Maluleke**

Instructed by : **Shinyori Chauke Inc**
: **c/o FR Chauke Attorneys**

For the 2nd to 7th Respondents : **Adv G Nel SC**

Instructed by : **Fasken Inc**
: **c/o Pratt Luyt & De Lange Attorneys**