



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29339/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

18 June 2024

DATE

[Redacted Signature]

SIGNATURE

In the matter between:

JABULANI NGOBENI

FIRST APPLICANT

NTHUPANG NGOBENI

SECOND APPLICANT

and

MAGOLEGO AND SONS CONSTRUCTION (PTY)LTD

RESPONDENT

JUDGMENT

MOGOTSI AJ

Introduction

[1] This is an opposed application in terms of Rule 47 (4) of the Uniform Rules of the Court launched by both the first and second applicants against the respondent on the

basis that the latter is in default of Nyathi J's order dated 29 July 2022 requiring the respondent to furnish security for costs payable within 30 days of the date of the order.

[2] The applicants in terms of the notice of motion dated 15 September 2022 seek the following relief:

- “1. That the respondent has failed to comply with the order of this Honourable Court directing the respondent to furnish the applicant with security for costs of R250,000.00.
2. That the respondent's main action against the applicants is dismissed with costs.
3. That the respondent pays the costs of the application.
4. Further and/or alternative relief.”

[3] The respondent opposes the relief sought by both applicants because the applicants rendered it impossible for him to comply with the court order by failing to nominate a firm of attorneys and providing the latter's trust account into which the security for costs was to be deposited thereby failing to comply with their obligations under the Court Order.

The factual matrix

[4] On 29 July 2022, pursuant to an application brought by both applicants against the respondent in terms of Rule 47 of the Uniform Rules of the Court, Nyathi J granted the following order:

- (a) The respondent is directed to provide security for the applicant's costs in the pending proceedings between the parties instituted under case 29339/2020 (main action).
- (b) The aforementioned security shall take the form of a payment in cash in the amount of R250 000,00 (two hundred and fifty thousand rand) to the trust

account of the applicants' attorneys. (applicants are to nominate a firm of attorneys for this purpose).

- (c) The applicants' attorneys are directed to hold that sum of money, pending the final determination of the main action, in trust in an interest-bearing account, the interest accruing thereon to be for the benefit of the respondent;
- (d) The respondent is ordered to furnish such security within 30 days of granting this order.
- (e) In the event of the respondents failing to pay the aforesaid amount into the applicants' attorneys' trust account within 30 days of the date of this order, the applicants are given leave to apply, on the same papers, suitably supplemented as may be necessary, for an order:
 - (i) Dismissing the plaintiff's claim;
 - (ii) Directing the plaintiff to pay the costs of the action.
- (f) Respondent is ordered to pay the costs of this application

[5] The respondent's attorneys transmitted emails to the applicants on 29 July, 5 August, and 16 August 2022 requesting the details of the applicant's duly appointed firm of attorneys to enable it to comply with the court order. The second applicant responded on 16 August 2022, apologised for missing the emails mentioned above, and intimated that she would provide the requested information in due course. This was followed by a letter dated 18 August 2022, from Rerani Mdludla Attorneys confirming that they act on behalf of Mr Jabulani Ngobeni, the first applicant. Furthermore, they requested that all further communication be directed to them. Lastly, they attached a bank confirmation of their trust account details into which the security for costs should be deposited. The respondent's attorneys acknowledged the receipt of the email and advised them that they hold instructions to appeal the 29 July 2022 judgment and order.

[6] On 25 August 2022, the respondent's attorneys emailed Rerani Mdludla Attorneys advising them to file a notice of appointment as attorneys of record. This was followed by an email dated 13 September 2022, wherein the respondent enquired whether or not they were appearing on behalf of both applicants and further requested them to clarify whether they were appointed as the attorneys of record in (i) the application (ii) the main action or (iii) both the application and the main action. There was no response to the above email and a follow-up email was transmitted on 23 September 2022. A response was transmitted on 27 September 2022, wherein Rerani Mdludla Attorneys informed them that they no longer act for and on behalf of the First applicant and that their mandate was contingent upon the respondent paying the security amount referred to in the High Court order.

[7] As a result of the above-stated response, the respondent's attorney informed the applicants of the withdrawal of Rerani Mdludla Attorneys and that there was no attorney's trust account into which the security for costs could be paid.

[8] On 10 October 2022, the respondent's attorneys of record confirmed in a letter addressed to the applicants that they held the R250 000.00 in trust on behalf of the respondent and that it was their instruction to continue to tender the payment thereof as contemplated in the court order dated 29 July 2022.

[9] The applicants terminated the mandate of their former attorneys after they were informed that the respondents intended to appeal the 29 July 2022 order and awaited the appeal documents. When the appeal papers were not filed on 12 September 2022, they launched this application to dismiss the main action.

The issues

[10] The following are issues for determination:

- 10.1 Whether or not the applicants complied with their obligation in terms of the court order thereby placing the respondent in a position to comply therewith.
- 10.2 Whether or not the respondent acted recklessly and disregarded his obligations in terms of the court order.

The law

[11] Rule 47(4) reads as follows:

“The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem to meet.”

[12] The court in *Selero (Pty) Ltd and Another v Chauvier and Another*¹ in dealing with the development of Rule 47(4) stated as follows:

“Supreme Court Rule 47, which deals with security for costs, and more particularly sub rule (4) thereof, enables a Court if security be not given within a reasonable time, to dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as it deems fit. It gives effect to the previously existing inherent jurisdiction that the Supreme Court exercised to dismiss an action where there had been a failure to furnish the security ordered.”²

[13] The court in *Wallace No v Commercial Union Insurance Co of SA Ltd*³ interpreted the use of the word “may” in the provision of Rule 47(4) and held that:

¹ 1982 (3) SA 519 (T)

² *Id* at p522A-C.

³ 1999 (3) SA 804 (C).

“[T] his Rule gave effect to the previously existing inherent jurisdiction exercised by the Court to dismiss actions where there had been a failure to furnish security which had been ordered by the Court...While the word 'may' does on occasion signify a power amounting in law to a discretion, this is by no means necessarily so...The section empowers a Court to require security to be given where a company or other body corporate is a plaintiff in any legal proceedings, but the nature of the discretion to be exercised is not revealed merely by the use of the word 'may'.”⁴

[14] In *Mampudi Mining (Pty) Ltd v President of the Republic of South Africa and Others*⁵ the court, following the decision in *SA Scottish Finance Corporation Ltd V Smit 1966 (3) SA 629 (T)* confirmed the test to be applied by a court in exercising its judicial discretion concerning Rule 47(4) applications, it was held that whether an action should be dismissed based on failure to pay security is based on whether the plaintiff has recklessly disregarded his obligation, or the case appears to be hopeless, or the court is convinced that the plaintiff does not seriously intend to proceed.

Analysis

[15] It is clear *ex-facie* the papers that Rendani Mdludla Attorneys, did not file a Notice of Appointment as Attorneys of Record, and the status quo remained until their purported withdrawal. The respondent’s attorneys were courteous in engaging them, which, in my view, does not cure the fact that they were not formally on record.

[16] In their email, the first respondent’s attorney stated that they held instructions on behalf of the first respondent and failed to indicate their position regarding the second respondent exacerbating the latter's position. The fact that the applicants are married in

⁴ Id at p 808A-E.

⁵ [2004] 4 All SA 457 (T) at para 28.

community of property does not necessarily imply that they were acting on her behalf as well. Both applicants were cited, and none had the proxy to act on behalf of the other.

[17] The applicants state that they later withdrew the mandate of Rendani Mdludla Attorneys because of the assertion that the respondent intended to apply for leave to appeal the 29 July 2022 order. To begin with, this decision was, in my view, premature because they could have waited until the application for leave to appeal was filed. Lastly, this did not alleviate them of their duty to ensure that their appointed attorney is formally on record. Therefore, I find that the applicants failed to comply with their obligation in terms of the court order.

[18] I now commence to examine whether or not the respondent acted recklessly disregarding his obligations.

[19] It is apparent from the factual matrix that the respondent immediately after the order was granted until the launching of this application transmitted several emails to the applicants and Rendani Mdludla Attorneys to push them to be placed in a position to comply with the court order to no avail. In my view, the respondent's conduct is not consistent with the conduct of a litigant who recklessly disregards his obligations to comply with obligations in terms of the 29 July 2022 order.

Costs

[20] When addressing the court, both applicants sought a punitive cost order although it is not part of the orders they sought in the notice of motion. Both did not deal with this issue in their respective affidavits.

[21] In the matter of *Mahlangu and others v Mahlangu*⁶ in dealing with instances when a *de bonis propriis* order is appropriate the court held as follows:

“...*de bonis propriis* orders should only be made in exceptional circumstances, for example in cases of dishonesty, malice or serious negligence. It was however held in *Rautenbach v Symington* 1995 (4) SA 583 (O) at 588 A-B, that the aforesaid list is not exhaustive, and orders of this nature can be made where the order is justified by special circumstances or considerations.

It is clear from the quoted cases, that costs orders *de bonis propriis* are reserved for serious cases of misconduct or abuse of the processes of court. One should also remember that an attorney may well be emotionally invested in his client's case and that he could form a rosier picture of his prospects of success than the facts justify. It is fitting that an attorney should show concern for his client's interests, and it may well be that an attorney commences litigation with the best of intentions, but when the matter is considered in the cold light of day it may be completely without merit.”⁷

It is against this backdrop that I find that the applicants failed to make out a proper case in their founding for a *de bonis propriis* order. It is trite law that the cost must follow the results. In terms of the court order, that applicants, in the event of the respondents failing to pay the aforesaid amount into the applicants' attorneys' trust account within 30 days of the date of this order, the applicants were given leave to apply, on the same papers, suitably supplemented as may be necessary, for an order dismissing the plaintiff's claim; or directing the plaintiff to pay the costs of the action. The applicants elected to approach

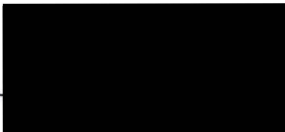
⁶ [2019] JOL 46130 (GP).

⁷ *Id* at para 25 and 29.

with an unfounded application to dismiss the claim. They should appreciate that judicial resources should be employed efficiently and that they should properly consider the matter before pursuing the same. The scarcity of judicial resources requires that such resources should be utilised appropriately and efficiently. I see no reason why they should be mulcted with costs.

ORDER

The draft order attached marked 'X' is made the order of the court.


P J M MOGOTSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicants:	In Person (Mr J Ngobeni; Mrs N Ngobeni)
For the Respondents:	Adv Meyer Ledwaba Mazwai Attorneys
Date heard:	27 May 2024
Date of Judgment:	18 June 2024

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 29339/2020

ON THE 27 OF MAY 2024

BEFORE THE HONOURABLE JUSTICE MOGOTSI AJ

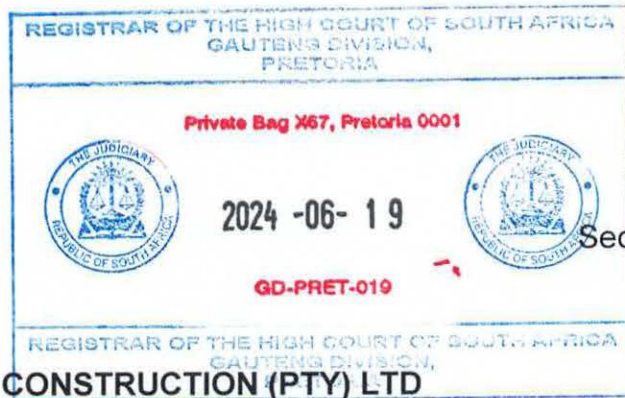
In the matter between:

JABULANI NGOBENI

NTHUPANG NGOBENI

and

MAGOLEGO AND SONS CONSTRUCTION (PTY) LTD



First applicant

Second applicant

Respondent

DRAFT ORDER

After having considered the papers filed of record and having heard counsel, an order is granted in the following terms:

1. The application brought in accordance with the provisions of Rule 47(4) of the uniform rules of court is dismissed.
2. The Applicants are directed within five (5) court days from the granting of this order to nominate and provide the Respondent's attorneys of record with the details of the attorney firm mandated by the Applicants to hold the sum of

R250 000.00 as directed per the court order of Nyathi J dated 29 2022 under case number: 29339/2020, together with the bank account details into which such funds are to be paid and held pending the final determination of the main action under the above case number.

- 3. The Respondent's attorneys of record are directed to pay the sum of R250 000.00 held in trust into the bank account identified in paragraph 2 above within five (5) court days from the date of receipt of the bank account details identified and referred to in paragraph 2.

- 4. Costs to be costs in the cause.

ORDER OF THE COURT

