IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number : 16715/18

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 28.08.2020 SIGNATURE:.....

IN THE MATTER BETWEEN:

SUKOLUHLE THANDO NKALA	First Applicant
HERBERT NKALA	Second Applicant
and	
MOLEFE RUFARO MTHULISI DLODLO	Respondent

REASONS FOR ORDER IN TERMS OF RULE 45(1)

BHOOLA AJ:

Introduction

[1] In the above matter enrolled as an urgent application on 12 August 2020 I granted the following order:

1. The application is enrolled as an urgent application, the non-compliance with the Rules are condoned and the forms, service and ordinary time periods provided for in the Uniform Rules of Court are dispensed with.
2. The variation application under the above case number (presently provisionally set down for 17 August 2020) is stayed pending the outcome of the:
2.1. stay application launched by the Applicants on 25 May 2020 under the above case number (attached to the founding affidavit as annexure "A");
2.2. rule 47(3) application launched by the Applicants on 21 July 2020 under the above case number (attached to the founding affidavit as annexure "B"); and
2.3. the application to compel heads of argument and practice note launched by the Respondent on 20 May 2020 under the above case number (attached to the founding affidavit as annexure "D").
3. The Respondent is to pay the costs of this application.

[2] These are my reasons for the order.

Non-appearance and late filing of answering affidavit

[3] At the commencement of the hearing of the matter by videoconference there was no appearance from the respondent. Although he had filed a notice of intention to oppose the application no answering affidavit had been filed. After confirming with counsel for the applicants whether they had received any communication from the respondent as to his intention to participate in the videoconference, and being assured that none had been forthcoming, I proceeded to hear the matter as an unopposed application. When I had granted the order I was informed that the respondent was trying to join the videoconference hearing and had just emailed his answering affidavit to the applicants' attorneys. I indicated that I would hear him to explain the situation. I proceeded to hear the respondent and indicated to him that I had already granted the order on an unopposed basis in the absence of an answering affidavit being filed. He had given no prior indication that an answering affidavit would be filed and it was in fact due on 7 August 2020. He confirmed that he had just managed to email them to the applicant's attorneys as a result of technical difficulties. I advised him that the answering affidavits were

filed after the order had already been granted and I was not able to assist him but that there were available remedies he could exercise. He promptly served notice of application for leave to appeal the order I granted on 12 August 2020.

Background and urgency

[4] This matter has a long history as a result of the acrimony between the parties. In 2018 an *actio communi dividundo* was instituted by the first applicant and this court granted an order. The second application is her father. The respondent instituted proceedings to vary the *actio* order in September 2019 ("the variation application"). The first applicant brought a counter-application seeking dismissal of the variation application, and seeking *inter alia* an order restraining the respondent from instituting any further proceedings. Since then the respondent has brought at least five urgent or interlocutory applications to this division in respect of substantially the same or similar issues, all of which have resulted in attorney and client costs being awarded against him. In her founding affidavit the first applicant states that there are currently five unpaid costs orders against the respondent emanating from this court and he has been issued with bills of costs but has to date not made payment.

[5] The applicants brought an application on or about 25 May 2020, ("the stay application"), seeking an order that all current and future proceedings launched by the respondent under the above case number and case number 3537/2017 be stayed pending payment by the respondent of all costs orders made against him in these and other matters by this court. The respondent is opposing this application, which is still pending.

[6] On or about 21 July 2020 the applicants also brought an application in terms of rule 47 (3) ("the rule 47(3) application"), which required the security requested from the respondent to be furnished and the proceedings under the above case number stayed until such security is provided. In this application ancillary relief is also sought to the effect that if the respondent fails to furnish

such security the proceedings should be dismissed as provided for in rule 47(3). The respondent is likewise opposing this application. The respondent's answering affidavit is due on 17 August 2020.

[7] Despite the stay and rule 47(3) applications being pending, on 28 May 2020 the respondent notified the applicants attorneys by way of email that the variation application had been set down for 27 July 2020. Due to the fact that the variation application could not proceed in light of the pending stay application the applicants instructed the attorneys on a semi-urgent basis to have the stay application heard earlier then initially anticipated, i.e. before 27 July 2020. An urgent application was launched and set down for hearing on 14 July 2020, and served on the respondent on 25 July 2020.

[8] The respondent subsequently removed the variation application from the roll and the semi-urgent stay application was accordingly also removed and was to proceed in the ordinary course. The first applicant states that curiously, and despite the above incident apparently constituting an acknowledgement by the respondent that the variation application could not be heard before the determination of the stay application the respondent continued to serve notices of set down purportedly enrolling the variation application on the opposed roll. Clearly the stay application, the rule 47(3) application and the interlocutory application need to be heard first and the outcomes thereof will determine weather the variation application will even proceed or whether the respondent must first pay the outstanding costs orders and furnish security to the applicants. It is clear that the respondent's intention is to have the variation application heard prior to these other applications.

[9] There is also currently a pending opposed interlocutory application brought by the respondent to compel the delivery of the heads of argument and a practice note in respect of the variation application ("the interlocutory application"). The applicants have raised a point of law in opposition to this application on the basis of the pending stay application and rule 47(3)

applications. This application is yet to be determined and it will also determine whether the variation application should proceed.

[10] Despite the various pending and interlocutory applications, first applicant states in her founding affidavit that the respondent persists in serving notices of set down on the opposed roll for hearings of the variation application. The latest notice of set down served by the respondent indicates that the matter will be heard on 17 August 2020. The first applicant also states that the respondent somehow manages to enrol matters without following due process as a result of which the applicants are forced to incur costs and on each occasion the matters are unable to proceed due to the respondent's underhand conduct. This conduct constitutes an abuse of this court's process.

[11] In this urgent application the applicants seek to urgently stay the hearing of the variation application pending the outcome of the stay and rule 47(3) applications, alternatively that the stay and rule 47(3) applications be heard on an urgent basis prior to the enrolment of the variation application on 17 August 2020. The first applicant states that it can only be assumed that the variation application will proceed on 17 August 2020, as the respondent has set it down for hearing, and the applicants will be forced to again incur costs to argue for a postponement in light of the pending stay and rule 47(3) applications. In order to limit costs and to prevent the burdening of this court's roll the applicants seek assistance with staying the variation application, or, should this court be so inclined, finally dispensing with the stay and rule 47(3) applications in order that the respondent's continuous use of irregular process is discontinued.

[12] The first applicant alleges in her founding affidavit that this application is urgent. They allege that they are inundated on a weekly and even daily basis with legal process from the respondent. They are forced to instruct their attorneys to deal with such process and continue to incur legal costs. The respondent is vexatious litigant and an application to declare him as such with ancillary relief is currently pending under the above case number.

Furthermore, the respondent as a lay litigant makes consistent procedural errors at the expense of the applicants. For instance, he persists in enrolling opposed motions on the unopposed roll (the facts relating to this are set out in the stay and rule 47(3) applications) and this results in applicants incurring costs. In addition, costs have been awarded against him by the court on numerous occasions in urgent applications he has brought but he has refused to pay these costs. On the last occasion on 25 June 2020 the respondent enrolled the interlocutory application on the opposed roll, and it was removed with costs granted against him in the unopposed court. Another example is that the respondent filed two different sets of heads of argument and practice notes in the variation application as well as two different notices of set down. This led to the applicants bringing an application to set aside the notices as constituting irregular proceedings.

[13] The applicant submits that before the respondent is permitted to enrol and proceed with the variation application he should be ordered to pay the costs due to the applicants as a result of previous court orders, and that his conduct in persisting with various attempts to set down the variation application simply constitutes abuse of this court's process. The applicants have suffered prejudice as a result and will suffer irreparable harm should they continue to face forced attempts to set the matter down and incur costs at each stage in circumstances in which he is yet to make payment of costs orders granted against him.

[14] The latter relief sought in this application i.e. that the stay and rule 47(3) applications be dispensed with prior to the impending variation application, is not appropriate at this stage, but I am nevertheless satisfied that this application should be urgently heard. I am further satisfied that the order should be granted given the conduct of the respondent as set out in the founding affidavit, with costs against the respondent given the filing of his notice of opposition to this application and failure to take further action except at a belated stage with no appropriate explanation.

_____

U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing: 12 August 2010. Heard by videoconference as per the Consolidated Directive of the Judge President of 11 May extended to 15 August 2020.

Date of reasons : 28 August 2020 . Reasons for order issued and emailed to parties on 28 August 2020.

Appearance:

Counsel for the applicants : R Blumenthal

Instructed by :Ramsay Webber Inc.

For the respondent : No appearance