IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 6683/21

REPORTABLE:YES

OF INTEREST TO OTHER JUDGES:YES

REVISED

DATE:12 MARCH 2021

In the matter between:

KHOROMMBI MABULI INCORPORATED **APPLICANT**

and

THE ROAD ACCIDENT FUND **FIRST RESPONDENT**

COLLINS PHUTJANE LETSOALO **SECOND RESPONDENT**

SHOKENG E DLAMINI **THIRD RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an application launched by way of urgency, seeking orders declaring the first and second respondents to be in contempt of an order of the full court of Justices Lamont, Ranchod and Kubushi dated 14 December 2020, and that the second respondent be committed to a term of imprisonment for six months or, in the alternative a fine and, for costs on a punitive scale. The application is opposed and the respondent raised a point *in limine,* being that of lack of locus standi. No relief is sought against the third respondent.

[2] The second respondent is the Chief Executive Officer of the first respondent. It is common knowledge that due to the precarious financial position of first

respondent, the Road Accident Fund ("the RAF"), it has been involved in ongoing litigation with some members of the legal fraternity, in particular attorneys representing members of the public in claims against the RAF. One such matter is an application in this court initiated by the first respondent, Road Accident Fund vs The Legal Practice Council and Others case number 58145/ 2020. Some of the respondents in that matter are Sheriffs, Absa bank and various attorneys, and as seen from the annexures provided in the answering affidavit, the applicant is not one of them. The purpose of the application (58145/2020) is an attempt by the RAF to seek interim relief from the court, relating to the attachments of its properties and bank accounts. In the application it was stated that the attachments were not in the public interest in that there was the potential of impeding and paralyzing the RAF's day- to -day functions and execution of its mandate.

[3] The applicant had been engaged in demanding payment from the first respondent before December 2020 and as stated by it, the purpose in this application is "not to enforce monetary judgements but to hold the first and second respondents liable for their *mala fide* contemptuous conduct" of the court order of the December 2020 in 58145/2020 which reads as follows:

"5.2 The Applicant will register court and settlement agreements on its list of the payments in order of the date that the court order was granted or the written settlement was made;

5.3 The Applicant will take reasonable steps to ensure that the court orders or written settlement agreements for payment are registered on the Applicant's payment list within 30 days of receipt of the court order or written settlement agreement;

5.4 The Applicant will take reasonable steps to ensure that the court orders or settlement agreements that have not been captured on its payment list will be captured on its payment list in historical chronological order from the date that order was granted by the court or written settlement agreement was made;

5.5 The Applicant will provide all attorneys on its database of email addresses of attorneys involved in third party matters against the Applicant with updated payment lists on a bimonthly basis from January 2021 onwards;

5.6 The Applicant undertakes to make payment of the oldest claims first by date of the court order to the date of written settlement agreement;

6. The Applicant undertakes to make payment of the payment of the oldest claims first by date of the court order or date of written settlement agreement."

A copy of the court order and the application was not annexed to the founding papers.

[4] The applicant also alludes to another application, case number 52865/20 without giving a full description of the parties, they are (Road Accident Fund v Absa Band Ltd and Another case 52865/20), where judgement was given by Fourie J on 22 October 2020, concerning payment delays by the RAF, and a possibility of a request being made to extend payment to a maximum of 180 days to satisfy court orders. An amended notice of motion under case 58145/2020 (Road Accident Fund vs Legal Practice Council and Others) was annexed, where the first respondent was seeking to suspend all writs until 30 April 2021; that reasonable steps be taken to register court orders and settlement agreements on its payment list within 30 days of their receipt; that reasonable steps be taken that all captured court orders and settlements be captured in chronological historic order and that attorneys on its data base be given information bi-monthly of updated payment lists. This matter is scheduled for hearing by a Full Court on 15 March 2021.

[5] I am also in receipt of a letter of complaint from the respondents' attorneys, regarding the filing afresh on case lines by the applicant of its documents after judgement was reserved. The state of filing of the applicants' documents on case lines, the failure to annex to the founding affidavit copies of the orders of court relied upon in this application, these were complained about by Mr Puckrin, counsel for the respondent. Mr Lazarus attorney for the applicant had difficulty in referring the court to particular documents since he was relying also on the numbering on the hard copies, which were also provided to me. I insisted upon using what was on case lines. Now, after judgment was reserved, I caused the following to be done:

(a) As we all recall, the applicant's bundles, especially some of the annexures were in very small font, documents had to be rotated, some were illegible. I instructed my clerk to request attorneys of the applicant to attend to the proper filing of the documents in its bundles and to increase the font on case lines and that did not mean **to introduce fresh documents.** Not everything was corrected and I have not observed that anything has changed in the documents previously filed or those of the hard copies in my possession.

(b) I also asked my clerk to request the respondents' attorneys to ensure that a signed copy of Mr Letsoalo's affidavit was filed on case lines and that was done.

No prejudice was suffered by the litigants.

BACKGROUND

[6] The applicant commenced with the problems taken up with the first respondent preceding the order of 14 December 2020 in the application of

58145/2020. According to the applicant the first respondent is indebted to forty- two (42) of its clients in respect of an amount of R 11 732 441.82 which was due and payable. The debts had aged from at least four months to more than a year from 22 October 2019. The amount owing included capital and taxed bills of costs and in respect of court orders and settlement agreements. Some of the court orders were loaded into the payroll system for over a year as seen in the applicant's spreadsheets annexed as "KM1 21" and court orders marked "KM1 22". No explanation was given for non-payment. The applicant contended that it was a matter of public record that payments due to clients of other legal firms had been paid.

[7] As a result, and commencing February 2020 the applicant caused to be issued various writs of execution against the first respondent's assets and or bank accounts, still no payments were forthcoming. On 17 September 2020 the applicant addressed a lengthy letter to the first and second respondent seeking answers to what it perceived as reasonable suspicions of bias and malfeasance towards it, for issuing warrant of executions against RAF. The applicant contended that non-payment compromised the client's constitutional rights of equality and the RAF's obligation to discharge its duty and mandate without favour fear or prejudice. It was further contended that in the discharge of its statutory duties, the RAF had to be open and transparent in its dealings with the public and a full disclosure of its records were demanded. There was no response to this letter and to a follow up of 6 October 2020.

[8] Consequently, after the court order of 14 December 2020 and, on 20 January 2021 the applicant lodged a formal complaint under 1/25/2021/12117 regarding non-payments and, demanded payment on all outstanding orders which were then due and payable. There followed an exchange of correspondence between the applicant and employees of the first respondent on 27 and 28 January 2020. In a further email after the latter date, the applicant referred to the first respondent's disregard of the clauses 5.4, 5.5 and 6 of the order of court

which ordered that payment of claims exceeding a 180 days, counting from date of court order as opposed to the date of capture, and a copy of the court order was annexed for reference. The first respondent replied as follows:

> "27 January 2021 T Madzihadila (first respondent): ……..**payment in question was requested 03 December 2020 and will be considered for payment when it reached +180 days dated from the date of requested on our system, depending on funds availability.**
>
> 28 January 2021 (first respondent)…….**the complaints department will attend to the complaints relating to the delays in requesting payment. Please note that the treasury is attending to the requested payments in terms of their cash flow management plan. Please see their statement regarding requested payments/**

……there are no definite payment commitment dates as the cash plan is managed from month to month…….

The principle of paying is as follows

(a) matters will be paid on the 180+day terms and on T-status

(b) subject to reconciliation & finalisation;

(c) On availability of cash resources (fuel levy funds) and

(d) **starting with the oldest matter first."**

[9] The applicant was further informed that the first respondent would endeavour to pay on the 180+ days from date on which payment was requested in the system and, not on date of settlement and that there were no guarantees that older claims would be paid first, it all depended upon availability of cash and, the reconciliation of the payment. The applicant viewed the response as a flagrant disregard of its complaint and as an imposition of a payment system that disregarded the plight of its clients and contemptuous conduct of an order by Louw J of 9 December 2020.

[10] Applicant addressed a letter on 1 February 2021 to officials of RAF, Mr Regan Adams and Mr Eduard Van Rooyen referring to the 1/25/2021/12117 complaint. The said officials were in charge of the costs payment and capital payment departments respectively at the RAF. The applicants requested the capture of the long overdue payments and gave an ultimatum to the close of business on 3 February 2021, failing which a complaint would be referred to the CEO, Ms Maria and Mr Walters to investigate the official's fitness to hold their respective positions. The first respondent replied to the letter on same date:

"**Good morning Mr Khorommbi**

The contents of your email are noted in the earnest. Please note that the RAF is indeed committed to assisting the claimants with having their settlements paid within a 180 days of settlement/court order, and on the basis of the date on which settlement was captured on the system."

Mr E Van Rooyen replied:

Good day,

Please find herewith and updated in respect of capital matters contained in your spread sheet;

Florence Senoko obo minor 22/10/2019 R818 183. 20 Capital 3791087

requested 4/12/2019

Vhonani Marcia Modau 07/02/2020 R3 100 045 capital requested 27/02/2020."

The applicant contended that Mr Adams communicated an injurious letter on

February 2021.

Good day

The above matter refers

Enclosed with the updated spreadsheet.

Please be advised that the region has been instructed to refer all bills for your firm to our Forensics Investigation Department and that we are not to process any of your bills until we receive further instructions. We trust that you find aforesaid in order."

[11] Mr Adams allegedly ordered his staff to stop processing all applicant's taxed bills and cancelled all payments which were requested in the applicant's complaint. The applicant's updated spreadsheet reflected that the applicant's taxed orders were referred for forensic investigation. On enquiries regarding this step Mr Adams informed the applicant that he received orders from Mr Marius Werner of the first Respondent's Forensic Department at Menlyn. The applicant made demand that the suspension of the processing of his taxed bills be uplifted by no later than 5 February 2021 or face litigation. Mr Adams undertook to take the matter up and discuss the suspension with senior management.

[12] Against this backdrop and from the various cases the first respondent has initiated, the applicant contended that the first respondent may have been making payment for settlement of claims to others, whereas, none of its claims were paid for over a period of one

year. The applicant contended that it had reason to believe that the first respondent was involved in "dirty and selective dealings". The applicant contended that the conduct of Messrs Adams and Van Rooyen was wilful and designed to frustrate the applicant and, the first respondent had not refuted instructions to cease payment to the applicant. Furthermore, intolerance was demonstrated by the first respondent against the "issuing of writs of execution by certain claimants and legal firms, who do not agree with the selective and or slow pace of payment." The applicant also referred to the utterances of the second respondent who described the attachments as a "self-help approach". The type of relief sought by the first respondent in cases numbers 58145/2020 which is to be heard by the full court during March 2021 and that in 52865/20 dealt with by Fourie J displays such intolerance and comments of the respective Judges were referred to.

[13] The applicant contended that the first respondent's insistence on its unlawful payment methods despite legal processes and court orders was illegal, and was driven by malice to unscrupulously avoid legal obligations conferred to it by judicial orders, as displayed by the conduct of its officials, Messrs Adams and Van Rooyen who feared escalation of the applicant's complaint to senior management. The instruction by Mr Marius Werner to cease all payments of the applicant's taxed bills to refer them to a forensic investigation was unconstitutional. No reasons for such investigation were given to the applicant, and even if there was reason for such investigation the first respondent had to treat such investigation with urgency. It was

contended that the first respondent was deliberately imposing its own payment regime despite court orders. The applicant contended that the second respondent's mandate as CEO of the first respondent was such that he could not plead ignorance of the payment system preferred by the first respondent, as he was the deponent in the application on behalf of the first respondent as he had knowledge of the court order of 14 December 2020. Therefore, the non-processing and non-payment of the applicant's taxed bills by the first respondent, could only have occurred at the behest and instruction and or authority of the second respondent and, that their conduct was wilful and *mala fide*.

[14] The applicant contended that the application was urgent for the following reasons:

(i) The outstanding capital payment was outstanding to the most vulnerable members of society; the plight of the litigants which included minors and the elderly;

(ii) The applicant's firm is being financially crippled by the failure by the first respondent to pay;

(iii) The experts used in the matters are owed money and are now refusing to work with the applicant's firm notwithstanding contingency fee agreements;

(iv) The flagrant disregard by the first respondent of orders of court;

(v) The applicant cannot obtain substantial redress at a hearing in due course;

[15] The second respondent deposed to the answering affidavit and raised points *in limine, b*eing, the alleged abuse of process, lack of *locus standi* and lack of urgency. In as far as the lack of *locus standi* was concerned he contended that the applicant does not rely on any order granted in its favour; the application should have been brought by the judgement creditor and not the applicant as, it was not the judgement creditor in whose name and favour all the orders relied upon were made.

[16] The second respondent bemoans the manner of service of the application at his residence and on his wife, which he viewed as an infringement to the right of privacy and dignity of his family and an attempt to pressure him to make preferential payment to the applicant.

[17] It was contended that the application was based on 'conjecture and defamatory statements,' and that applicant had failed to prove the essential elements for the relief sought. Furthermore, that the application was based on 'vexatious, frivolous and scandalous' attacks against the respondents, especially the second respondent in his personal capacity. It was contended that the applicant had failed to attach the first respondent's founding and replying affidavits in case number 58145/2020 which shows that the first respondent was in a parlous financial state, unable to make payment of claims by way of lump sum. The first respondent was daily inundated by letters, emails requesting payment. In an attempt to deal with the issue, a system was introduced to stagger payment after the lapse of 180 days from the date of a court order or date of settlement.

[18] The second respondent contended that subject to available funds the first respondent is abiding the court order by prioritizing capital claims above claims for legal costs and by paying the oldest claims first. There were a few exceptions, that is, where a firm of attorneys was under investigation for impropriety. It was contended that the first respondent's employees had incorrectly stated in their emails that the dates of the claims were determined only when captured because this referred to the old system. The second respondent denied that there was an obstruction and a deliberate and malicious intent in the payment process. Payment to applicant had been suspended pending the outcome of an investigation into suspicion of impropriety relating to the applicant's bills of cost and possible duplications of payment of claims.

[19] The first respondent had uncovered a substantial amount in duplicate payments arising from the manner of payments to attorneys, which payments were made as a result of

bank attachments and payments to attorneys directly on same matters. This required a reconciliation of payments to be done manually, which was time consuming with limited capacity. A verification process entails the creation of a duplicate register which is forwarded to the bank for confirmation and, a recovery instruction form is forwarded to the Debtors Department to initiate recovery.

[20] The first respondent contended that undertaking the investigative process was an exercise in fulfilling its statutory obligations and that the following provisions were applicable:

(i) section 1(v) of PAJA;
(ii) (ii) section 27 (2) of the Constitution, 1996;
(iii) (iii) section 4 of the Road;
(iv) Accident Fund Act.

The first respondent states that the process engaged was endorsed in the recent

judgment of Collis J in J Koekemoer and 353 Others v Road Accident Fund Case

64143/2020 (22 January 2021).

[21] The first respondent contended that payment to the claimants in this application was suspended pending the outcome of the investigations and possible claims against the applicant. The first respondent undertakes to complete its internal provisional investigation by May 2021 and that it will provide the applicant with its provisional report within 14 days of completion thereof. This undertaking is provisional on the applicant giving its full cooperation.

[22] The respondents apply for punitive costs against the applicant whom it contended was not competent to bring the application, there being no basis to approach the court by way of urgency and thereby incurring unnecessary costs for the respondents.

SERVICE OF THE APPLICATION ON THE SECOND RESPONDENT

[23] I know that Judges in the urgent court, with certain exceptions would always insist upon service on the other party. This application calls for the committal to prison of the second respondent, alternatively imposition of a fine. When I noted that the first and second respondent's answering affidavit had been filed on case lines and, that I had received a request to place the matter on the roll for either the 23 or 24 of February 2021, in order to accommodate Advocate Puckrin SC. I was confident that Mr Letsoalo, the second respondent, Chief Executive Officer of the first respondent had been notified of the

application and that he had the opportunity to place his version before the court.

[24] I am therefore not inclined to comment on his complaint of how the applicant and Sheriff went about serving at his place of residence; unlawful entry into his residential estate by the Sheriff; harassment to his wife and infringement of his family's right to privacy and dignity or, the allegation that the application was to place unlawful pressure on the first respondent for preferential payment. While he might have a right to bring this issue up, I view his complaint as trivial, not worthy of attention as compared to the circumstances and the problems the RAF is presently encountering. Therefore, the prejudice to third parties as a result of the parlous financial state of the RAF and, the attempts to alleviate and to correct this sorry state of affairs should be given priority.

LOCUS STANDI

[25] Having said the above, it is common knowledge that amidst its parlous financial state, the RAF has been beleaguered by demands for payment made on behalf of claimants and payment of bills of costs; a situation has arisen where experts have not been paid and are threatening not to render any services to assess and give reports in respect of injuries sustained by claimants in motor vehicle collisions; there are attorneys and advocates who complain that their practices are almost in ruins. In this matter it is alleged that the first respondent is indebted to the applicant's forty-two clients in the amount R11 732 441.82,which amounts are now due and payable. Although it is not payment that the applicant seeks to enforce, the claims had aged from at least four months to almost one and a half years and most importantly, the first respondent and second respondent have not complied with the order of 14 December 2020, which it is alleged they disregard with impunity.

[26] As I see it, on a strict interpretation of the Powers of Attorney annexed to the papers, and without analysing the entire content of the document, I find that the powers do not extend to authorizing the applicant to launch contempt proceedings against the first and second respondents. The personal details of and amounts due to the judgement creditors were available to the applicant at all times. It is the judgement creditors who have a direct and substantial interest, especially where it is alleged that the first respondent has not complied with an order, which directs that

court orders and settlement agreements in their favour as judgment creditors be registered for payment, especially the long outstanding ones that are 180 days or older.

[27] The importance of the judgment creditor's substantial interest is demonstrated in J Koekemoer and 353 Others *supra.* The applicants consisted of judgment creditors and the 354th applicant was their attorney of record, who probably had a similar Power of Attorney

referred to in this matter. In my view, the importance of the judgment creditors bringing the application against RAF in their personal capacities, is their entitlement or right to prompt direct payment within the period prescribed in the Road Accident Fund Act 56 of 1996. In the Koekemoer matter the RAF was able to convince the court to allow for a period of investigation to precede payment to the claimants. Albeit in my view, as probably is the case in this application this process of investigation had the potential of prejudice, to those claimants who were not tainted by fraud or duplicate payments and further prejudice in that a system of payment which has no legality presently is being foisted upon them.

[28] Again, in the matter of RAF v ABSA Bank Limited and Another case number 52865/202, Fourie J considered the issue of non-joinder of the third parties in particular, the claimants. The court found that the applicant was aware of the joinder requirement but, had conveniently opted not to comply with it. The court was not in favour of granting a rule nisi to have this lacuna fulfilled because there was more at stake to the prejudice of the claimants. Opportunity was given to the RAF, to launch a fresh application and to cite third parties who would be affected by the order.

[29] According to Mr Lazarus the applicants had demonstrated that they had a substantial interest in the order, hence the launch of the application on behalf of their clients. I do not find that such direct and substantial interest, in their capacity as attorneys for the judgement creditors had been established or properly articulated. Alternatively, a further complication is that no confirmatory affidavits from the judgement creditors have been obtained and annexed to the papers. In as much as I would have wanted to deal with the entire application, however, having come to this conclusion I find that it is no longer necessary to deal with the issue of contempt of the order of 14 December 2020, as doing so would render the exercise superfluous and of no consequence. I rely on what was stated in Four Wheel Drive Accessory Distributors CC v Leshni Rattan N.O 2019(3) SA 451 (SCA) where the following was stated at paragraph 19:

"The court a quo was thus correct in holding that the plaintiff did not prove that it bore any risk in respect of the Discovery. It did not prove an interest in the litigation and consequently, failed to establish *locus standi.* The court also rightly found that no

contract came into being because there was no consensus regarding the terms (and nature) of the agreement. That should have been the end of the matter. Indeed, the court held that the failure to prove *locus standi* was dispositive of the entire action."

[30] Mr Puckrin submitted that in the event of a dismissal, costs on a punitive scale be awarded, I am no inclined to do so.

[31] In the result the following order is granted.

1. The application is dismissed with costs including costs of senior counsel.

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TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**24 & 25 FEBRUARY 2021**
JUDGMENT RESERVED ON	**:**	**25 FEBRUARY 2021**
ATTORNEYS FOR THE APPLICANTS	**:**	**SHAPIRO LEDWABA INC.**
ATTORNEYS FOR THE RESPONDENTS	**:**	**ROAD ACCIDENT FUND**