HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 93439/2020

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 15 JANAURY 2021

SIGNATURE [redacted]

In the matter between:

MATSI MAILULA INCORPORATED Applicant
(Now: Matsi Law Chambers)

and

LESIBA JEREMIAH MAILULA First Respondent

LESIBA MAILULA INC ATTORNEYS Second Respondent

J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020 in open court. The judgment and order are published and distributed electronically in accordance with these Directives.

DAVIS, J

[1] Introduction

This is the judgment in an urgent application which came before the urgent court earlier this week, on 12 January 2021. It deals with the consequences of a split-up between two attorneys of this court who had previously practised in the same firm.

[2] The parties

2.1 The two attorneys are Mr M.L Matsi and Mr L.J Mailula. Due to the various applications between them and the different names of firms under which they respectively practise or have practised, they shall be referred to as Mr Matsi and Mr Mailula to avoid confusion. To also avoid confusion, the heading of the main application, as more fully referred to hereunder, has been retained.

2.2 The two attorneys have practised as co-shareholders and co-directors of Matsi Mailula for nine years. On 1 February 2019, Mr Mailula resigned as director and employee of Matsi Mailula Inc and "withdrew" his shareholding of that firm.

2.3 Recently, Mr Matsi has changed the name of the firm to Matsi Law Chambers. He is the sole director and shareholder of this firm where he still practises as an attorney.

2.4 Mr Mailula, in the meantime, practises as an attorney the sole director of Lesiba Mailula Inc.

2.5 Both attorneys' practices are in Pretoria.

[3] The main application

3.1 On 18 December 2020, Mr Matsi's firm obtained an order from this court whereby Mr Mailula was ordered to return to Mr Matsi's firm some 116 original client case files that Mr Mailula had removed and taken with him subsequent to his resignation referred to in paragraph 2.2 above. He was also ordered to furnish copies of termination of mandates to Mr Matsi's firm and notices of substitution whereby Mr Mailula and his firm had been appointed.

3.2 Mr Matsi did not deny clients' rights to choose which attorney they preferred after the split from each other but demanded the return of the files, being his firm's property, primarily to recover the fees and disbursements earned and expended up to date of termination of his and his firm's mandates. For this reason, he also obtained an order restraining Mr Mailula from submitting bills for taxation prior to Mr Matsi's fees and disbursements having been properly catered for.

3.3 The main application referred to above, served before Baqwa, J. It was preceded by a notice in terms of Rule 30A (1), delivered by Mr Mailula, claiming dissatisfaction with compliance or lack of compliance with certain Rules, the contents of which notice are no longer of any moment in this application.

3.4 Mr Matsi had, prior to the hearing of the main application, delivered a response to the Rule 30A notice.

3.5 Mr Mailula had not, after receipt of the response to his Rule 30A notice, proceeded with any application as contemplated in Rule 30A (2).

3.6 Mr Mailula had also, by choice, refrained from delivering an answering affidavit. At the hearing of the main application, he was represented by

counsel and sought to rely on the issue of his complaint raised in his Rule 30A (1) notice. When, due to his failure to have proceeded as contemplated in Rule 30A (2), this point was rejected, he did not ask for a postponement or any other relief. Consequently, the orders referred to above, were granted.

[4] The current application

4.1 The two week period within which Mr Mailula had to comply with the order of Baqwa, J expired on 4 January 2021 (the first of January being a public holiday, followed by Saturday 2 January 2021 and Sunday 3 January 2021). Rather than comply with the order, Mr Mailula launched the current application, on an urgent basis, on that day.

4.2 In the current application, Mr Mailula seeks, in terms of part A of the Notice of Motion, an order suspending the operation of the order granted in the main application, pending the determination of a rescission thereof, claimed in Part B of the Notice of Motion, still to be enrolled in due course.

4.3 The urgent application for the relief claimed in part A of Mr Mailula's Notice of Motion is opposed.

[5] Suspension of court orders

5.1 Rule 45A provides that a court may suspend the executive of its orders "for such period as it may deem fit".

5.2 Mr Mailula argues that part B of the current application (and his affidavit in support thereof), being a claim for a rescission of the initial order in the main application, constituted good grounds for the ordering of a suspension. In short, he says that the files which he took, formed the

subject matter of an agreement between the parties reached in 2018. He disputes the cause relied on by Mr Matsi in the main application.

5.3 Mr Mailula's argument is similar to the following statement in Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd 2014 (1) SA 168 (WCC) at 170 F – G:

> "*It is clear that what was intended in this case was that, where the cause for the execution is a judgment, and that judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for a favourable discretion by a court*".

5.4 The general principles for the granting of a stay in execution were summarized as follows in Gois t/a Shakespeare's Pub v Van Zyl 2011 (1) SA 148 (LC) at 155H – 156B:

> '*(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.*
>
> *(b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.*
>
> *(c) The court must be satisfied that:*
>
> *(i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondents(s); and*

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e where the underlying causa is the subject-matter of an ongoing dispute between the parties.

(e) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute'.

5.5 Although the court need not at this stage assess the merits of Mr Mailula's grounds upon which he claims rescission, the affidavits indicate that those grounds raise serious doubts as to the success of his application for rescission and, at best, he faces the hurdles of overcoming numerous factual disputes. To this must be added the procedural difficulties – the rescission application clearly cannot be entertained in terms of Rule 31. At best, it might be entertained in terms of Rule 42, which brings one back to the seriously contested issue of whether the initial order had been erroneously sought. Clearly it had been brought on the basis of Mr Mailula's admitted resignation in February 2019.

5.6 In circumstances where the right sought to be asserted by Mr Mailula is open to doubt, the further requirements to be satisfied, similar to those for an interim interdict, are: 1) whether there is a well-grounded apprehension of irreparable harm to him if execution is not stayed should he be ultimately successful in rescinding the order of Baqwa, J, 2) whether the balance of convenience favours him and 3) that he has no other satisfactory remedy.

5.7 All the above considerations have been addressed by the following statement by Mr Matsi in his answering affidavit (and which has been confirmed in open court on his behalf) and which also addresses the possible irreparable harm and prejudice to him, should the order not be executed:

> "*The balance of convenience will be maintained if Mr Mailula and the second applicant simply make copies of the files and return the originals ... . in the case of matters where they have received mandates from clients to take over, they must return the files accompanied by terminations of mandate. In respect of terminated matters the Respondent [Mr Matsi] will prepare its bill of costs and claim its fees and disbursements as per procedure known to Mr Mailula. What harm can the applicants possibly suffer in doing that?*"

5.8 It does appear that, apart from the absence of irreparable harm should the order be executed in this fashion, Mr Mailula has an alternative remedy. This alternative remedy, catering for a "seamless" transition in matters where Mr Mailula received substituting mandates from clients, had been on the table both prior to and subsequent to his resignation. It appears that he has simply not availed himself of it. All he needed to do, was make copies of what he wanted to retain and then return the originals with copies of terminations of mandate.

5.9 On these facts and considerations, I find that execution of the order by Baqwa, J should not be granted, save, in the exercise of my discretion, for the granting of a further period to Mr Mailula to comply therewith.

[6] Costs

6.1 Ordinarily, costs of interlocutory proceedings are costs in the final proceedings, in this case, the intended rescission application contemplated in Part B of the Notice of Motion. However, in this application, Mr Mailula brought the urgent application on short notice, on the last day on which he had to comply with the existing order, in circumstances here he had, on his own version, been aware of his alleged grounds for rescission the very same day that the order was granted on 18 December 2020. Moreover, he is the one who was in default or wilfully decided not to deliver an answering affidavit to the main application. Furthermore, his response to Mr Matsi's statement quoted in paragraph 5.7 discloses absolutely no reason or justification why the procedure mentioned therein could not be followed. In fact, Mr Mailula's paragraph in his replying affidavit, dealing with this aspect, concludes inappropriately for an officer of this court: "*the allegations in this paragraph are not supported by any evidence, unable to confront the allegations directly absent any supporting documents. It is nice to know*".

6.2 Taking all of the above into account as well as the fact that ample measures had been available whereby the whole urgent application could have been avoided, I intend exercising this court's discretion in relation to costs against Mr Mailula and his firm, on the same scale as which he had claimed costs against Mr Matsi.

[7] Order

1. The relief sought in part A of the urgent application is refused.
2. The respondents in the main application are granted until 26 January 2021 to comply with the order of Baqwa, J dated 18 December 2020.

3. The applicants in the urgent application are ordered to pay the costs thereof incurred to date, jointly and severally, on the scale as between attorney and client.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 December 2021

Judgment delivered: 15 January 2021

APPEARANCES:

For the Applicant:	Adv. K Mokwena
Attorney for Applicant:	Matsi Mailula Incorporated, Pretoria
For the Respondents:	Adv. M R Maphutha with Adv K Mvubu
Attorney for Respondents:	Khorommbi Mabuli Attorneys Inc., Pretoria