

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/ 0085/ 2021

FELLENG ‘MAMAKEKA MAKEKA

APPLICANT

AND

AFRICA MEDIA HOLDINGS

1ST RESPONDENT

OFFICER CMMANDING THETSANE POLICE

2ND RESPONDENT

COMMISSINER OF POLICE

3RD RESPONDENT

Neutral Citation: Felleng ‘MamakekaMakeka v Africa Media Holdings C/O
Lesotho Times and 2 others CCA/0085/2021 [2021] LSHC 8 COM (9th
February, 2022)

REASONS FOR JUDGEMENT

CORUM:	MATHABA J
Heard on	14 th December 2021
Order Pronounced on	14 th December 2021
Reasons provided on	9 th February 2022

Summary

Ex parte application – applicant failing to be ultra – scrupulous in obtaining interim relief and pursuing meritless application – such conduct attracting discharge of the rule nisi with punitive costs.

Tacit hypothec – principles discussed – failure to prove rentals owing – application dismissed.

Costs de bonis propriis – responsibility of Counsel towards Court vis a vis his client – Counsel mulct with costs for twisting the facts and assisting client to pursue unarguable case.

Annotations:

Cited Cases:

Lesotho

Abel Moupo Mathaba & Others v Enoch Matlaselo Lehema& Others 1993 – 1994 LLR & LB 402

Commander Lesotho Defence Force and Another v Matela LAC (1995 – 99) 799; 1999 – 2000 LLR – LB 13 (CA)

Fothoane and Another v President of the CDP and Others LAC (2000 – 2004) 287

**LNDC v Grayon and Wing on Garment (Pty) Ltd v LNDC and another
CIV/APN/39/1999**

**Mahlakeng and Others v Southern Sky (Pty) Ltd and Others LAC 2000 -
2004) 742**

South Africa

**Engen Petroleum Limited v Krishna Moodley NO (OBO Deceased estate D.
Moodley) and Royal Wholesale Paraffin Distributors (Pty) Ltd Case
numbers: 2016/00276 and 2016/3066**

Frank v Van Zyl 1957 (2) SA 207

Khan v Mzovuyo Investments (Pty) Ltd 1991 (3) SA 47

**Khunou and Others v M Fihrer & Son (Pty) Ltd and Others 1982 (3) SA
353 (W)**

**Matidi Paul Motshegoa v Pauline Moipone Motshegoa and Another
(995/98) [2000] ZANWHC 6 (11 May 2000)**

Powell and others v Van der Merwe and Others 2005 (5) SA 62 (SCA)

Rautenbath v Symington 1995 (4) SA 583 (O)

**Recycling and Economic Development Initiative of South Africa v Minister
of Environmental Affairs 2019 (3) SA 251 (SCA)**

**RMS Tibyo (Pty) Ltd t/a Bhunu Mall v Bridge Finance (Pty) Ltd (3446/10)
[2011] SZHC 84 (07 March 2011)**

Room Hire Co. (Pty) Ltd. v. Jeppe Street Mansions (Pty.) Ltd 1949 (3) SA 1155

Schlesinger v Schlesinger 1979 (4) SA 342 (W)

South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board and Others 2009 (1) SA 565 (CC)

Washaya vWashaya 1990 (4) SA 41 (ZH)

INTRODUCTION:

[1] The application was argued before me on the 14th December 2021.

Upon hearing Counsel for the parties, I issued the following orders:

- i) The rule *nisi* granted on the 26th October 2021 is discharged;
- ii) The application is dismissed;
- iii) Counsel for applicant must file heads of argument on or before the 16th December 2021 on why this Court may not issue an order of costs *de bonis propriis* against her or an order of costs at attorney and client scale against the applicant.

[2] What follows are my reasons for the order.

[3] On the 21st October 2021 the applicant filed an urgent application which her Counsel, Mrs. *Musi – Mosae*, moved *ex parte* before me on the 26th October 2021 where I granted the interim court order in the following terms:

“1. That a **Rule Nisi** is hereby issued returnable on the **02nd** day of **November 2021** at **9.30a.m.** calling upon the Respondents to show cause (if any) why the following Orders shall not be made final:-

- a) The Rules as to form and notice shall not be dispensed with on account of urgency herein;
- b) The Sheriff of this Honourable Court shall not be authorized and required to proceed to the premises occupied by the 1st Respondent on the premises situated at **Lower Thetsane** in the district of **Maseru**, specifically **House Number 220** and therein make an inventory of all equipment and goods in the possession of the 1st Respondent and submit same to applicant’s Attorneys and the Registrar of this Honourable Court;
- c) The equipment and goods in the possession of the 1st Respondent on/in House Number 220, situated at Lower Thetsane in the district of Maseru shall not be attached by the Deputy Sheriff of this Honourable Court and remain

under attachment pending the finalization hereof and finalization of the action which will be instituted within fourteen (14) days after the granting of this application;

- d) The Sheriff of this Honourable Court shall not be authorized and allowed to remove all the movable goods, stocks, furniture and equipment of whatsoever nature on **House Number 220** occupied by the 1st Respondent, situated at **Lower Thetsane** in the district of Maseru and place same in a safe place and/or storeroom to be provided by the Applicant pending the finalization hereof;
- e) The 2nd and 3rd Respondents and Officers subordinate to them be and are hereby enjoined and ordered to assist the Deputy Sheriff to fully execute the orders hereof pending the finalization hereof and the finalization of the action which will be instituted within fourteen (14) days after the granting of this application;
- f) The 1st Respondent be and is hereby restrained and interdicted from disposing of by way of sale or in any way the equipment and goods under attachment in paragraph (b) and (c) above pending the finalization hereof and the

finalization of the action which will be instituted within fourteen (14) days after the granting of this application;

- g) The Applicant herein shall not be declared to have a tacit hypothec right over the 1st Respondent's property which remains at her **House numbered 220** and located at **Lower Thetsane** in the District of Maseru;
- h) The 1st Respondent shall not be ordered to pay costs hereof;
- i) The Applicant shall not be granted further and/ or alternative relief;

- 2. Prayers **1(a), (b), (c), (e)** and **(f)** operate with immediate effect as an Interim Court Order pending the finalization hereof”.

[4] Mrs. *Musi – Mosae* also moved the Court to grant prayer 1 (d) above. I refused to grant the prayer as I thought it was unnecessarily drastic, particularly when the applicant wanted to obtain it *ex parte*.

THE MAIN PARTIES:

[5] The applicant is a sub – lessor of the 1st respondent, a print media publishing company based in Johannesburg in the Republic of South Africa and carrying on business on the premises of the applicant at Lower Thetsane, House Number 220 in the district of Maseru. The sub-lease agreement between the parties commenced during the year 2014.

[6] The real dispute between the parties is the alleged indebtedness by the 1st respondent for not paying yearly rent escalations in the amount of M25,113.06 from the 15th August 2020 to the 15th October 2021. It is common cause that sometime in 2020, the applicant waived rent escalations at the instance of the 1st respondent. The parties have a different understanding of what waiver entailed in this regard. The applicant asserts that rent escalations were deferred while the 1st respondent contends that rent escalations were set aside.

[7] My reasons for discharging the *rule nisi* and dismissing the application are based on the following aspects, one of which influenced me to consider costs *de bonis propriis* against Mrs. Musi-Mosae or an order of costs at attorney and client scale against the applicant:

- 5.1 Material Non – Disclosure;
- 5.2 Dispute of fact; and
- 5.3 Applicant’s failure to prove that rent was in arrears.

Material Non – Disclosure

[8] The applicant purported to come to Court on the basis that the 1st respondent owed her rentals which it has not paid for the past 21 months. The

applicant asserted that the rentals covered the period from January 2020 to the 1st August 2020 and for the period 1st August 2020 to August 2021 and to the 21st October 2021. The total amount of rentals owed according to the applicant is M629,452.72. That was the kernel of the applicant's case.

[9] It turned out however that the 1st respondent paid its rentals since the 16th August 2019 until the 26th October 2021 and that except for the payment of the 26th October 2021, the applicant knew of all the other payments that were made by the 1st respondent. The 1st respondent filed of record transaction reports from the bank which reflect all rentals paid to the applicant from the 16th August 2019 to the 26th October 2021.

[10] The 1st respondent further filed of record the statement of account authored by the applicant reflecting payments made by the 1st respondent covering the period from 1st August 2020 to August 2021. The only payments which do not appear in the statement, one of which the applicant had acknowledged its receipt were those made on the 19th and 26th October 2021 in the sum of M27,672.75 in both instances.

[11] The 1st respondent placed cogent evidence of record that it had been paying its rentals of which the applicant was aware when she instituted the application except payment made on the 26th October 2021. The applicant was not able to deal with this evidence in her replying affidavit except to say that payments were made late and caused her financial prejudice. That was not the

applicant 's initial case as it appears in the founding papers. The applicant cannot be allowed to panel beat her case when the falsity of her claim is exposed.

[12] At the time she approached the Court *ex parte* alleging that the 1st respondent owed her rentals for the past 21 months in the sum of M629,452.72, the applicant deliberately misled this Court. The applicant withheld information relevant to payments that were made by the 1st respondent. She knew that the real dispute between the parties is the disputed rent escalations.

[13] It bears emphasizing that at the time she launched the application, the applicant was aware of all the payments that were made by the 1st respondent except payment that was made on the 26th October 2021 as the case had already been instituted by then.

[14] The omission of material facts may either be willful or negligent. Either way, the Court may on this ground alone dismiss an *ex parte* application. Regarding the Court's discretion to set aside an *ex parte* order because of non-disclosure, Le Roux J said the following in **Schlesinger v Schlesinger** 1979 (4) SA 342 (W) at 350 (C)

“Unless there is a very cogent practical reason why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set aside the order even if relief could be obtained on a subsequent application by the same applicant.”

[15] In **Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs** 2019 (3) SA 251 (SCA) the Court reiterated the longstanding principle of full disclosure in *ex parte* applications as follows:

“[45] The principle of disclosure in *ex parte* proceedings is clear.

In *NDPP v Basson* this Court said:

“Where an order is sought ex parte it is well-established that the utmost good faith must be observed. All material facts must be disclosed which might influence a Court in coming to its decision, and the withholding, or suppression of material facts, by itself, entitles a Court to set aside an order, even if the non-disclosure or suppression was not willful or mala fide (Schlesinger 1979 (4) SA 342(W) at 348E-349B)

[46] *The duty of utmost good faith, in particular duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely **audi alteram partem**. The law sometimes allows a departure from the principle in the interest of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralize the prejudice the affected party suffers by his or her absence.*

[47] *The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all*

relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquires and conduct such investigations as are reasonable in the circumstance before seeking ex parte relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matters regarded as irrelevant was sufficiently material to require disclosure. The test is objective.”

[16] An applicant in an *ex parte* application bears the duty to be ultra – scrupulous in disclosing any material facts that might influence the Court in coming to its decision. See: **Powell and others v Van der Merwe and Others** 2005 (5) SA 62 (SCA) at 79, para 42.

[17] In the instant case, I make the following findings that are relevant to a consideration of the foregoing principles and considerations respecting institution of *ex parte* application. Nowhere in the founding affidavit does the applicant disclose this material fact, namely, that the 1st respondent had been paying its rentals and that as late as the 20th October 2021, she received proof of payment of rent from the 1st respondent. Further that, in actual fact, the

applicant received communication from the 1st respondent that it was making arrangements to pay the rentals for October 2021 latest by the 22nd October 2021.

[18] The applicant proceeded to obtain an *ex parte* order in this matter attaching the goods of the 1st respondent on the ground she was owed rentals in the sum of M629,452.72 for the period January 2020 to October 2021 when that was not true. The applicant decided to withhold the information that rentals were paid and that the real dispute between the parties was on rent escalations. This was a material non – disclosure. It was critical to the relief sought and obtained *ex parte*.

[19] The applicant justified an *ex parte* procedure by misleading the Court into believing that the 1st respondent was in a precarious financial situation and that should notice be given to the 1st respondent, it will suddenly remove its property which the applicant wanted attached.

[20] On authorities, these are material facts which the applicant owed a duty of utmost good faith to disclose to the Court. By withholding these facts, which in the circumstances of this case were more likely to influence the Court in refusing to consider the matter on an *ex parte* basis, the applicant acted in material breach of her duty to act in good faith in instituting the urgent *ex parte* application. The disputed rent escalations are way insignificant compared to the purported liability of M629,452.72. Had I known that the real subject of dispute

between the parties is the disputed rent escalations, I would certainly have not granted the interim relief. On this ground alone, the application stands to be dismissed.

Dispute of fact

[21] The high-water mark of the applicant 's case was that she was owed M629,452.72 in rentals which accumulated since January 2020 to October 2021. The 1st respondent has placed overwhelming evidence to the contrary. Applicant 's Counsel conceded in her main heads of argument at paragraph 2.5 thereof that there was a foreseeable dispute of fact as far as the issue is concerned. The applicant was therefore grossly at fault in snatching an interim court order *ex parte* in circumstances where it was clear that a dispute of fact was inevitable. Since the applicant foresaw this dispute of fact, it was only proper to exercise my discretion to dismiss the application instead of referring the disputed fact for oral evidence. *See: Room Hire Co. (Pty) Ltd. v. Jeppe Street Mansions (Pty.) Ltd* 1949 (3) SA 1155 at 1162.

Failure to prove that there were arrear rentals

[22] To obtain attachment order or an interdict against the lessee, the lessor must establish that the lessee is in arrear with his rent. *See: LNDC v Grayon and Wing on Garment (Pty) Ltd v LNDC and another*

CIV/APN/39/1999 at page 4. In **Frank v Van Zyl** 1957 (2) SA 207 at 208, Watermeyer J, stated that –

“...Applicant’s claim is for the enforcement of her tacit hypothec as Landlord ...upon the leased premises for rent due. The first thing which she would have to show ... is that rent was in arrears...”.

[23] In **RMS Tibyo (Pty) Ltd t/a Bhunu Mall v Bridge Finance (Pty) Ltd** (3446/10) [2011] SZHC 84 (07 March 2011) the Court said the following at paragraph 14:

“In conclusion the applicant has failed to establish that the Respondent is in arrear rental; it has failed to show how the amount claimed is made up. In addition, it has failed to show which months are in arrears. The drastic nature of the remedy sought by the applicant requires that the landlord should establish on a balance of probabilities that the tenant is in arrear rental before the attachment order or the interdict against removal of his movable assets is made. The court should be left with no doubt that the tenant is in arrear rental. It is the Founding Affidavit which should contain all the necessary allegations and annexures establishing the arrear rental”.

I cannot agree more.

[24] As it has already been indicated elsewhere in this judgment, the 1st respondent placed overwhelming evidence of record to demonstrate that it was up to date with its rentals except for disputed rent escalations.

[25] I therefore find that the applicant has not been able to establish that there are arrear rentals. I am also unable to find that there are arrear rentals based on disputed rent escalations for two reasons. Firstly, the gravamen of applicant's case was not disputed rent escalations. Secondly, there is a serious dispute of fact incapable of being resolved on papers as far as it relates to rent escalations.

[26] If the kernel of applicant's case was disputed rent escalations; I would have a discretion to refer the matter for oral evidence on this aspect. *See: Mahlakeng and Others v Southern Sky (Pty) Ltd and Others* LCA (2000 – 2004) 742 at 753 A. However, since the applicant knew at the time she instituted the application that there was a serious dispute of fact regarding rent escalations, I was still not going to exercise my discretion in her favour and refer that aspect for oral evidence. Doing so would have the effect of having the case jump the queue at the expense of other deserving cases. Rather, I was going to dismiss the application. *See: Room Hire Co. (Pty) Ltd supra.*

[27] In the result, I find that the applicant has not been able to establish on a balance of probabilities that the 1st respondent is in arrears. The applicant is therefore not entitled to an order for attachment and interdict restraining the 1st respondent from disposing of or removing the movables from the leased premises pending the determination of proceedings for the recovery of the rent.

Costs

[28] I asked Mrs. *Musi – Mosae* to address me on why I may not order costs *de bonis propriis* against her or an order of costs at attorney and client scale against the applicant. The move was actuated by the following factors:

- a) the applicant instituted the application *ex parte* claiming that she was owed rentals in the sum of M629,452.72 covering the period from January 2020 to October 2021 knowing fully well that the only issue was disputed rent escalations. I view this as a clear abuse of *ex parte* procedure.
- b) the first respondent set aside M25,113.06 as security for the alleged indebtedness with respect to rent escalations which it paid into its attorneys of record trust account. It stated unambiguously more than once in its answering affidavit that it was not acknowledging any liability to the applicant. Despite the clear purpose as spelled out in the answering affidavit for which the M25,113.06 was set aside and very clear denial of liability, Mrs. *Musi – Mosae* twice in her heads of argument said that the 1st respondent admitted being liable in the amount of M25,113.06. In my view, Counsel was deliberately twisting the facts and I gave her an opportunity at the beginning of the proceedings to explain why she said that the 1st respondent admitted liability. The

Court spent a considerable amount of time on this aspect with Counsel sticking to her guns even as she could not find anything from the record to support her assertion. Counsel was literally quarrelling with the Court instead of just conceding that she was wrong in arguing that the 1st respondent admitted liability. I did not take kindly to Counsel twisting the obvious facts and then quarrelling with the Court when it was pointed out to her that her submission was not supported by facts.

[29] Mrs. *Musi- Mosae* filed her heads of argument addressing the two aspects. Regarding the first aspect Counsel indicated that applicant had consulted with her principal Adv. R. Setlojoane who thereafter asked Counsel to institute the tacit hypothec application. Counsel explained that since she could not get further details from Adv. R. Setlojoane who was out of the office for a while, she consulted directly with applicant who said that she took it upon herself ‘to calculate the money that was owing from 2020 to 2021 together with the escalation therein attached in terms of the parties’ lease agreement’. Counsel then submitted as follows in her heads of argument:

“2.3 Consequently, I instituted the application in the amounts as reflected in the Founding Affidavit and it was not until the delivery of the Answering Affidavit upon my office that I learned that the actual rent was paid and there are statements to that effect. I aver that at the time of institution of the

application, no such statements were issued to me by client, I relied on the sole information that rentals were owing from 2020 up to 2021 and came up with the numbers. I verily aver that I would not have proceeded with those numbers had I been aware that only the escalations were in issue.

2.4 Whilst I admit and appreciate the fact that, as an officer of this Honourable Court, I have to exercise due diligence and care when it comes to institution of proceedings and the averments therein contained. My humble submission is that for this application, I genuinely believed I had done exactly that, I honestly did not anticipate that the non-payment of those rentals would turn out to be in that much dispute by the 1st Respondent, it came as a shock when I received the Answering Affidavit and I immediately consulted the client with regards their Response. Client indicated that it must have been a miscommunication and said she should have been clearer as to what she meant by her statement.

2.5 Realizing this huge mistake, I took it upon myself of course with the consultations of both the client and my Principal, to propose an amicable settlement of the matter but it was unfortunately not successful as the 1st Respondent insisted that client tenders costs for the application. That is when in preparing the Replying Affidavit, the issue of escalations was admitted and issue of other elements raised, the Hope (sic) was that client would be protected from having to pay costs that were as a result of miscommunication.

2.6 I humbly submit therefore that I did not willfully and intentionally mislead this Honourable Court with the figure of M629,452.72 as reflected in the Founding Affidavit, I genuinely believed that the client was not only owed rent

escalations but arrear rentals an (sic) am requesting that costs should not be issued against me personally”.

[30] On the second issue Counsel commenced her submissions by tendering an apology. She explained herself further as follows:

“3.1 The issue I was mainly trying to stress was that there was an admission of liability and having been made aware that, that line of arguments (sic) was premised on tendering of the abovementioned security in my Heads as well as the Replying Affidavit, I should have withdrew (sic) that statement then and there. I repeat that the intention was to prove liability by demonstrating that the 1st Respondent’s case is that their calculations of the escalations owing amounts to M22,276.56 hence they paid security in the amount of M25,113.06.

3.2 I submit that this was my first encounter where I had to insist on an argument that the court deems it rather disrespectful to pursue moreso when counsel is given an opportunity to reflect. I have been advised and will most certainly rely on the same to withdraw my argument the next time I foresee the possibility of appearing as disrespectful or offensive in insisting on a certain argument. I must mention that I was admitted to practice as an Advocate sometime in **August 2017** and this has been quite a journey for me, I have had to learn a lot through several appearances and this was definitely a lesson for me”.

[31] In **Abel Moupo Mathaba & Others v Enoch Matlaselo Lehema& Others** 1993 – 1994 LLR & LB 402 at 452 the Court indicated that

costs at attorney and client scale are granted for instance in proceedings which are an abuse of court process, where there is absence of *bona fides* in conducting the litigation or for litigant's objectionable behaviour.

[32] In **Mathaba** *supra*, Cullinan C.J, as he then was, quoted **Nel v Waterberg Landbouwers Ko-operative Vereeniging** (1949) A.D 597 at p. 607, where Tindall, J.A said the following:

“In some cases it had been said that the court makes the order to mark its disapproval of the losing party's conduct. This terminology suggests that an award of the attorney and client costs is a form of punishment. But the treatment of such an award simply as punishment does not supply a complete explanation of the ground on which the practice rests; something more underlies it than the mere punishment of the losing party. On the other hand, the order cannot be justified merely as a form of compensation for damages suffered...the true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation”.

[33] In **Khan v Mzovuyo Investments (Pty) Ltd** 1991 (3) SA 47 (Tk) the Court ordered the plaintiff's attorneys to pay the costs of a postponement of

the matter *de bonis propriis* in circumstances where the matter was set down when it was not ripe for hearing after it had been removed from the roll on seven previous occasions. Hancke J outlined the approach in awarding costs *de bonis propriis* (at page 48) as follows: —

“The principle of awarding costs *de bonis propriis* is summed up by Innes CJ in *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679 at 691 as follows:

'The whole question was very carefully considered by this Court in Potgieter's case (1908 TS 982), and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable.'

[34] In **South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board and Others** 2009 (1) SA 565 (CC) it was stated (at para 54) that:

“An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs *de bonis propriis* on the scale as between attorney and client. The order is

made against the office of the State attorney, not personally against the attorney concerned. This court's displeasure is primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate”.

[35] Where a legal practitioner has conducted himself in an irresponsible and grossly negligent manner in relation to the litigation, such cost order marks Court’s disapproval of the conduct. See: **Khunou and Others v M Fihrer& Son (Pty) Ltd and Others** 1982 (3) SA 353 (W); **Washaya v Washaya** 1990 (4) SA 41 (ZH); **Commander Lesotho Defence Force and Another v Matela** LAC (1995 – 99) 799 at 804 I – 805 B; 1999 – 2000 LLR – LB 13 (CA) at 16; **Fothoane and Another v President of the CDP and Others** LAC (2000 – 2004) 287 at 294 – 295; **Mahlakeng and Others v Southern Sky (Pty) Ltd and Others** LAC 2000 -2004) 742 at 753 to 754.

[36] The Court ‘s discretion to award costs *de bonis propriis* is not restricted to cases of dishonest, improper or fraudulent conduct - no exhaustive list exists. The discretion includes all cases where special circumstances or considerations justify such an order. See: **Rautenbath v Symington** 1995 (4) SA 583 (O).

[37] The circumstances of this case warrant punitive costs against the applicant as well as *Mrs. Musi-Mosae*. In the first instance the evidence established that at the time that the applicant approached the Court on an *ex parte* basis purporting that she was owed rentals in the sum of M629,452.72

covering the period January 2020 to October 2021 she knew fully well that the 1st respondent had been paying its rentals and that the issue between her and the 1st respondent was disputed rent escalations.

[38] Mrs. *Musi – Mosae* attributed this sorry state of affairs to miscommunication between herself and the applicant at the time that the application was prepared. This is all the more bizarre when there is taken into account the fact that the applicant deposed to the founding affidavit and declared to the Commissioner of Oaths that she knew and understood its contents. Before deposing to the affidavit, the applicant either read the affidavit or it was read to her. Therefore, the purported miscommunication between the applicant and Counsel which translated into misrepresentation of facts in the founding affidavit, should have been evident at the time the applicant deposed to the affidavit.

[39] Again, it is clear from the letter of demand issued by the applicant's Counsel of record to the 1st respondent dated the 24th September 2021 which is annexed to the founding affidavit that what was being demanded from the 1st respondent was rent escalations and not the M629,452.72. This letter must have clearly raised Mrs. *Musi-Mosae's* eyebrows even if she was not personally the author thereof. I assume that Counsel read the letter before annexing it to the founding affidavit. Otherwise she would have still committed

negligence of a severe degree if she filed the letter in Court without first having read it.

[40] The applicant persisted with this sterile application even after the answering affidavit was filed which presented overwhelming evidence that the 1st respondent paid its rentals and that the applicant was aware of this fact. What is of significance is the reason provided by Mrs. *Musi-Mosae* at paragraph 2.5 of her heads of argument on costs why the applicant persisted with the application. According to Mrs. *Musi-Mosae* they realised that they made a huge mistake in the founding papers but persisted with the application in order to protect the applicant from having to pay costs after her proposal for amicable settlement failed as the 1st respondent insisted on the costs of the application.

[41] To compound matters, instead of withdrawing the manifestly false allegations in the founding affidavit on the basis of which the interim relief was granted, the applicant made attempts to panel beat her case in the replying affidavit. Mrs. *Musi - Mosae* did not help in her main heads of argument. At paragraph 6.10 thereof, she persisted with the argument that the applicant was owed approximately M629,452.72 when this was already known by her to be false. In my view this was highly unacceptable.

[42] As if that were not enough, Mrs. *Musi-Mosae* asserted that the 1st

respondent admitted liability in its answering affidavit. Counsel took leaf from the applicant in this regard. This was despite the fact that the 1st respondent explained more than once that, without conceding liability, it set up security in the sum of M25,113.06 for the full amount of the alleged indebtedness based on the applicant 's calculations for not paying the yearly escalation following the moratorium it got from the applicant. According to the 1st Respondent's calculations, the disputed amount is only M22, 276.57.

[43] What bothered me the most is that Mrs. *Musi – Mosae* persisted with this argument even after I brought it to her attention that she was twisting the facts. I have grave misgivings about the explanation tendered by Counsel for this conduct because the 1st respondent had indicated that the rent escalation which in its own calculations amounted to M22,276.57 was disputed and had denied liability more than once in its answering affidavit.

[44] A lawyer is an officer of the Court and owes the Court an appropriate level of professionalism and courtesy. An order of costs *de bonis propriis* is issued against a lawyer where a Court is satisfied that there has been negligence in a serious degree warranting an order of costs being made as a mark of the court's displeasure.

[45] As Sutherland J said in **Engen Petroleum Limited v Krishna**

Moodley NO (OBO Deceased estate D. Moodley) and Royal Wholesale Paraffin Distributors (Pty) Ltd Case Numbers: 2016/00276 and 2016/3066 –

“An attorney does not become the sycophantic agent of his client and thereby is bound to perform any antic that may advance the client’s interest. The attorney’s function is to dispassionately advise a client of his rights, of what redress is available, and diligently advance a case to achieve a favourable outcome. But that duty to the client never translates into the embarrassing charade of putting up silly points that are unarguable, harass opponents and waste the time of the Court...”

[46] It is convenient at this stage to refer to instructive remarks of Mogoeng J, as he then was, in **Matidi Paul Motshegoa v Pauline Moipone Motshegoa and Another** (995/98) [2000] ZANWHC 6 (11 May 2000) at page 18 where he said the following:

“In considering the question whether costs must be awarded against an attorney de bonis propriis, the Court must always bear in mind that practitioners, like all other people have varying degrees of capabilities and that to err is human. Room must therefore be made for mistakes resulting from negligence, superficial research, insufficient knowledge of the law, etc. On the other hand the Court would be failing in its duty if it were not to remind practitioners that much as they have an obligation to their clients, even those with bad cases, they also have an obligation towards the Court. The duty to the Court entails, inter alia, not to use its Rules in order to frustrate the very purpose for making them, to respect Court orders and challenge

them on legitimate, although at times mistaken, grounds but not to purposefully seek to sabotage them under the guise of advancing the rights of a client. Practitioners must know that there is a line which divides a pursuit of a client's genuine course and an abuse of process which they dare cross at the risk of personally attracting the wrath of the Court".

[47] As the facts set out hereinabove indicate, the application was moved *ex parte* on facts which were known to the applicant to be false and was prosecuted in a very woeful manner. There was want of *bona fides* at the time the application was lodged and prosecuted. Assuming that the application was brought hastily and there was miscommunication as Counsel alleged, she realised when the answering affidavit was filed that the application was premised on false facts and very likely to fail. She was warned by 1st respondent's attorneys that punitive costs would be requested against the applicant. She had time to advise her client to abandon the case or to prepare appropriately in respect of further documentation. I have no doubt that she earned herself a chance to be mulcted with costs. She persisted with the meritless argument that the applicant was owed M629,452.72 even as she was aware of the falsity of the applicant's allegations in this regard. She thus conducted herself in flagrant disregard of her duties as an officer of the Court.

[48] Moreover, inasmuch as Counsel was entitled to steadfastly argue her client's case, it was unacceptable of Counsel to waste Court's time by

raising unarguable point that the 1st respondent admitted liability and insisted on this point even after she was given a chance to revisit the answering affidavit. In my opinion, it would be grossly unfair to order the applicant to bear the costs of this application alone.

[49] I have considered Mrs. *Musi – Mosae*'s apology and the degree of her culpability in pursuing this application. Noteworthy is that an order of costs *de bonis propriis* is not intended to bankrupt a lawyer. As Mogoeng J, as he then was, said in **Matidi Paul Motshegoa**, *supra*, like all other people, legal practitioners have varying degrees of capabilities and to err is human. Some legal practitioners are at a very early stage in their career. In my view, imposition of costs *de bonis propriis* on them must be done with caution unless their conduct is extremely opprobrious. I do not consider Mrs. *Musi – Mosae* to be a senior legal practitioner considering that she only started practising in August 2017. On the other Ms. *Musi – Mosae* must be reminded that she has an obligation towards the Court as well.

[50] It is for the reasons above that I discharged the rule and dismissed the application on the 14th December 2021 and I hereby order as follows:

50.1 That Mrs. *Musi – Mosae* pays 15% of costs incurred in this application *de bonis propriis* on an attorney and client scale; and

50.2 That the applicant pays the remaining costs pertaining to this application on an attorney and client scale.

A.R MATHABA J
Judge of the High Court

For the Applicant: Mrs. Musi- Mosae
For 1st Respondent: Mr. P. R Cronjé