IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

[redacted]

SIGNATURE DATE: 22 April 2024

Case No. 2024-024114

In the matter between:

NOMPUMELELO NENE	Applicant
and	
NATIONAL LOTTERIES COMMISSION	First Respondent
JODY-LYNNE SCHOLTZ	Second Respondent
LIONEL VICTOR OCTOBER	Third Respondent
TINTSWALO MARY-ANN NKUNA	Fourth Respondent
ADVOCATE PRANISHA MAHARAJ PILLAY	Fifth Respondent
LIBERTY GROUP LIMITED	Sixth Respondent

JUDGMENT

WILSON J:

1 The applicant, Ms. Nene, is the first respondent's company secretary. The first respondent, the NLC, suspended Ms. Nene from that role over a year ago,

pending an investigation of her conduct in office. The NLC then decided to convene a disciplinary inquiry to determine whether Ms. Nene had committed various acts of misconduct identified in a charge sheet that was finalised and given to Ms. Nene in November 2023. The disciplinary inquiry is to be chaired by the fifth respondent, Ms. Pillay, and was set to commence on 26 March 2024.

2 On 14 March 2024, I struck from the roll Ms. Nene's urgent application to interdict and restrain the commencement of the disciplinary hearing. I found that Ms. Nene had failed to set out any primary facts upon which it could be concluded that the disciplinary proceedings set to commence would be so tainted by unfairness or illegality as to justify my enjoining them. The absence of those facts also meant that the application could not be urgent, and had to be struck from the roll for that reason. I gave my judgment *ex tempore.* My judgment was later transcribed and published as *Nene v National Lotteries Commission* (0224114-2024) [2024] ZAGPJHC 286 (14 March 2024).

3 Ms. Nene's application was so devoid of substance that it warrants a punitive costs order. Urgent court is for truly urgent matters. Enrolling a case in urgent court in the genuine but mistaken belief that the matter should be given preference is one thing. Enrolling a matter on an urgent basis without so much as attempting to set out an urgent cause of action based on primary facts is quite another. It wastes a court's time. At best it reduces the time and attention that can be invested in dealing with other cases that might be urgent. At worst, it crowds those cases out. The Deputy Judge President of this court has

repeatedly warned that abuse of the urgent roll is widespread and should be penalised. Ms. Nene's case is a good example of such abuse.

4 The failure to set out even the slenderest cause of action naturally raises questions about whether Ms. Nene was competently and ethically advised. In addition, the conduct of her case at the 14 March 2024 hearing left much to be desired. Ms. Nene's attorney did not attend court. There was, as a result, no buffer between Ms. Nene and her counsel, Mr. Alcock. Mr. Alcock's attempts to argue what he must have known was a very difficult case were impaired by Ms. Nene's attempts to brief him, in real time, on the facts I pointed out were missing from her papers. On more than one occasion, I had to pause argument, or stand the matter down, to allow Mr. Alcock to take instructions. In the absence of her attorney, Ms. Nene appeared unwilling to allow Mr. Alcock to argue the case as he saw fit. Recognising how untenable this was, Mr. Alcock withdrew, and allowed Ms. Nene to press her case on her own.

5 There was also the further abuse Ms. Nene's legal representatives committed by setting her case down for hearing on a Thursday rather than on a Tuesday. As is well-known, all urgent motions to be argued during a particular week should be enrolled on Tuesday, which is the ordinary urgent motion hearing day. Tuesday enrolment allows the presiding Judge to prepare for court on Monday, before allocating that week's motions to the other four days of the working week when the roll is called on Tuesday.

6 Sometimes a matter is so urgent that it arises and must be determined between two Tuesdays. In that instance, the senior urgent court Judge may be approached for permission to enrol the matter on a very urgent basis on a

day other than Tuesday. But Ms. Nene's case was not of that nature. The application was instituted on 5 March 2024, nine days before it was heard, and ought accordingly to have been set down on either 12 or 19 March 2024. The logical choice would have been 19 March 2024, since Ms. Nene's disciplinary inquiry was only set to commence the week after that. In an effort to procure compliance with the practice directives, the respondents' attorneys proposed that the matter be moved to 19 March 2024, but Ms. Nene's legal representatives rejected that proposal.

7 Given all this inappropriate conduct, Ms. Baloyi, who appeared together with Mr. Peter for the NLC, asked that I make a punitive costs order against Ms. Nene's attorney, *de bonis propriis*. The effect of such an order is that the unsuccessful litigant, in this case Ms. Nene, is relieved from the obligation to pay the successful litigant's costs, which must be paid instead by the unsuccessful litigant's attorney. An order *de bonis propriis* (very loosely translated as "for one's own account") is meant to signify that a legal representative's conduct of the case has fallen so far below the standard expected of a reasonable legal practitioner that they, rather than their client, should bear the financial burden of losing in court.

8 It should be clear by now that many of the prerequisites of an order *de bonis propriis* are present in this case. The urgent application was grossly misconceived from the outset. It was not just that a bad case had been made out in her founding affidavit. No legally recognisable case had been identified at all. Ms. Nene's affidavit contained little more than a series of heated allegations against the respondents, most of whom should not have been

joined to the case at all. No reasonable legal practitioner would have permitted Ms. Nene's affidavit to be placed before a court.

9 As I held in my judgment on urgency, I have no doubt that Ms. Nene genuinely believes the respondents are determined to dismiss her come what may. But her belief is without any discernible factual foundation. Her attorney ought to have advised her of this reality and counselled her against an approach to the urgent court. The fact that Mr. Alcock was left to argue the application on his own merely compounded the situation. Having failed dissuade Ms. Nene from pursuing a manifestly inappropriate application, the least her attorney ought to have done was attend court and help her prepare for the inevitable outcome.

10 That none of this was done satisfied me that Ms. Nene's attorney, a Ms. Vilakazi, ought to explain why she should not be ordered to pay costs *de bonis propriis*. I afforded Ms. Vilakazi a week to file an affidavit giving such an explanation.

11 In her affidavit, Ms. Vilakazi explained that Ms. Nene drafted her own founding papers, albeit with comment and input from Ms. Vilakazi. Ms. Vilakazi also revealed that she took Ms. Nene's case *pro bono*. Ms. Vilakazi says that she did not attend the court hearing because she was at a conference of local government legal practitioners. Ms. Vilakazi had nonetheless prepared a WhatsApp group of all the key players in Ms. Nene's legal team and thought that it was appropriate to keep in touch on that forum. She was also available to be telephoned.

12 Ms. Vilakazi sent a candidate legal practitioner, a Mr. Mthembu, to court to represent her. Mr. Mthembu was apparently sitting in the public gallery during argument. I do not know why he did not sit in the well of the court, so as to be able to be of some practical use. Mr. Mthembu was not there for show. He had a function to perform – to take instructions from his client and to convey them, where appropriate, to Mr. Alcock, whose right it was to prosecute the case as he saw fit. Mr. Mthembu did not perform that function. As the WhatsApp exchanges attached to Ms. Vilakazi's affidavit show, he looked on in horror as the argument deteriorated, and Mr. Alcock had finally to withdraw.

13 In sum, Ms. Vilakazi should not have allowed the case to proceed on the papers that were filed. She should have heeded this court's practice directions and set the matter down for a Tuesday rather than a Thursday. She should have attended court, failing which she should have briefed Mr. Mthembu properly, so as to put him in a position to be of genuine assistance to Ms. Nene and Mr. Alcock. In neglecting to take any of these steps, Ms. Vilakazi's conduct fell short of the standard of conduct expected from a reasonable legal practitioner.

14 The fact that Ms. Vilakazi acted *pro bono* nonetheless appears to have elicited some sympathy from the respondents. In their responding submissions, Ms. Baloyi and Mr. Peter made clear that the respondents no longer seek a costs order *de bonis propriis*, primarily for that reason. In my view, however, the fact that the litigation was undertaken *pro bono* does not in itself mitigate Ms. Vilakazi's conduct. *Pro bono* litigation generally demands more, not less, of a legal practitioner than remunerated legal work. Litigants represented *pro bono*

are generally less familiar with legal process, less able to identify the facts relevant to their claim, and more in need of sensitive counselling in order to develop and implement the options open to them.

15 That said, Ms. Nene is no ordinary *pro bono* litigant. She is an admitted advocate, a Bachelor of Laws, and a senior corporate lawyer. She drafted her own papers. She ought to have known that they failed to make out a case, and that, consequently, her claim could be neither urgent nor successful. Ms. Nene's lack of detachment from her claim meant that she could not face up its shortcomings. But she, more than most, ought to have known better. Perhaps Ms. Vilakazi believed that Ms. Nene's legal training meant that she could afford to manage the case with a light touch. That, if true, was a mistake.

16 The fact that a *de bonis propriis* costs order is no longer sought is reason enough not to grant one. However, a punitive costs order is still necessary. Ms. Nene is an empowered litigant. She was clearly in a position to know the shortcomings of her case and the inappropriateness of its conduct. She ought to bear the consequences of pressing that case to its inevitable conclusion.

17 Accordingly, I order that the costs of the urgent application, including the costs of the post-hearing exchange of affidavits and submissions, are to be paid by the applicant. Those costs will be taxed on the scale as between attorney and client. They will include the costs of two counsel.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 22 April 2024.

APPLICANT'S SUBMISSIONS ON:	28 March 2024
RESPONDENT'S SUBMISSIONS ON:	12 April 2024
DECIDED ON:	22 April 2024
For the Applicant:	Buthelezi Vilakazi Inc
For the Respondents:	S Baloyi SC L Peter Instructed by Cheadle Thompson & Haysom Inc