

SOUTH AFRICA / JUDGMENT

20Twenty Projects (Pty) Ltd v Tsantsabane Local Municipality (404/2016) [2022] ZANCHC 23 (22 April 2022)

[2022] ZANCHC 23

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

404/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

No: 404/2016

Heard:	11/03/2022
Delivered:	22/04/2022
Reportable:	Yes/NO Circulate to Judges: Yes/NO Circulate to Magistrates: Yes/NO Circulate to Regional Magistrates: Yes/NO In

the matter between:	20TWENTY PROJECTS (PTY) LTD Applicant/plaintiff and TSANTSABANE LOCAL MUNICIPALITY Respondent/defendant
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JUDGMENT

Mamosebo J

[1] Mr Kevin George Craig Allardyce, a partner of Allardyce and Partners and the applicant's attorney of record, deposed to the founding affidavit in this interlocutory application whereby the applicant, 20Twenty Projects (Pty) Ltd, is seeking the following relief:

1.1 to compel the respondent, Tsantsabane Local Municipality, to deliver a response to the Notice in terms of Rule 37(4) served by the applicant on 13 August 2021;

1.2 to compel the respondent to deliver its discovery affidavit in compliance with the applicant's Rule 35(1) Notice together with Rule 35(6), 35(8), and 35(10) Notices served on 22 April 2021; and

1.3 Costs on the scale as between attorney and own client.

[2] The respondent, Tsantsabane Local Municipality, attacked the application by filing a Notice in terms of Rule 6(5)(d)(iii) raising questions of law and submitting that should the answers to those questions be in its favour, that that will be dispositive of the application.

[3] The questions raised are the following:

3.1 Whether Allardyce and Partners is entitled to prosecute the application dated 25 October 2021, given that it did not respond to the defendant's notice in terms of Rule 7(1) served on 23 September 2021;

3.2 Whether the application complies with the provisions of Rule 6(1) given that it is contended that the deponent "does not appear to have signed the affidavit before a commissioner of oaths". The respondent contends that this is demonstrated by the fact that the commissioner of oaths was unable to certify whether the deponent is either male or female.

3.3 Whether the affidavit complies with the provisions of Regulation 4 of the Regulations Governing the Administration of an Oath or Affirmation, Government Notice R1258, of 21 July 1972 ("the Regulation") under section 10 of the Justices of Peace and Commissioners of Oaths Act 16 of 1963;

3.4 Whether the applicant is entitled to prosecute the application despite not having complied with the provisions of Rule 30A(1) and has not given the 10 days' prior notice as contemplated by the Rule;

3.5 Whether, in respect of securing compliance with the request in terms of Rule 37(4), the applicant is entitled to rely on undertakings given at the Rule 37 pre-trial conference, whereas the minutes thereof have not been signed.

- [4] It is worth pointing out that at commencement of the hearing, Mr Mike Louw, for the respondent, contended that discovery has been complied with. However, after Mr Rust, for the applicant, denied that his client ever received any discovery, Mr Louw was constrained to concede and retract the submission after his instructing attorney could not produce any proof of discovery.
- [5] Mr Louw further made the submission that the pre-trial minute issue was resolved. Just to recap, the issue taken by the respondent in this regard was whether the applicant can rely on undertakings given at a Rule 37 pre-trial conference whereas the minutes thereof have not been signed. The applicant served its discovery affidavit on the respondent on 28 June 2021. A Rule 37 Pre-trial conference was conducted virtually on 26 August 2021. Participating for the plaintiff was its attorney Mr K Allardyce and for the defendant was Adv Louw and Att. Johan Terblanche.
- [6] As submitted by Mr Rust, the correct position is that the respondent's attorney has signed the Pre-trial minutes. The last page of the Pre-trial minute reflects a signature above the name Peyper Attorneys, defendant's attorneys. Of more significance is the principle articulated by Van Dijkhorst J in *Kerksay Investments (Pty) Ltd v Randburg Town Council*[1] confirmed on appeal on this point in *Randburg Town Council v Kerksay Investments (Pty) Ltd*[2] that if the parties have formulated specific issues in the pre-trial minutes, the trial court is not entitled to go beyond the issues as formulated and decide the case on another basis. The salutary principle that unless there has been a full investigation of a matter falling outside the pleadings and there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the parties are held to the issues pleaded, applies equally, if not more, where the parties have formulated specific issues in the pre-trial minutes.
- [7] It is clear to me from the participants in this virtual Pre-trial conference that the deponent to the founding affidavit participated. The respondent's legal representatives are well aware that he dealt with the Pre-trial issues with them. This aspect of the respondent's attorney not having signed the minutes should not have been raised as a legal issue particularly when the true position is known that not only were the minutes signed but the purpose of Rule 37 being the promotion of effective disposal of the litigation. The following issues are recorded in the Rule 37 Minute:

7.1 At para 1 that the respondent will deliver its response to the applicant's notice in terms of Rule 37(4) on 30 August 2021;

7.2 At para 2.2 that the respondent/defendant will deliver its discovery affidavit on or before 15 September 2021 and should it not be able to do so it would advise the applicant/plaintiff. This has not been done.

- [8] I gain the impression that abandonment of this aspect at this late stage, after the applicant's counsel argued it, served not only as an attempt to trivialise it but also, used as a technical argument, by the respondent, which is deprecated. In any event, a party is not entitled to resile from agreements made by his attorney, without his knowledge, at a Rule 37 conference.[3]

Authority to prosecute the matter by Allardyce and Partners

- [9] The respondent also took issue with the alleged lack of authority of the applicant and therefore served a Rule 7(1) notice. Notwithstanding that the notice was not even served under case number 404/2016 (the case in casu) but related to another matter under case number 2259/2018, the applicant still served and filed both the resolution giving the deponent the necessary authority and the Special Power of Attorney dated and signed by the directors on 15 February 2021. The respondent abandoned this point at the hearing. This was a needless and wasteful stratagem.

Whether the application complies with the provisions of Rule 6(1) given that it is contended that the deponent 'does not appear to have signed the affidavit before a commissioner of oaths' and whether the affidavit complies with the provisions of Regulation 4 of the Regulations Governing the Administration of an Oath or Affirmation.

- [10] The respondent takes issue with the fact that the founding affidavit does not seem to comply with Rule 6(1) in that it does not seem as if the deponent signed the affidavit in the presence of a commissioner of oaths. Had that been the case, the argument went, the commissioner would have correctly classified the applicant either as male or female. Further, the said founding affidavit does not seem to comply with the provisions of Regulation 4 of the Regulations Governing the

Administration of Oath or Affirmation, Government Notice R1258 of 21 July 1972 (as amended) in that the commissioner of oaths failed to print his full names and address below his signature; state his designation; state the area for which he/she holds his appointment;

and the office held by him, if he holds his appointment ex officio, the submission continued.

- [11] The respondents invoked Absa Bank Ltd v Botha NO and Others[4] contending that while the gender of the deponent Kevin George Craig Allardyce is not stated in the body of the affidavit, the commissioner's

certificate refers to the deponent as "He", and or "She" or "His".

- [12] The deponent in the Absa Bank application for summary judgment stated that she was a manageress. Two issues bear mentioning in the Absa matter that distinguish it from the case before me. First, the fact that the deponent specified that she is the manageress conclusively categorises her as a female. Secondly, summary judgments are perceived as final in effect in that they permit the granting of a judgment or order in a defended action without full pleadings or a trial. Therefore, to avoid shutting the door in a litigant's face completely, one

would rather tread more cautiously before granting such an order. As correctly argued by Mr Louw, the deponent did not specify his gender in the affidavit, therefore, unlike in the Absa case, it cannot be inferred that he was not before the commissioner of oaths without more. Form should never be elevated above substance.

- [13] The respondent also took issue with the applicant for not having afforded it a period of 10 days prior to the notice contemplated in terms of Rule 30A[5]. The question to be answered is whether or not the applicant's e-mail addressed to Mr Louis Radley marked "FA8" dated 17 September 2021 complies with the provisions of Rule 30A. The e-mail reads:

"Dear Mr Radley

1. I shall advise my client not to communicate directly with you.
2. He did so out of frustration because he feels that client persistently fails to respond to correspondence from my office.
3. I have raised this with you before in the attached letter but you did not respond.
4. The pre-trial minutes provides:
 - a. That you shall deliver a response to our Rule 37(4) notice on 30 August 2021. You have not done so.
 - b. You undertook to deliver your discovery affidavit on 15 September 2021. You have not done so.
 - c. In paragraph 5.2 you shall respond by 15 September 2021 in respect of the issue of who bears the duty to begin and the onus. You have not done so.
 - d. In paragraph 11.2 it is recorded that you shall revert on or before 15 September 2021 in respect of the special plea. You have not done so.
5. You have also failed to respond to e-mails requesting you for your input on the minutes and then your signature.
6. Your statement that our client is attempting to intimidate your client is unfounded.
7. We also reject your blaming the pandemic and the fact that it is an election year on your client's failure to conduct itself in a professional manner.
8. We shall provide you with an opportunity to respond on 20 September 2021 and to deliver your client's discovery affidavit and your client's response to the Rule 37(4) notice by 20 September 2021.
9. However if we do not receive the aforesaid plus the signed minute I shall bring an application to compel and in which I shall draw to the court's attention the manner in which your client has conducted itself in this litigation through your offices and shall seek not only a costs order but a censure of your client's behaviour.

Kind regards

Kevin Allardyce.”

[14] Regard being had to the aforementioned e-mail, I do not agree with Mr Louw, for the respondent, that there ought to have been compliance with Rule 30A but rather agree with the contention by Mr Rust that the failure by the respondent to discover must be met with Rule 35(7) that stipulates:

“(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.”

[15] In *S v Munn*[6], Van Den Heever J, had an opportunity to consider the regulations for the administering of oaths by commissioners of oaths and held that Regulation 4 is directory and not peremptory, and that the Court has a discretion to accept the affidavit where substantial compliance has been proved. Whether there has been such ‘substantial compliance’ is a matter of fact, not of law.

[16] The commissioner of oaths states at the end of the affidavit that the affidavit was signed and sworn before him on 15 October 2021. The first part is the gist of the attack which stems from the following: ‘the deponent having acknowledged that he knows and understands the contents of this affidavit and that she has no objection to taking the prescribed oath, and which he considers to be binding on his conscience...’. There is nothing in the body of the affidavit and in this attestation that excludes an error in the use of the pronoun ‘she’. I am not persuaded by the contention on behalf of the respondent that the pronoun confirms that the deponent was not before the commissioner of oaths as the other two pronouns correctly refer to Mr Allardyce as ‘he’. In addition the deponent who was taking the oath’s full names are “Kevin George Craig Allardyce” who is addressed as “Mr” in all the correspondence and court processes prior to and as the occasion of him taking the oath. These names and appellation strongly suggest that the gender of the deponent is male. Mr Allardyce is an attorney. I would be very surprised if his colleagues did not know him.

[17] The second part of the attack pertains to compliance with Regulation 4(1) whereby the commissioner is required to sign the declaration, print his full name and business address below his signature, and state his designation and the area for which he holds the appointment or his office if he has been appointed ex officio.

The commissioner of oaths, in this instance, is a member of the South African Police Service (SAPS) in the Client Service Centre (formerly known as the Charge Office), Midrand, holding the rank of constable. This detail appears in the required area. This is what appears: The commissioner’s signature and to the right of the signature is the abbreviation “Cst” which the respondents have not challenged as standing for “Constable” and which I take judicial notice of.

Immediately below the abbreviated rank is his service or force number and immediately thereunder the full names of the constable in what appears to be his own handwriting. Below these details appears the official stamp of the

Client Service Centre. There is therefore no merit in the attack of the non-compliance in terms of Regulation 4 by the respondent.

[18] I am consequently satisfied that there has been substantial compliance with the Regulations. In the exercise of my discretion, I apply the maxim omnia praesumuntur rite esse acta donec probetur in contrarium also known as the ‘presumption of regularity’ in that I accept for purposes of this application that the affidavit by Mr Kevin George Craig Allardyce was in fact, sworn to and signed in the presence of the commissioner of oaths.

The application does not constitute an irregular proceeding.

[19] What remains is the question of costs. The applicant is seeking costs de bonis propriis against the instructing attorney of the respondent based on the following:

19.1 The respondent has raised fallacious legal arguments in terms of Rule 6(5)(iii) of the Uniform Rules of Court. It initially raised the issue of lack of authority only to be abandoned later. This argument can only be taken with the assistance of an attorney.

19.2 Both the respondent’s counsel and attorney made undertakings during the Pre-trial conference that were later ignored or denied, including that the minute was not signed whereas that submission was misleading.

19.3 To date, the respondent has not discovered whereas its counsel initially argued that discovery was water under the bridge as there was nothing outstanding; that submission was not correct and was retracted shortly thereafter. It remains inexplicable then why the respondent has still not discovered.

[20] In countering the de bonis propriis submissions by Mr Rust for the applicant, Mr Louw, for the respondent, argued that costs usually follow the result. Should this Court find the correct rule to be complied with to be Rule 30A(1) then the respondent will be entitled to its costs. Counsel further submitted that there is no reason why this Court should award costs on a scale as between attorney and own client as merits could not be evaluated from the technical points taken. Counsel further submitted that, on the papers, there is no malice on the part of the respondent that should attract a punitive cost order. Mr Louw reiterated that he was told that everything had been resolved including discovery and was only going to argue costs.

[21] The submissions by Mr Louw is inconsistent with para 4 of the Rule 6(5)(d)(iii) notice delivered to the applicants in November 2021, asking whether, in respect of securing compliance with the request in terms of Rule 37(4), the applicant is entitled to rely on undertakings given at a Rule 37 pre-trial conference, whereas the minutes thereof have not been signed. However, the pre-trial minutes had been signed in September 2021. As I

indicated earlier, the relief was only abandoned at the hearing when the respondent was caught out in a lie.

[22] It remains inexplicable why the respondent has still not discovered to date hereof. The submissions by the respondent's counsel pertaining to resolved and unresolved issues as well as the failure by the respondent to honour the undertaking stemming from the pre-trial conference are the types of conduct that cause the courts to show their displeasure by imposing punitive costs orders. It was unnecessary for the respondent to have raised the frivolous legal issues which bordered on the vexatious but certainly had the effect of delaying court process and proliferating costs.

[23] Costs de bonis propriis are not easily awarded. There has to be a serious degree of negligence or exceptional circumstances must be shown to exist to warrant such costs. I am of the view that such elements do not exist in this application. However, the conduct of the respondent's attorney deserves censure.

[24] In the result, the following order is made:

1. The respondent is compelled to deliver a response to the Notice in

terms of Rule 37(4) served by the applicant on 13 August 2021 within 10 (ten) days of this order.

2. The respondent is compelled to deliver its discovery affidavit in

compliance with the Notice in terms of Rule 35(1), 35(6), 35(8) and 35(10) served on 22 April 2021 within 10 (ten) days of this order.

3. Costs on a scale as between attorney and own client.

M.C.MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the Applicant: Adv. J.M Rust

Instructed by: Haarhoffs

Inc

For the respondent: Adv. M.C Louw

Instructed by: Duncan

& Rothman

1] 1997 (1) SA 511 (TPD) at 520F – 521E

[2] 1998 (1) SA 98 (SCA) at 104A - B

- [3] MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA) para 6
- [4] [2016] JOL 37101 (GNP); 2013
- (5) SA 563 (GNP) at para 10
- [5] Rule 30A stipulates: (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in Rule37A, any other party may notify the defaulting party that he/she intends, after the lapse of 10 days from the date of delivery of such notice, to apply for an order: That such rule, notice, request, order or direction be complied with; or That the claim or defence be struck out.
- [5] Rule 30A stipulates: (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in Rule37A, any other party may notify the defaulting party that he/she intends, after the lapse of 10 days from the date of delivery of such notice, to apply for an order:

That such rule, notice, request, order or direction be complied with; or

That the claim or defence be struck out.

- [6] 1973 (3) SA 734 (NC) at 738A – C; [1973] 4 All SA 96 (NC)

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Prepared on 12 October 2026 · Esheria