

SOUTH AFRICA / JUDGMENT

Batlhaping Ba-Ga Phuduhucwana Traditional Community and Another v Makgale (M573/16) [2017] ZANWHC 89 (1 June 2017)

[2017] ZANWHC 89

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

M573/16

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M573/16

In the matter between:-

BATLHAPING BA-GA PHUDUHUCWANA

TRADITIONAL COMMUNITY

1ST APPLICANT

GREATER TAUNG LOCAL MUNICIPALITY

2ND APPLICANT

And

LENTIKILE ABEL MAKGALE

RESPONDENT

JUDGMENT

GUTTA J.

[1] The applicants launched an interlocutory application for inter alia the following relief:

1.1 that the court grant condonation for their non-compliance with the rules of court due to the fact that the notice of motion and other notices in the main application was signed by an attorney who was not admitted or enrolled to practice in the North West Division.

1.2 that the court direct the respondent to file his answering affidavit within 15 days from the date the court grants the affidavit.

1.3 Costs in the event of opposition.

[2] The applicant's interlocutory application preceded a notice filed by the respondent on the 27 February 2017 in terms of Rule 30 and 30 A wherein the respondent alleged that the applicant had taken irregular steps, alternatively non-compliance with the Rules and practice direction in that:

2.1 In term of the notice of motion, the attorney appointed one Thabo Masike Attorneys to act as their local correspondent. However on the 15 February 2017, the applicants filed a notice of instatement in terms of which DC Kruger Attorneys was appointed as the applicant's local correspondent. As no notice of withdrawal as attorney had been filed by Thabo Masike Attorneys, the notice of instatement of DC Kruger Attorneys is an irregular step.

2.2 Pursuant to a notice in terms of Rule 7(1) filed by the respondent on the 13 January 2017, the applicants filed a reply to the notice in terms of Rule 7(1) attaching a resolution of first applicant and an appointment letter of second applicant. The said reply to the notice in terms of Rule 7(1) indicated that DC Kruger Attorneys represents the applicant's attorneys. This constitutes an irregular step as DC Kruger attorneys was only instated on 15 February 2017. Hence the reply to the notice in terms of Rule 7(1) constitutes an irregular step.

2.3 Applicant's notice of motion, notice of set down, notice of instatement and notice of reply in terms of Rule 7(1) was signed by the applicant's attorney instead of the local correspondent attorney which constitutes an irregular step.

[3] Hence the applicants in the interlocutory application only sought condonation in respect of the third ground raised in the Rule 30 and 30A notice and not in respect of the two remaining grounds referred to in paragraph 2.1 and 2.2 supra.

[4] The respondent in his affidavit opposing the condonation application also raised the following points in their opposing affidavit:

4.1 the applicant's notice of motion in the condonation application is defective in that it does not state the date, when and the place where it was signed and

4.2 the affidavit filed in support of the condonation application was deposed to by a representative of the first respondent and there is no evidence that the second respondent supports the condonation application.

[5] I will commence with the third ground raised in the Rule 30 and 30A notice, namely that the notice of motion in the main application,

notice of set down, notice of instatement and notice of reply was not signed by the local attorney situated in this court's

jurisdiction. In terms of the uniform rules of court, an attorney is defined as “an attorney admitted, enrolled and entitled to practice as such in the division concerned”. An attorney’s right to sign pleadings is limited to the division in which the attorney was admitted or enrolled[1]. It is common cause that the attorney, Mr Shuping who signed the notice of motion and other notices was not admitted, enrolled and practising in this court’s division. In *AECI Limited v Marthinus Johannes Laufs*[2], the full bench of this court recently found that:

“(7) It is common cause that the appellant’s attorney was not admitted, enrolled and entitled to practice as an attorney in the North West division, Mahikeng of the High Court of South Africa. The attorney was therefore not entitled to sign the motion qua attorney, as he is not an attorney of this division. The notice of motion is voidable because it was not issued and signed by an attorney “admitted, enrolled and entitled to practice in such division concerned””.

- [6] In the *AECI limited* matter supra, an attorney who was not admitted or enrolled in the North West division signed the notice of motion. Although the applicant in the court a quo launched an application for condonation from the bar, the court a quo did not consider the said application and ruled that the notice of motion constitutes a nullity due to the fact that a local attorney did not sign the notice of motion. The full bench remitted the matter back to the court a quo for consideration as the irregularity was voidable and not void.
- [7] The applicant in *casu* alleged in the founding affidavit that the attorney Shuping made a bona fide mistake in signing the notices as he believed that as an admitted attorney in the Gauteng division, he was entitled to practice and sign documents in all divisions. The respondent at paragraph 10.1 of his opposing affidavit, said “Be it however as it may, it is accepted that the attorney on behalf of the applicant has given a reasonable explanation for the irregular step regarding the signing of notices...”. It is thus surprising when considering the aforesaid remarks that the respondent opposed applicant’s condonation application.
- [8] The explanation proffered by the applicant in the condonation application is in my view reasonable as there are many practitioners

who are under the bona fide belief that because they are admitted and enrolled as an attorney in one division they can sign pleadings and notices in any other division irrespective of the fact that they are neither admitted nor enrolled in that division. Furthermore the overall consideration in such applications for condonation is whether the respondent suffered any prejudice because Shuping attorney who is not enrolled and admitted to practice in this division signed the notice of motion. I am of the view that the respondent has not suffered any prejudice and in the circumstances grant the applicant condonation.

- [9] In respect of the second prayer sought by the applicant, namely that the court direct the respondent to file his answering affidavit

within 15 days of granting the application for condonation. It is trite that the respondent would in terms of the uniform rules of court have to file his answering affidavit within 15 days from the date the court grants the condonation application, hence there is no reasonable explanation why this court should grant the relief sought in prayer 2 of the notice of motion. It is also noted that applicant's counsel later abandoned this prayer.

[10] In respect of the applicant's failure to state in the notice of motion filed in the condonation application, the date, when and the place where it was signed, the court condones the applicant's non-compliance and accepts the explanation provided in the applicant's replying affidavit as supported by their correspondent attorney confirmatory affidavit. I agree with applicant

that the respondent was not prejudiced by their non-compliance and echo what the Appellate Division said in *Trans African Insurance Co Ltd v Maluleka*[3], namely

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules of Court, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits"

It is also noted that counsel for the respondent later abandoned this point.

[11] Turning to the issue raised by the respondent in their opposing affidavit that there is no evidence before court that the second

respondent supports the application for condonation. Proof has been furnished by the applicant in their reply in terms of Rule 7(1) that Shuping attorney was duly appointed to represent the second applicant. Pursuant thereto Shuping Attorney's authority to represent second applicant was not challenged by the respondent. Shuping Attorneys instituted the application for condonation on behalf of both the first and second applicant. The application for condonation is an interlocutory application and Shuping attorney's

authority to act on behalf of both the first and second applicant has been established. It was not necessary for the second applicant to file an affidavit in support of the application for condonation. A notice of motion can be supported by any person who is in a position to provide the necessary material to support the claim[4]. Any person who can lawfully be a witness can execute an affidavit[5]. In the circumstances this ground raised by the respondent is in my view without merit and must fail.

[12] The issues dealt with supra, were only the only issues for this court to consider in the interlocutory application. Unfortunately both the applicants and the

respondent in their heads of argument as well as in their submissions to court, raised the two remaining grounds referred to in the respondent's notice in terms of Rule 30 and 30A, namely whether the notice of instatement filed by Kruger Attorneys and the reply to the notice in terms of Rule 7 was irregular in that one Masike Attorney did not file a notice withdrawal as the applicant's

correspondent attorney and Kruger attorney had not filed a notice of instatement when he filed the reply to the notice in terms of Rule 7.

[13] This court from the outset expressed its displeasure about the poor handling of the matter as it became clear to the court that both parties have contributed to the delay in bringing this matter to finality, which unfortunately is at the litigant's expense. For example the applicant elected to apply for condonation on the one ground raised in the Rule 30 and 30A application instead of applying for condonation on all three grounds as it is trite that the appointment of two correspondent attorney in one matter is irregular. Furthermore the applicant applied for an order that the respondent file its answering affidavit in the main application within 15 days when that is what is required in terms of the rules of court. What was also surprising is that although the applicant only applied for condonation on the one ground raised in the Rule 30 and 30A notice, the applicant elected to deal with the two remaining grounds in its heads of argument as well as at the hearing of this matter.

[14] Similarly as stated supra, the respondent also dealt with the two remaining issue raised in the Rule 30 and 30A notice, in the heads of argument and during the hearing. What the respondent should have done as they had not abandoned the two remaining grounds, was to apply for the setting

aside of the irregularity in terms of Rule 30 and 30A and apply for consolidation of both the application for setting aside and the application for condonation so that they could be heard simultaneously. As the respondent intends pursuing the other two grounds raised in the Rule 30 and 30A notice they will have to set that matter down for hearing before filing their answering affidavit

in the main application. This will result in a further delay as the court will first adjudicate the interlocutory application and should the court find that it is an irregular step or proceeding, the court may set it aside in whole or in part and grant leave to amend or make such order as to it seems meet. Furthermore the reason why the respondent opposed the applicant's condonation application when he conceded that the applicant gave a reasonable explanation would ordinarily be met with an appropriate order of costs.

[15] It is imperative for practitioners to promote the effective disposal of litigation and not be engaged in protected litigation which ultimately is at the litigant's expense. In the circumstance, I can only show my indignation by directing each party to pay their own costs. Applicant's counsel in any event correctly abandoned the cost order it initially sought against the respondent.

ORDER

[16] In the result,

1. Applicant's condonation for its non-compliance with the rules of court is hereby granted.
2. Each party is to pay its own costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 25 MAY 2017

DATE OF

JUDGMENT

: 01 JUNE 2017

ADVOCATE FOR PLAINTIFF

: ADV O MONNAHELA

ADVOCATE FOR DEFENDANT

: ADV H SCHOLTZ

ATTORNEYS FOR APPLICANT

: DC KRUGER

(Instructed by: Shuping Attorneys)

ATTORNEYS FOR RESPONDENT

: VAN ROOYEN TLHAPI WESSELS Inc.

(Instructed by: J K L Ikaneng's Attorneys)

[1] Liberty Group Ltd v Singh and Another 2012(5) SA 526 (KZD) [2] [FB8/2016] unreported judgment, case number CIV APP FB 8/2016 North West High Court judgment handed down 01 December 2016

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[2] [FB8/2016] unreported judgment, case number CIV APP FB 8/2016 North West High Court judgment handed down 01 December 2016

- [3] 1956 (2) SA 273 (A)
- [4] Leith NO and Heath NO v Fraser 1952(2) SA 33(0) at 36B
- [5] Chaimowitz v Chaimowitz(1) 1960(4) SA 818(C)
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Prepared on 12 October 2026 · Esheria