

SOUTH AFRICA / JUDGMENT

Kay-Pee Ntila Attorneys and Another v Minister of Safety and Security (4019/2007) [2012] ZAECHGHC 24 (3 May 2012)

[2012] ZAECHGHC 24**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Kemp

CASE / FILE NUMBER

4019/2007

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****(EASTERN CAPE,
GRAHAMSTOWN)****CASE NO.: 4019/2007****Date heard: 19 April
2012****Date handed down: 3
May 2012****In the matter****between:**

KAY-PEE NTILA

ATTORNEYSFirst

Applicant

KP NTILA

.....Second

Applicant

and

THE MINISTER OF

SAFETY AND SECURITYRespondent

JUDGMENT

KEMP, A.J.:

The applicants sought to rescind an order of costs, granted against them *de bonis propriis* and in their absence, on the 9th November 2007. The second applicant is an attorney who practices under the name and style of the first applicant.

The applicants previously represented one Luyanda Nodu (“Nodu”), in an application brought on an urgent basis against the respondent, in order to attempt to secure his release from prison. He had been convicted of theft in 1994 and sentenced to three years imprisonment. He appealed the sentence and was granted bail pending the outcome of the appeal. His appeal was subsequently dismissed in 1995 and he dutifully reported to the Mdantsane police station to commence his term of imprisonment. The police official concerned advised him that the paper work necessary had not arrived yet and that he could wait for them to advise him when he should report to them again.

The years went by and despite Nodu enquiring from time to time, he heard nothing further. In February 2007 he spoke to the investigating officer, who invited him to his office. Nodu went, and was arrested. He alleged that the investigating officer did not have the correct documents to arrest him, and that the Correctional Services officers who accepted him at the Department of Correctional

Supervision a few days later fraudulently altered the reception documents.

The reason why Nodu then brought the application, as far as I could make out, was that he was concerned that due to the alleged irregular arrest and subsequent alleged unlawful reception at the Department of Correctional Supervision, that his actual term of imprisonment had not yet officially commenced. He should be released, so his argument appeared to go, so that he could be detained on proper documents, after which there would be a proper record of his reception and his term of imprisonment would not be in vain, but would be credited to him. There was also some concern expressed by him that he did not yet qualify for parole due to the alleged incorrect admission, but the allegations in general appeared to be vague and unsubstantiated and were disputed by the Respondent. Nodu had already been in prison for some seven months before the application was launched on the 25th October 2007 and served on the respondent on the 27th October 2007. On the 1st November 2007 the State Attorney advised the first applicant that it was of the view that the matter was not urgent and invited them to remove the matter from the roll. After no response was forthcoming, a notice of intention to oppose was then transmitted

to the first applicant on the 7th November 2007 and at approximately 09:21 on the 9th November 2007, the day the application was due to be heard, a “Notice of Removal” was faxed to the Registrar’s office by the first applicant, purporting to unilaterally remove the matter from the roll and to re-enrol it again on the 27th November 2007.

It is common cause that after discussion between the respective legal representatives, that an order by agreement was issued on the 9th November, postponing the matter to the 6th December 2007, with the costs occasioned by the postponement reserved.

On the 28th November 2007 a "Notice of Withdrawal " was faxed to the respondent's attorneys at approximately 4pm. The notice was then filed at the Registrar's office on the 30th November. The notice was addressed to the registrar and to the respondent's attorney but not to Ndlovu, and read as follows: "Kindly take notice that Messrs Kay-Pee Ntila Attorneys withdraws as attorneys of records. Kindly take notice further that the last known address of the Applicant was Mdatsane Correctional Service, Mdatsane, Eastern Cape." (sic) It is abundantly clear that the notice failed, in a number of respects, to comply with Rule 16(4) of the Uniform Rules, which provides as follows: Where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.

After such notice, unless the party formerly represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in subrule (2), it shall not, be necessary to serve any documents upon such party unless the court otherwise orders: Provided that any of the other parties may before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented.

The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.

The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b). The fact that applicants did not give notice to Nodu deprived him of the right to elect whether or not to exercise any of the rights provided for in sub rule (b), as a result of which he may well have been materially prejudiced.

In *Transorient Freight Transporters Corporation V Eurocargo Co-Ordinators (Pty) Ltd*,¹ Fleming J stated that: It is important that practitioners do realise that Rule 16 (4) requires more than a notice of withdrawal with freely chosen content. The document to be filed by the Registrar must not only state that the attorney is withdrawing. It must state: who the "parties" are who were notified of the withdrawal;

when each "party" was notified of the withdrawal;

how each notification was "sent"; and

reflect the contents of the original notification or notifications to parties, generally probably by way of attaching a copy of the document which was - clearly at a stage prior to the signing of the notice now under consideration - "sent".² The learned judge cautioned further that: "Failure to comply with the very explicit requirements of a notice of withdrawal to the Registrar may then, on the lines which I have indicated, render an attorney liable to pay some compensation to the opposite party. The position of an attorney B clearly creates obligations not only towards his own client but also towards the Court and to some extent to the opposite party. However, the interests

to be guarded over by the Courts cannot be made dependent upon the degree of activity of individual parties in respect of claims for compensation. It may well become appropriate *mero motu* to order an attorney whose failure to comply with Rule 16 (4) causes costs of C additional service or postponements, to pay such costs *de bonis propriis*.³ (my emphasis) Rule 7 of the Joint Rules of Practice issued in this Division provide as follows: Uniform Rule 16

- (4) (a) provides that an attorney ceasing to act for a party must forthwith give notice thereof to such party, to the registrar, and to all other parties. An attorney so ceasing to act should state in writing exactly what steps he has taken to advise his former client of that fact, and whether he can say that his former client has received such notification and is aware of his rights and obligations and of the possible consequences if he fails further to comply with the requirements of the rule. Where a date of hearing has already been allocated at the time the attorney withdraws, the notice of withdrawal should state whether and in what manner the client has been informed of the date of hearing. As an officer of the court, it is a matter of an attorney's duty not to withdraw at so late a stage that a matter which has been set down for hearing cannot proceed on the allocated date. In the event of the late withdrawal of an attorney occasioning a postponement, the judge may require the attorney concerned to explain on affidavit why he or she did not withdraw earlier and, if no satisfactory explanation is forthcoming, the attorney may be ordered to pay any wasted costs occasioned by the late withdrawal *de bonis propriis*. (my emphasis) I have some reservations about whether the relief sought by the applicant in this matter was appropriate. If his main concern was about his time served not being credited to him then it seems to me to have been inappropriate for him to have applied for his release from prison. In any event, after already having served seven months of his sentence it hardly seemed to be an appropriate matter to hear on an urgent basis, although there is little doubt that it is not the applicant, but his legal advisors, who advised him to proceed in the manner in which he did. The applicants in the present matter have alleged that the order against them was obtained fraudulently. There appears to not only be no basis for such an allegation, but it seems to me that there is *prima facie* evidence that the applicants themselves have attempted to mislead, not only the respondents, but also the court. Ms Watt, who represented the applicants and who was not involved in the matter previously, conceded quite correctly that the applicants must have, on a proper reading of the papers, known of the postponement to the 6th December 2007 and that their submissions to the contrary are accordingly false. The applicants, in attempting to weave their web of deceit, referred to the Respondent's letter of the 1st November 2007, requesting them to remove the matter from the roll, as evidence that they acquiesced promptly. Quite pointedly, they do not say when the agreement was reached although they imply that it was reached on or soon after the 1st November 2007 when it was in fact quite clearly reached at the doors of the court on the 9th November 2007, as alleged by the respondents.

In “support” for their allegation that they were somehow taken by surprise by the fact that the matter went ahead on the 6th December, they annexed a copy of the respondent’s attorney’s letter of the 9th November addressed to them. In the letter the respondent’s attorney set out the history of the matter as follows: “We confirm that by agreement between your Mr. Ntila and Adv. Bloem, Plasket J. postponed this matter to the 6th December 2007 with the costs occasioned by the postponement reserved. We place on record the following: On the 1st November 2007 the State Attorney requested you in writing to remove this matter from the roll;

As at 8 November 2007 you had not responded to the State Attorneys request;

Your Mr. Ntila telephoned the writer during October 2007 and enquired whether our firm would be prepared to act as your correspondents in this matter. The writer informed your Mr. Ntila that we would be prepared to act as your correspondents on receipt of written

instructions to that effect;

To date hereof we have not received such instructions;

We received written instructions from the State Attorneys on 5 November 2007 to act on behalf of the Respondents’

On perusal of the Notice of Motion the writer noticed that you had instructed Mzimba Jubase & Co to act as your correspondents in the above matter;

On 8 November 2007 we delivered the Respondents Notice of Opposition; service was effected by fax on Mzimba Jubase & Co;

On 9 November 2007 Counsel and I attended court;

When there was no appearance on behalf of your client we made enquiries at the Registrar’s office;

The registrar showed us the court file and we discovered that your Mr. Ntila had uplifted the contents of the file on 26 October 2007; that he uplifted the contents under the name of our firm and that a Notice of Removal was faxed to the Registrar on the morning of the 9th November 2007. We fail to understand how you could have faxed the aforesaid notice directly to the Registrar without instructing

us (as your alleged correspondent) to attend to such removal.” (my emphasis) The second applicant alleged that he was not informed that the matter was postponed to the 6th December but this is contrary to what is contained in the introduction to the letter above, presented by the applicants as support for their version, and contrary to what Mr Mvulana deposed to in his opposing affidavit. Mr Mvulana said that he was present when the respondent’s erstwhile counsel, Mr Bloem, had a telephonic conversation with Mr Ntila, during which it was agreed, on the 9th November, that the matter would be postponed to the 6th December, with costs reserved. Mr Mvulana and Mr Bloem then proceeded to the presiding judge’s chambers and advised him of this arrangement, which was then recorded in an order. Fortunately the arrangement was then

recorded in the letter referred to above.

The second applicant did not deal with the reference in the letter to the 6th December but persevered quite inexplicably with his denial of any knowledge of the date. His submissions are clearly unsustainable,

demonstrably false and appear to amount to a very poor attempt to mislead the court. Under the circumstances I had no hesitation in agreeing that a punitive costs order was called for. The appellants are the attorneys in this case and no point would be served in making an order that costs be paid de bonis propriis, although it certainly is an appropriate case in which to make such an order. For the foregoing reasons the following order was accordingly made: The application is dismissed;

Costs are awarded against the applicants jointly and severally on the scale as between attorney and client, such costs to include the wasted costs occasioned by the postponement on the 9th February 2012.

L D KEMP ACTING JUDGE OF THE HIGH COURT For applicant: Ms Watt, instructed by Dold & Stone Attorneys. For respondents: Mr S Rugunanan, instructed by Mili Attorneys.

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Where a date of hearing has already been allocated at the time the attorney withdraws, the notice of withdrawal should state whether and in what manner the client has been informed of the date of hearing.

As an officer of the court, it is a matter of an attorney's duty not to withdraw at so late a stage that a matter which has been set down for hearing cannot proceed on the allocated date. In the event of the late withdrawal of an attorney occasioning a postponement, the judge may require the attorney concerned to explain on affidavit why he or she did not withdraw earlier and, if no satisfactory explanation is forthcoming, the attorney may be ordered to pay any wasted costs occasioned by the late withdrawal *de bonis propriis*. (my emphasis)

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ACTING JUDGE OF THE HIGH COURT

For applicant: Ms Watt, instructed by Dold & Stone Attorneys.

For respondents: Mr S Rugunanan, instructed by Mili Attorneys.

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(3) SA 542 (W)

2at p 545 F-G

3at p 546 A-C

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Prepared on 12 October 2026 · Esheria