

SOUTH AFRICA / JUDGMENT

Mahlatsi and Another v Kelbrick and Others (96026/2016) [2018] ZAGPPHC 324 (4 May 2018)

[2018] ZAGPPHC 324

COURT

North Gauteng High Court, Pretoria

BEFORE

MIA

CASE / FILE NUMBER

96026/2016

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

CASE NO: 96026/2016

4/5/2018

DAVID MAHLATSI AND OTHERS

1ST APPLICANT

FORMER BMW EMPLOYEES

SURPLUS FUND

2ND APPLICANT

And

ANTHONY R KELBRICK

1ST RESPONDENT

ALEXANDER FORBES FINANCIAL SERVICES

2ND RESPONDENT

BMW PENSION FUND

3RD RESPONDENT

BMW PENSION FUND BOARD OF

TRUSTEES

4TH RESPONDENT

JUDGMENT

MIA, AJ

INTRODUCTION

- [1] The applicant brought an application for an order in terms of Rule 30A of the Uniform Rules of Court setting aside as irregular the notice of intention to oppose an amendment filed by certain of the respondents cited in the matter.
- [2] The background to the application is as follows. The applicant is an executive member of the BMW employee's surplus fund. The second applicant is the BMW employees' surplus fund an association constituted of members who were employees. The first applicant issued summons against all the respondents cited in the application on 9 December 2016. The first respondent, AR Kelbrik, is the principal officer of the fund appointed in accordance with the rules of the fund. The second respondent, Alexander Forbes Financial Services (Alexander Forbes), is the administrator of the fund. The third respondent, the BMW Pension Fund, is the fund for former and current employees. The fourth respondent, BMW Fund Board of Trustees, is the board of trustees of the BMW pension fund. The sheriff was only able to serve on the second respondent, Alexander Forbes.
- [3] The first applicant sought to amend its particulars of claim to include the fourth respondent's address. The service effected was on the second respondent. Service was attempted on the other respondents but was

not successful. Notwithstanding on service the first, third and fourth, respondents they all filed notices of intention to defend the action. When the first applicant brought an application to amend its particulars of claim the respondents all filed a notice of opposition to the proposed amendment. The first applicant contends that there was no service on the first, third and fourth respondents and no compliance with Rule 4. The first, third and fourth respondents notice of intention to defend and opposition to the amendment thus constitutes an irregular step.

- [4] Mr Yawa appearing on behalf of the first applicant submitted that there were developments in the matter as there was a withdrawal of the action against some respondents and he requested relief only against the second respondent. The third respondent had volunteered themselves into the proceedings. He conceded that the application was drafted poorly and explained that he had been briefed late to attend to the matter. He was arguing the matter on an application and heads of argument drafted by his colleague.

[5] Mr Ngcobo appearing for the first, second and third respondent submitted that the applicant was not seeking any relief against the first and second respondents. This was confirmed by Mr Yawa. He submitted that

there was a withdrawal of the action against the first respondent. This was applicable as against the second respondent as well in view of the applicant not proceeding against the second respondent. Although this was not clear on the papers. If the applicant was not proceeding in the action against the second respondent this application too was unnecessary and the second respondent was not informed timeously to avoid the briefing of counsel in the matter and it was not necessary to cite the second respondent in the matter either. He submitted further the application indicated the summons was served on the second respondent at paragraph 7 on page 10 of the application. It was thus necessary for the second respondent to respond to the application and to defend the application as well. The first applicant ought to have been clear on his position regarding the second respondent to avoid costs. The applicant's poor drafting had occasioned the second respondents costs herein. He submitted that there was no merit in the application and it put the second respondent to an unnecessary burden in defending the matter and incurring costs.

[6] After a short adjournment Mr Ngcobo informed the Court that he received an instruction to appear for the third respondent as well. The application had been served on the third respondent's previous attorney whilst the applicant had been informed of the third respondent's attorneys Cliffe Dekker Hofmeyer Inc. substitution as attorneys of record by Thyne Jacobs Incorporated. The first applicants were aware of this as it is Thyne Jacobs Incorporated who filed opposing papers to the amended particulars of claim. The applicant thus did not serve the application on the correct attorneys as the attorneys had been substituted.

[7] Mr Yawa conceded the poor drafting of the application. He submitted however that in view of the applicant giving notice of withdrawal of the application on 5 January 2018 it was not clear why the second respondent sought costs of the application.

[8] I have considered the submissions of counsel on both sides. Notwithstanding that the application was withdrawn against the first and fourth respondent on 5 January 2018, there was no such withdrawal against the second respondent Mr Kelbrik. Further as pointed out the first applicant's affidavit on page 10 in paragraph 7 indicates that there was service on the second respondent. The second respondent is cited in the application. There is no assurance in the application that no relief sought against the second respondent. Mr Yawa conceded the poor drafting of the application and this has occasioned the costs and resulted in the order handed down on 26 February 2018.

ORDER

[9] For the above reasons the following order was handed down:

1. The application is dismissed against the first and second respondent with costs.

2. The application against the third respondent in terms of Rule 30A is struck off the roll with costs.

SC MIA

ACTING JUDG- EOF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the applicant : Adv EM Yawa

Instructed by

: Moshabane Attorneys

On behalf of the 1st , 2nd

and 3rd Respondents

: Adv PMP Ngcobo

Instructed by

: Norton Rose Fulbright Inc &

Thyne Jacobs Incorporated

On behalf of the 4th Respondent : No appearance

Instructed by

Date of hearing

: 26 February 2018

Date of judgment

: 4 may 2018

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