

SOUTH AFRICA / JUDGMENT

Malebye v Head of the Department of Transport and Roads: North- West Provincial Administration (882/05) [2006] ZANWHC 31 (4 May 2006)

[2006] ZANWHC 31

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

882/05

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA

PROVINCIAL DIVISION)

CASE

NO: 882/05

In

the matter between:

NCHAUPE

SOLOMON MALEBYE

Applicant

and

THE

HEAD OF THE DEPARTMENT OF

First Respondent

TRANSPORT

AND ROADS: NORTH

WEST

PROVINCIAL ADMINISTRATION

TEBOGO

RAKGOALE NO

Second Respondent

THE

HEAD OF THE DEPARTMENT OF

Third Respondent

PUBLIC

WORKS: NORTH WEST

PROVINCIAL
ADMINISTRATION
CIVIL
MATTER
DATE
OF HEARING
:
19 APRIL 2006
DATE

OF JUDGMENT : 04 MAY 2006
COUNSEL
FOR THE APPLICANT
:
ADV M B HITGE
COUNSEL
FOR THE FIRST AND
SECOND
RESPONDENTS
:
ADV B VALLY

JUDGMENT

HENDRICKS J:

[1] This is an interlocutory application in which the Applicant seeks an order in the following terms:-

“1.1 That the answering affidavits filed on behalf of First and Third Respondents be set aside;

1.2 That the Applicant shall file his supplementary affidavit, if any, within ten days from the date of this order;

1.3 That the normal Rules of Court shall apply thereafter;

1.4 That the First and Third Respondents shall jointly and severely be liable for the costs of this Application.”

A.

Background:

The background facts as it appears from the affidavits, documents and correspondence filed, can be summarised as follows:-

[2] The Applicant launched an application with this Court on 20 July 2005, to review and set aside the decision of the First Respondent to proceed with a disciplinary hearing against him, which decision was taken on 9 December 2004. Copies of the application initiating the review proceedings were served on the Respondents on 26 July 2005.

[3] Subsequent to the delivery of their notice of Intention to Oppose and in particular on 6 September 2005, the First Respondent delivered its answering affidavit. The Third Respondent's answering affidavit was duly delivered on the 13th September

2005. On the 29th September 2005 the Second Respondent's answering affidavit was delivered.

[4] On 14 September 2005 the Applicant delivered a notice in terms of Rule 30 A of the Rules of Court, in which he essentially complains that the answering affidavits of the Respondents were filed prematurely, as the record of the proceedings that forms the basis of the review application had not yet at that stage been filed.

[5] Applicant seems to have been of the view that because the record had not been filed and the answering affidavits were already filed, he had been prejudiced in that he was deprived of the opportunity availed to him in terms of Rule 53(4) to amend, add to or vary his notice of motion and to supplement his founding affidavit.

[6] On 28 September 2005, the First and Third Respondents delivered their response to the Rule 30 A notice. In their response, the following is stated:-

"The full record of the proceedings before the second respondent has already been placed before the Honourable Court. These are contained in the founding papers of the applicant."

[7] The Second Respondent delivered his notice in terms of Rule 53(1)(b) of the Rules of Court on 29 September 2005, the contents of which reads as follows:-

"4. I do not oppose the application. I will abide the decision of the Honourable Court."

5. My decision which the applicant seeks to have reviewed and set aside has already been placed before the Honourable Court. It is annexure 'NSM17' to the founding affidavit. I do not wish to add anything to that decision.

6. There is no evidence led before me. The applicant raised a point in limine. The parties presented documents and written arguments to me. They also requested that I make my decision on the basis of the written

argument and documents presented. There was no dispute of the fact between the parties. The written arguments and documents are already before the Honourable Court. They are contained in Annexures 'NSM14' 'NSM15' and 'NSM16'. Hence, the full record of the proceedings before me is already before the Honourable Court. It is in the applicant's founding papers."

[8] On 10 October 2005, the First and Third Respondents filed the mechanically recorded proceedings forming part of the record, with the Registrar.

- [9] The Applicant then responded by launching an application in terms of Rule 30(2)(c) read with Rule 30(A)(2) in which he seeks, among others, an order:-

“That the 1st and 2nd Respondents shall within 5 (five) days from date of this order comply with the provisions of Rule 53(1)(b) of the Rules of Court, by filing with the Registrar:-

- 1.1 The handwritten minutes of the 2nd Respondent;
- 1.2 The reasons of the 1st Respondent for his decision;
- 1.3 The documents considered by the 1st Respondent in taking his decision.”

- [10] On 02 November 2005 the First and Third Respondents filed their notice of Intention to Oppose the interlocutory Rule 30(2)(c) read with Rule 30(A)(2) Application.

- [11] “On 1st November 2005, the First and Third Respondents’ attorney wrote a letter to the Applicant’s attorney indicating that the relevant record the Applicant seeks is already in his possession. The relevant portions of the letter reads:

“As regards your client’s request that the answering affidavit be withdrawn, we wish to inform you that there is no need for that. Your client can still, if he wish, supplement his founding affidavit. We have no objection to him doing so. The fact that he is in possession of the answering affidavit means that he benefits from having the answering affidavit before he serves and files his supplementary affidavit; he gains an advantage not otherwise available to him. At the same time, he suffers no prejudice from having sight of the answering affidavit prior to serving and filing his supplementary affidavit. He should serve and file his supplementary affidavit five days after receipt of the notes referred to above. Thereafter should our clients see the need to supplement their answering affidavit they will do so within the normal time periods. Should they do so, then your client should, if he so wishes, serve and file his replying affidavit within the normal time periods.”

- [12] On the 4th November 2005, the Second Respondent delivered the handwritten notes that he took at the disciplinary hearing.

- [13] On 09 November 2005 the Applicant’s Attorney replied to the letter of the First and Third Respondents’ Attorney of 01 November 2005 and states inter alia:-

“Regarding the remainder of your letter, we will concede that your Affidavit stands, and that we may file our replying affidavit if need be, upon receipt of your supplemented answering affidavit.

Take note that the above stated concessions is made with the understanding that you tender the wasted costs on a party and party scale (to be taxed) for our application in terms of Rule 32(c) read with Rule 30(a)(2). Should this costs not be tendered, kindly inform us accordingly as we will then immediately proceed to bring the application.”

- [14] On 14 November 2005 the First and Third Respondents filed their answering affidavits in the interlocutory Rule 30(2)(c) read with Rule 30(A)(2) application.

[15] On 21 November 2005, the transcript of the tape-recording of the disciplinary proceedings was sent to the First and Third Respondents' Attorney.

[16] Numerous letters and correspondence were then exchanged between the respective attorneys appearing for the Applicant and for the First and Second Respondents. The contents of these letters are important and for the sake of completeness I will refer to the relevant portions thereof:-

[17] On 9 December 2005, the Applicant's Attorney was informed by the Attorneys for the First and Third Respondents that:-

"Your Draft Order makes reference to your client filing his supplementary affidavit on or before 20th January 2005. With neither

explanation nor justification, your client has chosen to extend the time period laid down in Rule 53(4). We are of the view that there is no justifiable reason for your client to take such extreme liberty by delaying the delivery of his supplementary affidavit. Should we not receive his supplementary affidavit by 13th December 2005 we will assume that he stands by his notice of motion and does not wish to deliver a supplementary affidavit.

There is no need for an order of Court to spell out the time periods for the delivery of respective affidavits. Rule 53 caters adequately for this. The only reason we can infer from your client's proposal to obtain an order for the Court is that he wish to extend the time period prescribed in Rule 53(4).

We believe that the issue of the delivery of the supplementary affidavit is separate and distinct from the issue of costs of the interlocutory application. We strongly urge your client to do the same."

[18] The Applicant's reply to this was:

"We have attempted in the Draft Order to amicably agree on dates for certain documentation to be filed, as it is now year end and our counsel is already on leave until 9 January 2006.

It is senseless to pressurise us in filing our applicable affidavits whilst we have already suggested time frames in our proposed Draft Order in which same can be (sic).

We are not in a position to file our Affidavits by 13 December 2005 and in the light of our attempts to amicably settle certain issues regarding this matter, we will apply for Condonation for the late filing thereof if the need arises."

[19] On 13 December 2005 the First and Third Respondents' attorney wrote the following to the Applicant's Attorney:-

"That your client wants an extension of time to deliver his supplementary affidavit cannot be doubted – although he never spelt this out before. At this stage we are not aware of the basis upon which he seeks this indulgence. He may, as appears from your letter, try to take advantage of the impending holiday period as providing a reason for his non-compliance with Rule 53(4) of the Uniform Rules of Court (the

Rules), but we remain uninformed about why he could not, as he received the record, prepare his supplementary affidavit. Our clients are very concerned at the lengthy delay in this matter, which delay, as you will no doubt agree, benefits your client in the sense that it prevents the disciplinary hearing from proceeding. Should our client succeed in opposing your client's application, they will, nevertheless, have lost valuable time and would have paid your client his remuneration – which would have been unnecessary if your client is found guilty and dismissed. More importantly, the longer the disciplinary hearing is delayed, the greater the potential of our clients' case (at the disciplinary enquiry) against your client (bearing in mind that our clients will rely, inter alia, on viva voce evidence to make their case against your client) being weakened, if not destroyed altogether. Hence, our clients' anxiety to finalise your client's application as soon as possible.

We do not accept that your client's failure to comply with the provisions of Rule 53(4) of the Rules can in any way be attributable

to our clients' alleged failure to 'comply with the Rules of Court'. As soon as your client received the record, he was to deliver his supplementary affidavit. Whatever occurred before then was, and is, irrelevant for purposes of the time period laid down in Rule 53(4) of the Rules.

We note that your client indicates that he will apply for condonation for the late filing of his supplementary affidavit. We cannot stop him from doing so. However, we are concerned by the fact that there is absolutely no commitment in your letter as to when the supplementary affidavit will be delivered. Your client's non-committal in this regard is particularly disturbing"

(Emphasis added.)

[20] On 10 January 2006, the Applicant applies for a trial date for the interlocutory application. The trial date received is the present one, i.e. 19 April 2006.

B. Nature of Application:

[21] The nature of this interlocutory application is one in terms of Rule 30(2) of the Uniform Rules of Court. The Applicant seeks to have the Respondent's answering affidavits which were filed prematurely and out of sequence, contrary to the provisions of Rule 53(4) and (5), set aside.

[22] Rule 53(4) and Rule 53(5) provides that:-

"(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying

affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall-

- (a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and
 - (b) within thirty days after the expiry of the time referred to in sub-rule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.”
- [23] In terms of Rule 53 of the Uniform Rules of Court, an Applicant is entitled to file a supplementary affidavit after the record of the proceedings had been filed by the Respondent, who took the decision which the Applicant seeks to review.
- [24] A Respondent is only entitled to file his / its answering affidavit AFTER the supplementary affidavit, if any, by the Applicant had been filed.
- [25] It is contended on behalf of the Applicant that the premature filing of the answering affidavits amounts to an irregular step that needs to be set aside by the Court in terms of Rule 30 of the Uniform Rules of Court.
- [26] A party’s proper cause where any proceeding in the cause is irregular, is not to proceed as if there had been no such proceeding at all, but to apply under Rule 30 for an order setting the irregular proceeding aside.

See:- Standard Bank v Sewpersadh And Another

2005

- (4) 148 (C).
- [27] Erasmus: Superior Court Practice on page B1-190 list examples where this rule was applied to set irregular proceedings aside. For ease of reference the list of examples are quoted:-
- “(a) a proper power of attorney has not been filed;*
- (b) a proper service of summons had not been effected;
 - (c) an address for service of documents was not set out in a summons;
 - (d) pleadings were not signed in accordance with the rules or did not comply with the rules as to form;
 - (e) particulars of claim in an action for damages failed to comply with the provisions of rule 18(10);
 - (f) notice of intention to defend was irregular or delivered out of time, although such notice is not a further step which advances the proceedings one step nearer completion but is merely an act done with the object of qualifying the defendant to put forward his defence;

- (g) an application was brought on the grounds of urgency but no reasons of urgency were set out in the supporting affidavits;
- (h) there had been premature set down;
- (i) review proceedings were brought by way of action and not in terms of rule 53;
- (j) an irregular notice of bar had been served in provisional sentence proceedings;
- (k) lengthy affidavits were filed in proceedings under rule 43;
- (l) proper notice of taxation had not been given;
- (m) a notice of appeal was defective.”

[28] It was contended on behalf of the First and Third Respondents that, for good reason, the setting aside of an answering affidavit in an application proceeding which was prematurely delivered is not included in the list.

[29] I cannot agree with the submission that the filing of an answering affidavit does not advance the proceedings. The list is not exhausted. An irregular step as contemplated by the sub-rule is a step which advances the proceedings one stage nearer to completion.

See:- Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor 1984 (1) SA 152 (W).

I am of the view that the filing of an answering affidavit in an application proceeding does advance the proceedings one stage nearer to completion.

[30] Not every irregular proceeding or step that has been taken by a party will automatically be set aside by a Court. The Court is vested with a discretion whether to set aside an irregular proceeding or step or whether to condone it.

See: Rule 30(3) of the Uniform Rules of Court.

Trans-African Insurance Co. Ltd v Maluleka

1956

(2) SA 273 (A) at 276 E-H.

[31] For an irregular proceeding or step to be set aside, the party complaining about such a proceeding or step must prove that it suffers substantial prejudice if the irregular proceeding or step is not set aside. If substantial prejudice is not found to exist, the Court may condone the irregular proceeding or step taken.

Erasmus, (supra) states the following on page B1-193:-

“Proof of prejudice is therefore a prerequisite to success in an application in terms of Rule 30(1).”

See: Gardiner v Survey Engineering (Pty) Ltd

1993

(3) SA 549 (SE) at 551 C.

[32] It was contended on behalf of the First and Third Respondents that the filing of their answering affidavits does not amount to an irregular step. The Applicant, so it was contended, was not denied the opportunity of receiving the record of the disciplinary proceedings or the supplementing of his founding affidavit because he already had a copy of the proceedings and he could supplement his founding papers if he so wished.

[33] I find myself unable to agree with this contention. The mechanically proceedings forming part of the record of the disciplinary proceedings were filed with the Registrar on 10 October 2005, approximately a month after the answering affidavits of the First and Third Respondents have already been filed. The handwritten notes of the Second

Respondent which he took down at the disciplinary hearing was delivered on 04 November 2005, almost two months after the answering affidavits have been filed.

[34] This clearly illustrated the fact that the full record of the proceedings of the disciplinary hearing have not been filed before

the answering affidavits of the First and Third Respondents were filed.

It is not for the Respondents to decide which part of the proceedings it will file as the record. The Applicant is entitled to the record; the full record if it is relevant, or such part thereof that is necessary and relevant in order to enable him to prepare properly for his case.

In this case, it is clear that the Applicant did not waive his right to have a full record of the proceedings of the disciplinary hearing, hence he requested also the handwritten notes / minutes of the Second Respondent and the mechanically recorded proceedings.

[35] It is clear from the correspondence (letter dated 01 November 2005, *supra*) that the procedure adopted and followed by in particular the First and Third Respondents, does not conform with the procedure as laid down by Rule 53 of the Uniform Rules of Court. First and Third Respondents are of the view that they can, as of right, supplement their answering affidavits after the Applicant has supplemented his founding affidavit and then the Applicant can, if he so wishes, serve and file his replying affidavit. It seems to me that the First and Third Respondents wants to have two opportunities to answer to the founding and (possibly) supplementary affidavits of the Applicant.

This is not the procedure prescribed by Rule 53, which in my view is peremptory. An Applicant should adhere to the procedure laid down by Rule 53 and must not willy nully deviate from it unless in cases of urgency and / or where interim relief is necessary.

See:- *Safcor Forwarding (Pty) Ltd v N.T.C.* 1982 (3) 654 (A) at 675 H.

[36] Applicant submits that he is prejudiced by the premature filing of the answering affidavits in that:-

“25.1 The Respondents intend to received to answer to the founding (and supplementary) affidavits of Applicant, which entails additional

costs of the Applicant;

25.2 The Respondents have to date refused to accept liability for the present application before Court, occasioned by the irregular filing of the answering affidavit.

25.3 The filing of additional sets of affidavits as contemplated by the Respondents, cause prolixity and is potentially confusing;

25.4 Allowing the Respondents to take the cause of action proposed by them, creates and unnecessary precedent in respect of the pleadings before this Honourable Court, without proper motivation for such deviation.”

[37] I am of the view that although there is merit in these submissions on behalf of the Applicant, and although the Applicant’s objections are not purely technical in nature, the premature filing of the answering affidavits of the Respondents should be condone especially in view of the long delay that occurred thus far in this matter.

C. Costs:

[38] It is contended on behalf of the First and Third Respondents that this interlocutory application was completely unnecessary. It is further submitted that since there is no merit in this application, it is only an abuse of the processes of Court and calls for a punitive cost order to be granted against the Applicant.

I cannot agree with this submission.

[39] Although I am inclined to condone the premature and out of sequence filing of the answering affidavits by the Respondents, it does not mean that it was unnecessary for the Applicant to bring this interlocutory application. On the contrary it was indeed the right thing to do by the Applicant and not to simply take the processes of Court for granted.

[40] In my view, the First and Third Respondents did not comply with the provisions of Rule 53 which necessitated this application. Although they were requested to withdraw their answering affidavits at any early stage, they persisted in their refusal to withdraw it.

[41] I am of the view that costs should be awarded to the Applicant especially to show the Court’s disapproval for the blatant disregard of its rules by the First and Third Respondents.

Conclusion:

In the result, the following order is granted:-

- [i] The answering affidavits filed on behalf of the Respondents (First and Third) stands;
- [ii] The Applicant shall file his supplementary affidavit, if any, within ten (10) days from date of this order;
- [iii] The normal Rules of Court shall apply thereafter;
- [iv] The First and Third Respondents are ordered to pay the costs of this application jointly and severely.

R D HENDRICKS

JUDGE OF THE HIGH COURT

Attorneys for the Applicant: NIENABER & WISSING

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2006/31.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/malebye-v-head-unknown-topic-anwhc-2006>

Prepared on 11 October 2026 · Esheria