

SOUTH AFRICA / JUDGMENT

Mpembe and Another v Minister of Police and Another (2226/2022)

[2024] ZANWHC 131 (23 May 2024)

[2024] ZANWHC 131

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

2226/2022

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
CASE
NO: 2226/2022

Reportable:	YES/NO Circulate
to Judges:	YES/NO Circulate
to Magistrates:	YES/NO Circulate to Regional Magistrates: YES/NO In the matter

between:

MZONDAZE
WILLIAM MPEMBE
1ST
PLAINTIFF
GIDEON
JACOBUS VAN ZYL
2ND
PLAINTIFF
And
MINISTER
OF POLICE
1st DEFENDANT
THE
NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS
2ND DEFENDANT
CONCERNED
MEMBERS
Judgment
is handed down electronically by distribution to the parties'
legal representatives by e-mail. The date that the
judgment is deemed
to be handed down is 23
May 2024 at
10h00.
ORDER
(i)
The point in limine
is dismissed.
(ii)
The application to strike the defendants plea is
dismissed.
(iii)
The plaintiffs irregular step is upheld.
(iv)
The defendants application for the upliftment of
the bar is granted.
(v)
The defendants are to file their plea within ten
(10) days of this order.
(vi)
Costs are to be costs in the cause.
(vii)
A date is to be arranged in conjunction with the
Office of the Judge President for the action to be heard.

JUDGMENT

Reddy AJ

Introduction

- [1] What served before this Court were two opposed applications. The first is premised on Rule 27 of the Uniform Rules of Court, (“the Rules”), wherein the defendants apply for the upliftment of the bar. The second application is predicated on Rule 30 of the Rules of Court wherein the plaintiff contends that there has been an irregular delivery of a plea by the defendants, whilst same has been ipso facto barred. The plaintiffs therefore requests that the plea of the defendants be struck. For purposes of brevity the appellations of the parties as cited in the main action will be continued with.

Background facts

- [2] The first plaintiff is Mr Mzondaze William Mpembe. The second plaintiff is Mr Gideon Jacobus Van Zyl, (who will collectively be referred to as “plaintiffs”).

The first defendant is the Minister of Police. The second defendant is the National Director of Public Prosecutions.

- [3] The plaintiffs contend that on or about 15 March 2018, unknown members of the Independent Police Investigative Directorate (“IPID”), wrongfully and maliciously set the law in motion by falsely implicating the plaintiffs on charges of contravening section 33(3) read with section 1, 28 and 29 of the Independent Investigative Directorate Act 1 of 2011 and/or defeating the ends of justice and/or contravening section 6(2) of the Commissions Act 8 of 1947. The latter charge averred that the plaintiffs did not report the body in a canter of Van Wyk Sagala (“the deceased”) to IPID, defeated the ends of justice by concealing the death of the deceased to IPID, acted with common purpose and were intentionally untruthful under oath at the Marikana Commission. This resulted in the plaintiffs being summarily charged.
- [4] At the time of the plaintiffs being so charged, it was contended that the members of IPID had no reasonable and probable cause for believing that the plaintiffs had committed the offences so charged. There existed no reasonable belief in the truth of the information. As a result, the defendants acted with animus iniuriandi.
- [5] Founded on the conduct of the defendants, the plaintiffs were indicted on the aforesaid counts in this Court on 10 June 2019. On 29 March 2021 the plaintiffs were found not guilty and discharged on all counts.
- [6] In the main the plaintiffs contended that there existed a duty of care toward the plaintiffs on the part of the public prosecutor/s acting in the course and scope of their employment with the second defendant which condensed, and compelled the prosecutor/s to bring a proper application of their prosecutorial discretion to the facts as

encapsulated in the case docket before the institution of a prosecution against the plaintiffs. In essence, it was expected

of the prosecutors seized with the matter to ensure that the plaintiffs were not indicted on the counts outlined supra in the absence of the sufficient evidence. In the determination of the existence of sufficient evidence, the prosecutors were duty bound to perform their functions with the necessary care and diligence.

- [7] As a consequence of the duty of care towards the plaintiffs, the prosecutor(s) seized with the prosecution of the plaintiffs, negligently failed to properly apply their minds in deciding whether there was sufficient evidence to warrant the prosecution of the plaintiffs. To this end, the prosecutors did not take reasonable steps to ensure that the plaintiffs were not indicted in the absence of sufficient evidence to initiate a prosecution. To put it simply, the prosecutors failed to perform their duties with due care and diligence, by failing to give proper attention to the contents of the case docket on which the plaintiffs were prosecuted.
- [8] As a direct consequence of causing the plaintiffs to be prosecuted the plaintiffs right to dignity were infringed and each suffered damages including loss of income because of several appearances in this Court to defend the indictment, the reasonable legal costs associated with this defence and contumelia. In the premises each plaintiff claimed damages in the sum of R 3 000 000 00, mora interest at the prescribed legal rate from the date of service of summons until the date of payment and costs of the action on an attorney and client scale. The summons was issued and served on the defendants on 16 September 2022.
- [9] On 01 November 2022, the defendants delivered a Notice of Intention to Defend, with a simultaneous notice in terms of Rule 35(14) requesting copies of the plaintiffs identity documents and proof of their individual income. On 10 February 2023, the plaintiffs complied with the Rule 35(14) notice.
- [10] On 14 March 2023, the Notice of Bar is served. The service of the bar triggers a belated reaction from the defendants. To this end, on 23 March 2023, the defendants attorney transmits an email requesting an indulgence. On 23 March 2023, the plaintiffs attorney retorted as follows:

“ Dear Senye

As we are only the correspondent attorneys in this matter, we had to obtain instructions from the instructing Attorneys in this regard.

As this Plea was already due yesterday and the Defendants are ipso facto barred, we hold instructions not to grant any indulgence and will proceed with the application for default judgment.

We will hold of in bringing the Default Judgment Application to grant you the opportunity to bring an application for the upliftment of the bar within 5 days hereof.”

- [11] On 28 March 2023, an application for the upliftment of the bar was served on the plaintiffs. On 04 April 2023, the plaintiffs deliver a Notice of Intention to oppose same. Notwithstanding being ipso facto barred, the defendants served a plea. This prompted the plaintiffs to cause a Notice in terms of Rule 30 (2)(b).

The upliftment of the bar

- [12] The defendants contend that the file was under the control of Ms Bindza, (“Bindza”), who fell under the direct supervision of Mr Letsoalo, (“Letsoalo”). On 22 December 2022, Bindza resigned whilst the file was under her implicit control. Bindza was part of an exodus of five (5) attorneys at the Office of the State Attorneys, during

2022. This resulted in a shortage of capacity and stunted service delivery.

- [13] To cure this a proposal was drafted in January 2023, wherein it was suggested that attorneys who had resigned from the Office of the State Attorney be replaced by candidate attorneys, who would be monitored by junior and senior attorneys. This successful proposal caused Ms Senye Kedidimetse, (“Kedidimetse”) to be appointed. From 06 March 2023 to 22 March 2023, Kedidimetse was on leave in preparation for the sitting of her Legal Practice Board Exams.

- [14] Kedidimetse returned to her office on 23 March 2023. It was then that she discovered that the plaintiffs have delivered a Notice of Bar on 14 March 2023. This Notice of Bar was not brought to the attention of Letsoalo or any of the attorneys that were placed in a monitoring position. On this pleading being brought to the attention of Letsoalo, he immediately instructed Kedidimetse to forward the Notice of Bar to counsel to draft a plea. Counsel advised that the defendants were to request an extension of time from the plaintiffs afore the delivery of the defendants plea. The plaintiffs were unpliant to the request for an extension of time.

- [15] The defendants aver that the failure to deliver a plea was a bona fide and excusable error. In any event, the defendants plea was delivered six (6) days out of time, which is not excessive with the degree of lateness being reasonable.

- [16] In addressing the question of prejudice, Letsoalo contended as follows:

“ 7.1.10. I therefore submit that in the circumstances there is little or no prejudice to the plaintiff and that it should properly have accepted the late delivery of the plea and/or granted the Applicants an extension to file and serve their plea.

7.1.11. The only result thereof would be that there would have been a small delay on which the matter would be ultimately be capable of being enrolled.

7.1.12. The prejudice to the applicants, I am advised and submit, is very substantial in that the Applicants will be precluded from raising what I am advised is likely to be sound defence to the Respondents claim.

7.1.13. Accordingly, I am advised and submit that I have shown good cause to have the bar against delivery of a plea removed.”

Bona fide defence

- [17] The defendants assert that in the instituting of the prosecution the second defendant had direct evidence on the charges that were proffered against the plaintiffs at its disposal to enrol the criminal matter. This in the view of the defendants constitute “minimum evidence” which might have resulted in the plaintiffs being convicted of the offences so charged. In exercising the discretion to institute this prosecution, the second defendant, acted in good faith within the legislative framework of the provisions of section 42 of the National Prosecuting Authority Act 32 of 1998.
- [18] The second defendant, after due consideration of the contents of the case docket in conjunction with all witnesses, had a reasonable and probable ground for “such prosecution and believed there was an offence committed by the respondents’ and as such should be charged and brought before court of law to determine if they are guilty or not.”
- [19] The defendants contend that a reading of the plea that is annexed to the founding affidavit of Letsoalo reaffirms the defendants prospects of success at the trial of this action. The defence as captured in the plea based on facts that are not unfounded, if proved, would constitute a bona fide defence.

Plaintiffs opposition to the upliftment of bar

- [20] Advocate Smit asserted that defendants have not submitted a reasonable and acceptable explanation for the delay in the timeous delivering of the plea. Insofar as timelines prescribed by the Rules of Court are concerned, the defendants fail to explain the non-compliance with two timelines. Firstly, the defendants do not explain the failure to deliver the plea between the period of the delivery of the Notice of Intention to Defend and the Notice of Bar. Secondly, nor is the period from the delivery of the Notice of Bar to the delivery of the upliftment of the bar application adequately elucidated. In accenting these two relevant timelines, Advocate Smit referred to *Orthotouch (Pty) Ltd v Delta Property Fund Limited* (42987/2019), [2021] ZAGPJHC 480 (19 July 2021), *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021].
- [21] Advocate Smit contended that the defendants lacked the necessary bona fides to be successful. This contention was founded on the defendants strategic use of the Rules of Court to delay the expeditious disposal

of the action. To this end, Advocate Smit places much store on the use of Rule 35(14), which the defendants used to justify for the failure to deliver a plea for the period 01 November 2022 to 10 February 2023. It was further averred that the defendants did not explain the failure to use the mechanics of the Uniform Rules of Court to obtain a compelling order to secure the relevant documents. Advocate Smit submitted that the defendants were of the erroneous view that the delivery of a plea was suspended pending the compliance of Rule 35(14). To reiterate the latter

contention Advocate Smit made

referred to Potpale Investments (Pty) Ltd v Mkhize 2016 (5) SA 96 (KZN) at paragraph [18].

- [22] In addressing the narrative of non-compliance with the Rules of Court, Advocate Smit asserts that the defendants litigating strategy in dealing with the Rule 30 application is a yet another clear indicator of the absence of bona fides.
- [23] Insofar as a bona fide defence is concerned, Advocate Smit avowed that the defendants have not presented any evidence in their affidavits of a defence or what their defence is purported to be. Letsoalo avers broad legal principles in the affidavits. What is lacking, so the contention ran, was the actual evidence constituting the defence. Advocate Smit emphasized that the allegations made by Letsoalo in the founding affidavit as with those in the plea, is no more than bare denials and vague submissions that there existed reasonable grounds to arrest and prosecute. The absence of substantial facts is telling so Advocate Smit continued.

The plaintiffs point in limine

- [24] Advocate Smit contends that Letsoalo, the deponent to the founding and replying affidavits in respect of the application for the upliftment of the bar, does not possess actual and personal knowledge of the facts deposed to. Resultedly, in the absence of this implicit combined knowledge, Letsoalo would be disqualified from deposing to the affidavits. In amplification, Advocate Smit asserts that on the defendants own papers, Letsoalo is not the attorney who is dealing with this matter and therefore does not have any personal knowledge to depose to the affidavits alluded to.
- [25] Advocate Senyatsi submitted that the plaintiffs' point in limine is ill-founded, bad in law and should be dismissed with costs. To expound on the latter, Advocate Senyatsi avows that it is trite that a deponent as the instructing attorney, has the powers entrusted in him/her to act in the best interests of defendants and to oppose and or institute an action and or application on behalf of the defendants. To this end, Letsoalo did consult with the witnesses in this matter. This consultation resulted in Letsoalo attaining implicit personal knowledge of the facts involved in this matter. To put it simply, this personal knowledge made it permissible for Letsoalo to depose to the affidavits that are

central to these applications.

- [26] To reinforce the personal knowledge of Letsoalo, Advocate Senyatsi referred to NDPP v SP Randall & Others 2021 ZAFSH 76, where the following was held:

"I do not agree with the averment made by the respondent that the content of the founding affidavit is based on hearsay. The deponent

avers that a consultation occurred between him and counsel on 14 August 2020. On 25 August 2020, another consultation occurred between him, the prosecutor who dealt with the matter and counsel. This is a clear indication that the deponent has first-hand knowledge of the facts and is able to depose to the founding affidavit.”

[27] On the principle as enunciated in *Randall*, Advocate Senyatsi contended that the point in limine be dismissed with costs.

Ruling on point in limine

[28] Afore an exposition of the personal knowledge prerequisite of an affidavit, it is peremptory to define what an affidavit comprises. An affidavit is a sworn statement in writing. In using an affidavit as an evidential instrument, the facts that form the body of the affidavit must be within the personal knowledge of the deponent.

[29] The significance of the personal knowledge qualification in the deposing of an affidavit goes to the heart of affidavit evidence. In application proceedings, the affidavits take the place not only of the pleadings in action proceedings, but also of the essential evidence which could be led at trial. To this end, it axiomatically follows that generally relief may only be granted in motion proceedings if it is supported by primary admissible evidence that is set out in the body of the affidavits. The admissibility of a deponent’s evidence depends on whether he/she has personal knowledge of the primary facts. Intertwined with a deponent’s knowledge of primary facts is the hearsay rule of evidence. The hearsay rule of evidence applies to all proceedings, including applications. According to Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence is "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

[30] In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423D-E. the court held that the mere assertion by a deponent that he can swear positively to the facts is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.

[31] In *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at paragraph [38], the Supreme Court of Appeal remarked as follows on the meaning of personal knowledge:

“ A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible... Merely to allege that that information is within the 'personal knowledge' of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly, and no other basis for its admission has been laid. Indeed, the statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion.”

- [32] There is no undervaluing the importance of the personal knowledge aspect of the deponent to the material facts that are being deposed to in the founding affidavit. The absence of personal knowledge diminishes the evidential weight of the affidavit evidence. In motion proceedings, affidavits are the procedural mechanism which permits the introduction of evidence.
- [33] It is against this backdrop that Letsoalo's affidavits must be critically evaluated to determine if the personal knowledge prerequisite has been met. Letsoalo contends that he is the Senior Assistant State Attorney attached to the Office of the State Attorney, Mahikeng. He is also the attorney of record of the defendants. As a result, the facts contained in his affidavit are, save where the contrary appears from the contents thereof, within his own personal knowledge and belief are both true and correct.
- [34] Letsoalo submitted that after having perused records of the criminal proceedings and having consulted with witnesses of the first and second defendants, the defendants have good prospects of success and/or a bona fide defence.
- [35] A well founded criticism is that Letsoalo's affidavit does contain hearsay evidence which may conflate with the personal knowledge of Letsoalo. The presence of hearsay evidence does not erode the entire personal knowledge of Letsoalo. An over formalistic and rigid approach to the personal knowledge averment in affidavits must be deprecated. This should not be interpreted to provide a deponent with carte blanche authority to load an affidavit with hearsay to conjure with the requirement of personal knowledge. The presence of hearsay in the absence of confirmatory affidavits in specified instances or the absence of a plausible explanation for the use of same may be fatal. Each affidavit must be assessed of its own exigencies and particularities.
- [36] Taking this point to its logical conclusion, I am of the view that Letsoalo has demonstrated that he has the mandatory personal knowledge to depose the contested affidavits. This finding is then dispositive of the point in limine. Consequently, the point in limine falls to be dismissed.

The upliftment of the bar

- [37] It is settled law that the defendants would have to satisfy the requirement of good cause to be successful in the attainment of the upliftment of the bar to pave the way for the delivery of a plea. Good cause is delineated into two subclasses. Firstly, the defendants must put forward a satisfactory explanation for the delay. To this end, the defendants' must at least furnish an explanation in full for his/her/ their default comprehensively, such that the court should be able to determine his/her/their motives. See : Silber v Ozen wholesalers (Pty) Ltd 1954
- (2) SA 345 (A) at 353A. Secondly, the defendants must show that there exists a bona fide defence.
- [38] In Smith, N.O. V Brummer, N.O. And Another 1954

(3) SA 352 (OPD), Brink J stated that good cause will be constituted as follows :

“In an application for removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where: (a) the applicant has given a reasonable explanation of his delay; (b) the application is bona fide and not made with the object of delaying the opposite party’s claim; (c) there has not been a reckless or intentional disregard of the Rules of Court; (d) the applicant’s action is clearly not ill-founded, and (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs; The absence of one or more of these circumstances might result in the application being refused”.

[39] In *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021] ZASCA 69 (4 June 2021) trite legal principles that encompass good cause was reiterated at paragraph [21] where the following was postulated:

“[G]enerally, the concept of ‘good cause’ entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation.”

[40] In casu, I am satisfied with the explanation that has been proffered by the defendants.

Letsoalo has as best as he can explained the high turnover of professional personnel at the Office of the State Attorney and the impact that same has had on service delivery. Whilst the explanation provided is reasonable and acceptable, this should never be an impediment to the plaintiffs access to the courts and the expeditious adjudication of litigants matters. The access to the courts is a constitutional imperative where everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. See section 34 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[41] In respect of a bona fide defence, I am persuaded that the defendants have met the threshold of this requirement. The minimum that the defendants must show is that their defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence. See: *Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F–G. Letsoalo asserts that the defendants had direct evidence which implicated the defendants in the commission of the allegations that founded the prosecution of the appellants. Moreover, Letsoalo avows that the contents of the case docket and consultations with all the witnesses incriminated the plaintiffs. Putting it differently, Letsoalo states under oath that the prosecution had direct evidence which incriminated the plaintiffs. Direct evidence in our law is evidence which is provided by an eyewitness who testifies to a fact in dispute. Pursuant to this dual process, namely, the reading of the case docket and the consultation with witnesses, the defendants had a reasonable and probable ground for the prosecution of the plaintiffs. To my mind, the second requirement so far as the defendants presenting a bona fide defence, has been met.

- [42] It would be convenient at this juncture to deal with the striking of the defendants plea within the context of the Rule 27 application. The defendants plea that has been annexed to the founding affidavit of Letsoalo, as I see it has been annexed for a specific purpose and object. For my money, the plea has been attached to indicate that the plea exists. It has been crafted and a reading of it demonstrates a bona fide defence. It serves no other purpose. The annexing of same in no way skirts the mandatory procedure as evinced by Rule 27. The defendant remains under bar. The annexed plea countermands any contention of its non-existence. This application is superfluous and stands to be dismissed.
- [43] The plaintiffs counter application that the defendants have committed an irregular step by the delivery of a plea whilst it is ipso facto barred is meritorious as will become clear herein after. Being ipso facto barred literally interpreted means “by the fact itself”. The fact itself was that the defendants could not proceed with any procedural step as at the service of the bar namely, to file a plea. To file a plea, whilst being ipso facto barred the defendants required the consent of the plaintiffs. This consent was expressly refused. The alternative to the plaintiffs consent was a substantive application as evinced in Rule 27. This the defendants followed. It axiomatically follows that the filing of the plea by the defendants had no effect on the barring of the defendants because the bar remained extant.
- [44] A distinction must be drawn between two independent processes in this application as I see it. The first would be the annexing of the plea to the founding or replying affidavit in an application within the tenets of Rule 27. The second, being filing of a plea whilst in a state of bar as part of the process in ordinary civil litigation. The defendant in casu was ipso facto barred. This proverbial checkmate made it impermissible for the defendant to take any further step in the litigation process like the filing of a plea. By the filing of a plea, whilst being ipso facto, barred the defendants had taken an irregular step. Seeing that the upliftment of the bar was opposed, the permission had to be

obtained from this Court. If permission is granted, thereafter a plea can be filed but not before. The filing of a plea was irregular. It follows that this application must be upheld.

Costs

- [45] It is trite that the high court has a wide discretion to decide on the issue of costs. The general rule is that costs follow the result. The defendants have been more than substantially successful. However, the defendants have sought an indulgence from the court and filed their plea prematurely. The plaintiffs were successful to the extent that the irregular step in terms of Rule 30 was upheld. Given the limited successes of each of the parties, a deviation from the general rule relating to costs is warranted. It would be just and equitable that costs be costs in the cause.

Order

- [46] In the premises, I make the following order:

- (i) The point in limine is dismissed.
- (ii) The application to strike the defendants plea is dismissed.
- (iii) The plaintiffs irregular step is upheld.
- (iv) The defendants application for the upliftment of the bar is granted.
- (v) The defendants are to file their plea within ten
- (10) days of this order.
- (vi) Costs are to be costs in the cause.
- (vii) A date is to be arranged in conjunction with the Office of the Judge President for the action to be heard.

A REDDY

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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