

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES: **MFUNDO JUKUDA V AFRICAN PIONEER INVESTMENT
HOLDINGS LIMITED + 1**

NOT REPORTABLE

Case Number: **1770/08**

1] High Court: **PORT ELIZABETH**

- DATE HEARD: **18 AUGUST 2009**
- DATE DELIVERED: **27 AUGUST 2009**

JUDGE(S): **EKSTEEN AJ**

LEGAL REPRESENTATIVES –

Appearances:

- for the Plaintiff(s): **ADV MARELE**
- for the Defendant(s): **ADV SCOTT**
-

Instructing attorneys:

- Plaintiff(s): **NGQAJAYI INC**
- Defendant(s): **BOQWANA LOON & CONNELLAN**

CASE INFORMATION -

- 1] *Nature of proceedings:*
- 2] *Key Words:*
- 3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 1770/08

Date delivered: 27 August 2009

In the matter between:

MFUNDO JUKUDA

Plaintiff

and

**AFRICAN PIONEER INVESTMENT HOLDINGS
LTD**

First Defendant

STEPHEN MZUKISI DONDOLO

Second Defendant

JUDGMENT

EKSTEEN AJ:

2] The applicant in the action (to whom I shall refer to as “the plaintiff”) issued summons against the respondents (to whom I shall refer as “the defendants”) on 28 August 2008. The defendants thereafter served various notices on the plaintiff, including a notice in terms of rule 30 of the uniform rules of court to set aside the particulars of claim filed and two notices of exception.

3] On 5 March 2009 these proceedings came before Jones J. Jones J, after hearing counsel made an order including the following terms:

- “1. That the application in terms of Rule 30 to set aside the Particulars of Claim is granted, and both exceptions to the Particulars of Claim are allowed, with costs.
2. That the Particulars of Claim are set aside.
3. That the plaintiff is given leave, if so advised, to file amended Particulars of Claim within ten (10) court days of the date of this order.
4.”

4] Pursuant to this order the plaintiff proceeded within the stipulated time to file fresh particulars of claim under a notice headed “Notice of Filing: Amended Particulars”.

5] This was followed by the filing of a “Notice of Objection and of Irregular Step” filed on behalf of the defendants. The latter notice contained two grounds upon which the defendants rely for their contention that the filing of the amended particulars of claim constitutes an irregular step and, in the same notice, sets out an objection to the content of the amendment. It called upon the plaintiff to remove the cause of the complaint within a specified time. The cause of complainant was not removed within the time period set out in the “Notice of Irregular Step” and the defendants accordingly set down the application in terms of Rule 30 to again set aside the new particulars of claim filed by the plaintiff. The grounds upon which the defendants rely for their contention that the filing of the particulars constitutes an irregular step are as follows:

- “1. In terms of the provisions of Rule 28 of this Honourable Court

any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish further particulars of the amendment.

2. The abovementioned document, served and filed by the plaintiff:
 - 2.1 Does not notify the other party to this litigation of the plaintiff's intention to amend;
 - 2.2 purports to affect the replacement of the plaintiff's Particulars of Claim, struck out, with those annexed to the notice in question."

- 6] The plaintiffs contend that the order granted by Jones J essentially goes no further than granting the plaintiff leave, within a period of ten (10) days, to seek an amendment in accordance with the provisions of Rule 28. It accordingly contends that by virtue of the provisions of Rule 28 of the Uniform Rules of Court the plaintiff, desiring to amend his pleadings, was required to notify all other parties of his intention to amend and to furnish them with particulars of the amendment.

- 7] In support of this argument, Mr **Scott**, who appeared on behalf of the plaintiffs, has referred me to the matter of ***Trustee, Insolvent Estate Mc William v Bank of Africa, Limited*** (1911) 32 NLR 36 at 39 where Mr Justice Dove Wilson, JP stated as follows:

"I wish to say that where, on exceptions, leave to amend is given

it is very undesirable that the amendment should be admitted to the record before a party on the other side is satisfied, and the court is satisfied. I think that leave to amend should merely mean this – that the party to whom the leave is given should draft the exact terms of the amendment, which he proposes and that he should submit that proposal to the other side. If the other side sees no objection to it, and consents to, it can then become part of the record, on consent of the parties. But if the other side sees ground for objection the parties will then have to come to the court, who will determine whether the amendment is a competent and proper one or not.” (See also **Clulee v Mc Carthy and Company** 28 NLR 487 and 489.)

8] In the present matter, however, Jones J did not grant leave to amend, he went further and ordered that the plaintiff be given leave to “file amended Particulars of Claim” within ten court days of the order. An order at the conclusion of a judgment has a very special function: it is the executive part of the judgment that defines what the court requires to be done or not done. Where the meaning of the order is clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the judgment or in the rules of court. (See **Administrator Cape v Mtshwaqela** 1990 (1) SA 705 (A) 716B-C.) The same rules which find application to the construction of documents apply also in interpreting judgments or orders.

9] I consider that the order made by Jones J is clear and unambiguous. In these circumstances no extrinsic fact or evidence is admissible to contradict it or to vary it. It has been held that this rule excluding evidence to contradict or vary an order which is clear and unambiguous is a rule of law, not merely a rule of evidence that can be waived by the parties. (See **Postmasburg Motors Eiendoms Beperk v Peens** 1970 (2) SA 35 (NC) at 39. See also **Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa** (5th edition) p. 936.)

10] In all the circumstances I am of the view that on a proper interpretation of the order made by Jones J the plaintiff was entitled “to file amended particulars of claim” without first following the procedure laid down in rule 28.

In the result the application is dismissed with costs.

J W EKSTEEN
ACTING JUDGE OF THE HIGH COURT