



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: R 3751/2022

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

and

MOSEBETSI RICHERD MOFOKENG

RESPONDENT

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **05 OCTOBER 2023**

DELIVERED ON: **06 OCTOBER 2023**

INTRODUCTION

- [1] This is a condonation application. The Applicant seeks an order condoning the late filing of the answering affidavit in the review application pending before this court. The review application is enrolled for hearing on 16 October 2023. The parties will be referred to as cited above.

BRIEF BACKGROUND

[2] The Respondent instituted an application in terms of Rule 53 of the Uniform Rules of this court. The purpose of the review application is to impugn and set aside the decision of the Regional Court Magistrate. The Applicant in this application was cited as the Second Respondent in the main application. The following sets out the events which led to these proceedings before me:

- i. On 10 August 2022, the review application was served on the Applicant. The Applicant filed the intention to oppose on 23 August 2022.
- ii. The review application was enrolled for hearing on 15 September 2022 by the Respondent. On this day, however, the Respondent removed the application. The matter was subsequently enrolled for hearing on other dates. At all material times here to, when the review application was set down for hearing, there was no record of the decision Regional Court Magistrate.
- iii. It is the case for the Applicant that she became aware of the filed record on 20 January 2023. On the same day, the Respondent filed the answering affidavit, which is the subject of the dispute between the parties before me.

[3] It is necessary to refer to the following:

On 18 May 2023, the Respondent instituted an application in terms of Rule 30 read with Rule 30A. In the notice served in terms of Rule 30 read with Rule 30A the following allegations are made:

1. *The alleged answering affidavit by the Second Respondent was not served on the Applicant and or the First Respondent and therefore its filing constitutes and irregular step.*
2. *The Second Respondent's answering affidavit was filed extremely late with the Registrar of the Honourable Court in particular that of the Presiding*

Judge/s without it being first served. This is an irregular step and constitutes a flagrant disregard of the rules on service process and more so when its contents addresses irrelevant issues as will be dealt with later.

3. ***The Second Respondent's answering affidavit was filed out of time in that the Notice of motion by the applicant under Rule 53 (Review) was served on the Second Respondent on the 10th August 2022. (my emphasis) The Second Respondent filed its intention to oppose on the 23rd August 2022 at 10:54.***
4. *In terms of Rule 53(5) any Respondent who opposes such an application is obligated to file its answering affidavit within 30 days. The Second Respondent did not do so. In the circumstances the 30 days in terms of Rule 53 (5) (b) in September 2022. **The Second Respondent's answering affidavit was filed without it being condoned by the Honourable Court (my emphasis) and or condonation raised, it therefore constitutes an irregular step.***
5. *The degree of lateness is extreme and unexplained as it runs to about 105 court day (almost 4 months). The Second Respondent's failure to apply for condonation application and merely filing constitutes irregular step/s and prejudices the Applicant*

- [5] The application in terms of Rule 30 was heard by Mhlambi and at the time of the hearing of this application, judgment has not been delivered. During the hearing of this application, I asked both Counsels to address me on the effect, if any, of the Rule 30 application on the current application. It has to be borne in mind that the Respondent argues that the answering affidavit was filed out of time. The submission of the Applicant is that the filing of the application was effected within time. According to the Applicant no condonation application is necessary pertaining to the answering affidavit. The Applicant further contends that if this court were to find that the filing of the answering affidavit was done outside the prescribed time limits, then in that case, the Applicant submits that a proper case was made for this court to grant condonation.

- [6] It is in my view unnecessary to deal with the issue of condonation. The Rule 30 notice clearly indicates that the dispute in the application before Mhlambi, J is that the time of the filing of the answering affidavit in the review application is central to the application before him. The issues raised in that application are the same as the ones raised in the application before me.
- [7] The Respondent in this case did not patiently raise the issue of *lis pendens*. The evidence as well as the submission before me, however, point to its relevance. The following is in my view pertinent in the two applications: (a) That there is a pending litigation between the parties with reference as to whether the answering affidavit was filed within time or not; (b) That the dispute is between the parties before me; (c) The dispute is based on the same cause of dispute; (d) And the dispute is in respect of the same cause of action. However, on this aspect, it does not mean that the form of relief claimed must be identical. - See *Amler's Precedents of Pleadings*, 9th ed by LTC Harms.
- [8] One of the rationales for a plea of *lis pendens* is to avoid courts giving conflicting decisions. In the notice in terms of Rule 30 the Respondent contends that the answering affidavit was filed out of time, in this case, the Applicant contends that it was not. A determination of this issue must be made by my brother Mhlambi and myself in these proceedings. A possibility exists that we may come to different findings. This should not be allowed to happen.
- [9] In my view, the interests of justice demands that the application between Mhlambi, J be finalised first as it was argued first and only then, can this matter be further adjudicated upon. For this reason, I decline to make any finding at this stage and I order as follows:

ORDER

1. The application is removed from the roll pending the finalisation of the application in terms of the Uniform Rule 30 read with Rule 30A;

2. The costs stand over for later adjudication.



P. E MOLITSOANE, J

On behalf of the Plaintiff:

Instructed by:

Adv. E.B ONTONG

Director of Public Prosecutions

BLOEMFONTEIN

On behalf of the Defendant:

Instructed by:

Mr. TT HLAPOLOSA

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