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

Case number: 3108/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

DEREK YORK

Applicant

And

JAMES ANDREW CALLIS- N.O.

1st Respondent

(In his capacity as duly appointed executor
In the Estate of the late Ntau Lucas Mokoena
Estate number 006[...])

MASTER OF THE HIGH COURT, BLOEMFONTEIN

2nd Respondent

HEARD ON: 16 SEPTEMBER 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 07 January 2022.

[1] On 30 July 2018 the applicant's herd of 30 Brahman cattle was stolen from his farm. The cows were later recovered by the police and Mr. Ntau Lucas Mokoena ('the deceased') was arrested for the theft. The deceased passed away before the case was finalized, the first respondent was subsequently appointed as the executrix of his estate.

[2] The applicant alleges that as a result of the deceased's actions he suffered damages in the amount of R230 000.00 being the costs for transporting the cattle back to his farm, repairing his damaged fences, the fodder that was stolen and the loss of the calves aborted by the cows during the theft.

[3] In his quest to hold the deceased estate liable for the alleged damages the applicant submitted his claim with the first respondent on 01 September 2020.

[4] The claim was rejected by the first respondent and it is in that regard that the applicant has instituted these proceedings against the respondents seeking an order in the following terms:

"1. Declaring the applicant to be a lawful and valid creditor in the estate of the Late Ntau Lucas Mokoena under estate number 006[...];

2. The 1st respondent to be directed to include the claim of the applicant with any and all other claims of creditors successfully instituted against the estate of the late Ntau Lucas Mokoena under estate number 006[...];

3. The 1st respondent to be interdicted from finalising and/or proceeding with the estate until written confirmation of acceptance of the claim is provided to the applicant;

4. The costs of this application and against the 1st respondent be paid by the Estate of the Late Ntau Lucas Mokoena, estate number 006[...] on an attorney and client scale..."

[5] The application is opposed by the first respondent on several grounds including, the irregularity of the application due to non-compliance with Rule 41A of the Uniform Rules of Court (“The Rules”), *lis alibi pendens* and the illiquidity of the claim.

Non-compliance with Rule 41A

[6] Rule 41A provides thus:

“(2) (a) in every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall when delivering a notice to defend or a notice to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff’s or applicant’s attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.”

[7] It is common cause that when the application was served on the respondents on 07 July 2021 it was not accompanied by the notice as contemplated in Rule 41A (2) (a). Similarly, the first respondent’s notice to oppose the application and the subsequent answering affidavit were served without the notice in terms of Rule 41A (2) (b).

[8] On 14 September 2021 barely two days before the hearing of the application the applicant filed an application seeking condonation of the late service of the 41A (2) (a) notice. He admits that the notice was only served on the respondents on 27 July 2021 and explains that the failure to serve the notice simultaneously with the application was a *bona fide* mistake. It is his submission that the first respondent is not prejudiced by the late service of the notice as he has also not complied with the

provisions of 41A (2) (b) and there is no indication he would have referred the matter for mediation.

[9] According to the first respondent condonation should not be granted, the applicant's failure to comply with the provisions of rule 41A (2) (a) constitutes an irregularity the court should therefore decline to hear the matter and struck it off the roll as it is done in the Limpopo Division. The first respondent argues that the applicant has also failed to show good cause why the court should condone his non-compliance with the rules.

[10] I do not agree with the first respondent's contention that a failure to comply with the provisions of rule 41A (2) (a) warrants an order striking off the matter from the roll. The object of rule 41A is to afford litigants an opportunity to resolve their disputes through mediation as an alternative to litigation. It is a voluntary process parties cannot be compelled to submit their dispute to mediation.¹ The process is also confidential including the exchange and the contents of the notices contemplated in subrule (2).² The notices can only be brought to the attention of the court at the end of the proceedings when the court considers the issue for costs of the action or application in that a party who unreasonably avoided mediating a matter which was capable of being mediated may be mulcted with a cost order.³ In my view, the notices are not intended to advance or provide an effective disposal of litigation. I therefore fail to understand how the failure to comply with the provisions of subrule (2) warrants an order barring a litigant from being heard.

[11] It is trite that condonation cannot be had for the mere asking it is an indulgence which a court has a discretion on whether to grant it or not. The applicant must show sufficient cause entitling it to the court's indulgence by giving a full explanation for the non-compliance with the court rules so that the court can understand how the delay came about and to assess the responsibility.⁴

¹ Rule 41A (1).

² Subrule (2) (d).

³ Rule 41A (9) (b).

⁴ *Uitenhage Transitional Local Council v SA Revenue Services* [2004] (1) SA 292 (SCA) at 297 I-J.

[12] The applicant's affidavit in support of the condonation application merely states the following:

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCE, BLOEMFONTEIN**

CASE NO: **3108/2021**

In the matter between:

DEREK YORK

APPLICANT

(IDENTITY NUMBER: 6[...])

-and-

JAMES ANDREW CALLIS N.O.

FIRST RESPONDENT

(In his capacity as duly appointed executor

Is the Estate of The Late Ntau Lucas Mokoena

Under estate Number 006[...])

MASTER OF THE HIGH COURT, BLOEMFONTEIN

SECOND RESPONDENT

FOUNDING AFFIDAVIT

I, the undersigned,

WILLEM JOHANNES BOTHA

Hereby declare under oath:

1.

1.1 I am a major male attorney and director with identification number (Id no: 7[...]) currently practicing as such under the name and style of Willie J Botha

Incorporated with principal place of business at 97 Kellner Street, Westdene, Bloemfontein, Free State Province, 9301 .

1.2 I am duly authorized to depose this affidavit by virtue of being the attorney of record on behalf of the applicant.

1.3 The facts contained herein, fall within my direct and personal knowledge and is true and correct unless otherwise indicated.

2.

PARTIES / JURISDICTION

2.1 The applicant herein is the applicant as indicated and described as in the main application.

2.2 The first respondent herein is the first respondent as indicated and described in the main application.

2.3 The second respondent herein is the second respondent as indicated and described in the main application.

2.4 The above honourable court has jurisdiction to adjudicate this matter as the main application hereof is being adjudicated by this court.

3.

3. 1 This application is brought for the sole purpose of obtaining the courts leave for the late service and filing of the Applicant's Notice in terms of Rule 41A that was not served and filed with the application simultaneously , however only after filing the application .

3.2 The immediate filing of the said notice with the application was nothing but a mere *bona fide* oversight of the applicant, however same was filled in the course of proceedings and after the filing of the application.

4.

4.1 The Notice of Motion and founding affidavit of the applicant was issued on the 7th of July 2021 in the Free State High Court and served on the First Respondent 7th day of July 2021 .

4.2 The Applicants Notice in terms of Rule 41A was served on the First Respondent on the 27st of July 2021.

5.

5.1 The applicant herewith confirm that the applicant did not leave the entire filing of the said notice, same was only after the filing of the application. The notice was still provided to the first respondent indicating to the later that he is open to mediation of this matter.

5.2 Due to the fact that the notice was filed at a later stage, the first respondent never suffered any prejudiced thereto as the filing was indeed done.

5.3 The applicant further submit that the nature of the said notice is merely to indicate that the applicant is open to mediation of this matter and at no stage affected the first respondents fairness to oppose the matter nor affected such fairness through the later filing.

6.

6.1 In contrary to rule 41A(2)(a), Rule 41A(2)(b) indicate that the First Respondent had to, when delivering his Notice of Intention to Oppose, or at any time thereafter, but not later than delivery of his Answering Affidavit, to serve on the

Applicant or the Applicant's attorneys a notice indicating whether such Respondent agrees to or opposes referral to Mediation.

6.2 The First Respondent has indeed not filed one Answering Affidavit, but two and has still not even bothered to file his Notice in terms of Rule 41A(2)(b), this despite the Applicant clearly indicating in his Notice that he is open to Mediation.

6.3 This is a clear indication that the first respondent was not affected by the late filing.

7.

The First Respondent has up to date not once noted and/or indicated that he is being prejudiced by the fact that our Notice in terms of Rule 41A was not issued and served simultaneously with the Application nor indicated any ground , if any , why same would have prejudiced himself.

8 .

In light of the above , it is the applicant 's humble submission that neither the first and/or second respondent will be prejudiced at any stage by the condonation of the late filing of the applicants notice in terms of rule 41A , therefor request an order as set us in terms of the notice of motion.

SIGNED at BLOEMFONTEIN on this 13th day of September 2021 .

WILLEM JOHANNES BOTHA

I certify that this affidavit was signed and sworn to before me at BLOEMFONTEIN *this 13th* day of SEPTEMBER 2021 by the deponent who has acknowledged that he knows and

[13] The notice was served approximately 14 days after the application was served on the respondents. The delay is extreme and except for the scant averment

that the delay was occasioned by a “*bona fide oversight of the applicant*” there is no detailed explanation as to how this alleged oversight came about, when exactly it was discovered and what did the applicant do after the mistake discovered. The confirmatory affidavit confirming the allegations attributed to the applicant is not even attached. I hold that the explanation for the delay in serving the notice has not been fully and sufficiently given.

[14] It has been said that the applicant’s prospects of success and the importance of the subject matter are also factors that are of relevant consideration in condonation applications. In this matter no attempt has been made by the applicant to set out the averments in that regard.⁵ On the facts germane to this matter it does appear that the applicant has a *bona fide* intention in the sense of seeking an opportunity to have the matter be brought to finality.

[15] The applicant’s submission that the first respondent is not prejudiced by the late notice is uncontroverted. It is accordingly my view that it is in the interests of the administration of justice and the first respondent as well that this matter is finalized. I am therefore inclined to condone the late service of the applicant’s rule 41A(2)(a) notice.

Lis alibi pendens / Unliquidated claim

[16] The first respondent also seeks the dismissal of the application on the grounds that there is a pending case being litigated elsewhere involving the same parties based on a similar cause of action. The first respondent submits that pursuant to launching this application, the applicant issued a summons under case number 3341/2021 against the respondents based on the same cause of action. That case is still pending this application is thus *lis pendens*. Furthermore, the application is defective because the damages claimed by the applicant have not been quantified and in any event, damages cannot be claimed by way of application but by action proceedings.

⁵ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 22.

[17] On the other side, the applicant disputes that this application and the summons are based on a similar cause of action. According to the applicant, in this application a declaratory order is sought that the first respondent must accept the applicant's claim and be interdicted from finalizing the estate until he has provided proof that he has done so. In the summons the applicant claims payment for damages. Therefore, the only similarity between the proceedings is that both of them involve the same parties. The applicant agrees that damages can only be claimed by way of action proceedings. He reiterates that damages have been claimed in the summons and not in the application therefore there is no basis for the first respondent's objection.

[18] I'm in agreement with the applicant's contentions. The applicant pursues his claim for damages in the summons, the complaint relating to the quantification of damages in the application is accordingly meritless.

[19] As regards the defence of *lis pendens*, the requisites of a defence of this nature are now settled. The proceedings pending elsewhere must not only involve the same parties they must also be based on the same cause of action and in respect of the same subject matter.⁶ The underlying principle of the doctrine of *lis alibi pendens* is that where a dispute involving the same parties is litigated elsewhere it must be finalized in that forum and not replicated in another forum as that may result in different courts pronouncing on the same issue with the risk that they may reach differing conclusions.⁷

[20] There is no replication of proceedings. In *casu*, the relief sought is that the applicant should be declared a valid creditor in the estate of the deceased whereas in the action that has been subsequently instituted, the applicant is suing the respondents for payment of damages he allegedly sustained as a result of the theft

⁶ *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others* [2020] ZACC 8 para 26.

⁷ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* 2013 (6) SA 499 (SCA) paras 18-30.

perpetrated by the deceased. Except for the fact the pending litigation in both matters involve the same parties the litigation is however not based on the same cause of action and the relief sought is not the same. The objections raised by the first respondent herein are unfounded, they are accordingly dismissed.

[21] I now turn to the merits of the application. The issue that arise in this application is the first respondent's failure or refusal to accept the applicant's "valid claim with merits" lodged against the deceased estate.

[22] At the hearing of the matter and contrary to the averments contained in the applicant's founding affidavit, Mr Buys counsel for the applicant argued that this is an interdict application premised on the grounds that the applicant has a prospective claim against the deceased estate, the first respondent has failed to comply with the provisions of section 32 and 33 of the Administration of the Estates Act⁸ by refusing to accept the applicant's claim therefore an interim order must be granted pending the successful determination of the action instituted by the applicant.

[23] Mr Buys asked the court to grant an order which is not prayed for in the notice of motion namely, that the first respondent be "*directed to provisionally include the claim of the applicant with any and all other claims of creditors successfully instituted against the estate of the late Ntau Lucas Mokoena...*" and be interdicted from "*finalising and/or proceeding with the administration of the deceased estate pending the successful determination of the action instituted by the applicant....*"

[24] There is not even an attempt in the applicant's founding affidavit to aver the requirements of an interdict. In attempt to remedy this anomaly, Mr. Buys inexplicably sought to amend the cause of action and the relief claimed in the notice of motion from the bar.

[25] It is the first respondent's case that the applicant has failed to make out a factual case of the relief he seeks in his affidavit. The affidavit does not deal with the requirements of an interlocutory interdict or any other interdict for that matter. With

⁸ Act No 66 of 1965.

regard to the amendment, a notice of motion cannot be amended from the bar a proper application must be brought. The application lacks merit it dismissed. Mr. Snyman submits that having regard to the manner in which the applicant has repeatedly abused the court process in the manner in which he dealt with this matter, a punitive cost order is warranted.

[26] It is trite that a party who seeks such a substantial amendment (the cause of action and the relief) must comply with the provisions of Rule 28(1) which provides that:

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

[27] I'm satisfied that the first respondent's opposition is well founded, there is no proper application for an amendment before this court. On the available facts it has been conceded that the applicant's founding affidavit does not make out the case for the granting of the order sought. I have consequently arrived at the conclusion that the application ought to be dismissed.

COSTS

[28] It is clear from the facts of this matter that the applicant has been a serial violator of the Rules of the court. The application provided for less time periods for the respondents to file opposing papers and when the first respondent filed his opposing papers within the truncated periods and opposed the urgency of the matter the applicant's response thereto was merely that the matter was not urgent it was merely a mistake that the application provided for less time periods. Despite having filed a voluminous application (totalling over 203 pages excluding the heads of argument) the order that the applicant ultimately sought varied substantially with the relief sought in the notice of motion. I'm persuaded by the first respondent's contention that the application is an abuse of court process a cost order on a punitive scale is thus warranted.

[29] In the premises, the following order is granted:

(1) The application for condonation for the late service of the rule 41A(2)(a) of the Uniform Rules of Court is granted with no order in respect of costs.

(2) The application is dismissed with costs on the scale as between attorney and own client.

N S DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:	Adv. JJ Buys
Instructed by:	Willie J Botha INC
	BLOEMFONTEIN

Counsel on behalf of 1 st Respondent:	Adv. C Snyman
Instructed by:	Callis Attorneys INC.
	BLOEMFONTEIN