



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

Case Number: 504/2021

In the matter between:

ITUMELENG VICTORIA MOLOI

Applicant

And

THE MUNICIPAL MANAGER, FEZILE DABI

DISTRICT MUNICIPALITY

Respondent

In re:

THE MUNICIPAL MANAGER, FEZILE DABI
DISTRICT MUNICIPALITY

Plaintiff

and

ANNA MAGAGUDI OLIFANT

1st Defendant

ITUMELENG VICTORIA MOLOI

2nd Defendant

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 2 December 2021

DELIVERED ON: 07 March 2022

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 10H00 on 7 March 2022

- [1] The applicant seeks to declare the respondent's combined summons defective on the basis that it does not comply with Uniform Rule 18(1), and further seeks an order setting aside the notice of bar issued by the respondent on 5 August 2021 as an irregular step in terms of Rule 30, and or striking out the respondent's claim in terms of Rule 30A (1) for non-compliance with Rule 18(1).

- [2] It is contended on behalf of the applicant that although the summons appears to have been signed by the respondent's attorneys of record, Noge Attorneys Incorporated, it is not reflected in the contents of the said summons whether the respondent's attorneys of record is an attorney with a right of appearance in terms of Act 62 of 1995 (the Act). It is further contended by the applicant that it appears from the particulars of claim that same was signed by Noge Attorneys *per procurationem* (pp) on behalf of the respondent's counsel.

- [3] As a result of the purported non-compliance with Rule 18(1), the applicant served a notice in terms of Rule 30A in which the respondent was called upon to comply with the said rule 18(1).

- [4] The respondent did not comply with Rule 30A notice by amending the summons. On 26 May 2021 the respondent's attorneys instead wrote as follows to the applicant:

“We confirm that our particulars of claim were signed by our correspondent’s attorneys, Mr Paul Modise of Modise and Modise Attorneys, on behalf of our counsel.

We further confirm that such signature was done in accordance with Rule 18(1) as the attorney who signed the particulars of claim is an attorney who under s4(2) of the Right of Appearance Act 1995(Act 62 of 1995) has a right of appearance in the High Court.”

- [5] On 5 August 2021 the respondent served the applicant with a notice of bar. Service of this notice prompted the applicant to deliver a notice in terms of Rule 30 calling upon the respondent to remove the notice of bar as he viewed the said notice as an irregular step. The respondent did not react to this notice hence this application.

- [6] The respondent on the other hand contends that the application is out of time and avers that seeing that there is no condonation application, this application ought to be dismissed. It is further contended that the applicant’s Rule 30 notice dated 10 May 2021 was served 3 calendar months after the institution of the claims.

- [7] Mr Morolong Noge contends that he obtained his right of appearance in terms of the Act on 29 July 2016 while his instructing attorney Mr Modise obtained his in February 2014.

- [8] It is the respondent’s case that Mr Modise signed the summons in his capacity as an authorised agent and thus the election of Mr Modise to sign the document in his capacity as an authorised agent does not render the particulars of claim fatally defective as alleged by the applicant. The respondent argues that the

applicant failed to establish any prejudice it may have suffered by the signatures in contention.

- [9] Mr Noge denies that he signed the particulars of claim but avers same were signed by Mr Modise in his capacity as the correspondent of the respondent. In the confirmatory affidavit, Mr Modise confirms this assertion.
- [10] Save for the issue of condonation the issues for determination are that it is not indicated in the summons that the respondent's attorney of record is an attorney with the right of appearance in terms of the Act and the combined summons is co-signed by the respondent's attorney of record and counsel. The determination of these issues would ultimately lead to a final determination of whether the summons *in casu* is defective and if the delivery of the notice of bar was irregular. I am satisfied there is no need for a condonation application.
- [11] Rule 18 which provides for rules relating to pleadings generally. It provides as follows:
- “(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts, Act has the right of appearance in the Supreme Court (High Court), only such attorney or, if a party sues or defends personally, by that party.”
- [12] Section 4(2) of the Right of Appearance Act provides that:
- “If the registrar is satisfied that an application referred to in subsection (1) complies with the provisions of this Act, he or she shall issue a certificate to the effect that the applicant has the right of appearance in the Supreme Court (High Court.)”

- [13] The summons reveal that Noge Attorneys Inc. are the instructing attorneys of record of the respondent while Modise and Modise are the correspondent attorneys. The face of the summons indicate that the summons was signed by Noge Attorneys but do not reflect that Mr Noge is an attorney with a right of appearance as envisaged in s4(2) of the Act. This in my view is beyond doubt.
- [14] The combined summons has also been signed by the respondent's attorney of record *per procurationem*(pp). In my view the crisp issue in this question of signatures is whether the summons and the particulars of claim were signed by an attorney of record with a right of appearance in terms of the Act.
- [15] It is indeed so that in practise the attorney with a right of such appearance would usually have it reflected in the combined summons that he has such right of appearance. Rule 18(1) does not in my view say that the pleading must indicate *ex facie* that the person who signs, if he is an attorney, has a right of appearance in terms of the Act.
- [16] The application in this case was issued in 2021. Both Messrs Noge and Modise had by then been issued with certificates in terms of s4(2) and both thus had the right of audience in the High Court. The fact that they did not indicate such right in the summons does not, however, render the summons defective. Rule 18(1) simply requires that the combined summons be signed by an advocate and an attorney, or by the attorney with a right of appearance in terms of the Act. Noge and Modise are such attorneys. If this court were to insist that they should reflect their right of appearance in the summons, then in that case, such a move would be elevating form over substance. It is, however,

good practise that the right of appearance in terms of the Act should ideally be reflected in the combined summons and pleadings in order to obviate the necessity to bring the applications like the one before this court.

- [17] The fact that the combined summons did not reflect that the signatories to the combined summons were attorneys with the right of appearance surely prompted the applicant to bring this application. The respondent chose to proceed with delivering the notice of bar instead of effectively dealing with the concerns of the applicant. In my view the second respondent ought to have dealt with the concerns raised by the applicant and could have thus prevented this application. In fairness to the applicant the notice of bar ought to be uplifted and an opportunity granted to the applicant to file further pleadings. This application ought to fail. I accordingly make the following order:

ORDER

1. The application is dismissed;
2. The notice of bar delivered on 5 August 2021 is hereby uplifted;
3. The applicant is granted leave to file any further notice or pleading within 5 days of the service of this order failing which the respondent may file a further notice or pleading he deems fit;
4. Each party to pay his/its own costs.

P.E. MOLITSOANE, J

On Behalf of the Applicant:

Adv. Mvuyo Ndziba

Instructed by:

EG Cooper Majiedt Inc.
Bloemfontein

On Behalf of Respondent:

Adv. Ayitee Ayayee
Adv. Lerato Mukome

Instructed by:

Modise and Modise
Bloemfontein