

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

Case number: 1391/2019

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MOHOKARE LOCAL MUNICIPALITY

Applicant / 2nd Defendant

And

MAWETHU NGXITO

1st Respondent / Plaintiff

SIVUYILE XHANTINI

2nd Respondent / Plaintiff

HEARD ON: 05 MAY 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 14 July 2022.

[1] In this opposed application, the applicant seeks an order in terms of Uniform rule 30 for the setting aside of the respondents' notice of amendment of the particulars of claim on the grounds that it constitutes an irregular step.

[2] On 27 March 2019, the respondents (the plaintiffs) in their capacities as the owners or lawful possessors of the farm described as the Waterloo Farm in Zastron instituted a claim against the applicant (the second defendant) and the minister of police (the first defendant) for payment of an amount of R456 000.00 as damages on the basis of theft or loss of the plaintiffs' livestock and damage caused to the plaintiffs' farm by the defendants' employees during a raid on the plaintiffs' farm.

[3] Apart from defending the action, the second defendant raised an exception against the plaintiffs' particulars of claim on the basis that they were vague and embarrassing and did not disclose a cause of action. The plaintiffs refused to remove the cause of complaints with the result that the exception was set down for hearing before Boonzaaier AJ. On 18 March 2021 judgment (the court order) was granted in favour of the second defendant on the following terms:

"1. The exception is upheld with costs.

2. The plaintiffs are given leave to amend the particulars of claim by way of notice of amendment within 15 days of the date of this order.

3. If the amendment is not effected, leave is granted to the Defendant to approach this court on the same papers, duly amplified, for an order dismissing the claim.

4. The plaintiffs are ordered to pay the costs on a party and party scale."

[4] Pursuant to the court order precisely on 14 April 2021, the plaintiffs served their amended particulars of claim on the second defendant's attorneys under a notice titled: *"PLAINTIFF'S NOTICE OF AMENDMENT OF THE PARTICULARS OF CLAIM"* with the effect that the executor of the deceased estate of the owner of the farm was joined in the action as the third plaintiff, sub-paragraphs 5.1. to 5.4. were

inserted under paragraph 5 of the initial particulars of claim and the basis of the executor's capacity to join in the action was set out.

[5] The notice further records that:

"KINDLY TAKE NOTICE FURTHER that these amendments are effected and penned in terms of the Court Order dated 18 March 2021."

[6] It is the second defendant's case that the plaintiffs' notice of amendment constitutes an irregular step due to lack of compliance with rule 28 (1), (2) and (3) and the court order in that: a notice of the intention to amend containing the particulars of the amendments and a notification that the first defendant was entitled to object to the amendments was not served on the second defendant prior to the amendments being affected as envisaged in sub-rules (1) and (2).

[7] According to the second defendant, the plaintiffs also failed to comply with the court order by failing to serve the notice of intention to amend within the 15 days' period prescribed in the court order. The notice to amend was due on or before 9 April 2021 whereas the plaintiffs' purported notice to amend was only served on 14 April 2021 and no condonation has been sought for the late service.

[8] On the other side, the plaintiffs contend that the application has no merit it must be dismissed with costs.

[9] The plaintiffs do not deny that their notice of amendment does not comply with rule 28. The application is opposed on the grounds that the notice of amendment was filed in compliance with the provisions of the court order. Paragraph 2 of the court order merely states that *'the plaintiffs are given leave to amend the particulars of claim by way of notice of amendment within 15 days of the date of this order.'* The court order does not state that the plaintiffs must comply with rule 28.

[10] The plaintiffs submit that a court is entitled to grant orders contrary to the provisions of the court rules. In this matter the court deviated from rule 28 as it was entitled to by authorising the plaintiffs to amend their particulars claim by instantly

filing the amended particulars without having served the notice of intention to amend as contemplated in rule 28 (1) and (2) and also granted the plaintiffs 15 days to effect the amendments as opposed to the 10 days prescribed in rule 28 (1). A court order supersedes the court rules and since it has not been rescinded nor varied, it must be complied with.

[11] As regards the alleged late filing of the notice of amendment, the plaintiffs state that the judgment was electronically transmitted to the plaintiffs' attorneys on 23 March 2021 therefore, 15 days from the date on which the judgment was received only expired on 14 April 2021. The notice of amendment was accordingly served within the time prescribed in the court order.

[12] The rule pertinent to amendment applications provides thus:

“28. Amendment of pleadings and documents

(1) 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 particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.”

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed

to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorised by an order of the court may not be effected later than 10 days after such authorisation.”

(7) ...

[13] It is undisputed that the plaintiffs’ notice of amendment does not conform with the terms of rule 28. The notice was also not served within 15 days from the date of the order.

[14] The word “*shall*” in rule 28 (1) and (2) denotes that compliance with the rule is peremptory, it must therefore be complied with unless there are circumstances justifying non-compliance. See *Gouws v Venter & CO* **1961 (2) SA 329** (N) at 335A-B.

[15] The provision in paragraph 2 of the court order: ‘*the plaintiffs are given leave to amend the particulars of claim by way of notice of amendment within 15 days of the date of this order*’ is in line with the terms of rule 28(1) and (2) which requires a party wishing to amend its pleadings to notify the opposing party by way of notice containing the particulars of the proposed amendments and conveying that unless a written objection to the proposed amendment is delivered within 10 days of delivery of the said notice the amendment will be effected. Likewise, in terms of rule 28 (6) a court authorising an amendment is entitled to order that the contemplated amendment be effected later than the 10 days prescribed by the rule. I’m not persuaded that the substance of the court order granted on 18 March 2021 authorised the plaintiffs to circumvent the provisions of rule 28.

[16] There is also no merit to the plaintiffs’ contention that the purported notice of amendment was filed within the 15 days stipulated in the court order. On

the plaintiffs' own submission, the notice was only served on the second defendant's attorneys on 14 April 2021 approximately 18 days from the date of the order.

[17] For the reasons that I have set out above, I find that the delivery of the plaintiffs' notice of amendment of the particulars of claim is an irregular step.

[18] In terms of rule 30, the court has a discretion to set aside an irregular step which would prejudice the second defendant in the conduct of its case, see *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* **1999 (2) SA 599** (TPD) at 611C-F; *Trans-African Co Ltd v Maluleka* **1956 (2) SA 273** (A) at 276 F-H and *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* **1992 (4) SA 466** (W) at 496 G. The onus is on the second defendant to set out the facts upon which prejudice can be established.

[19] According to the second defendant, prejudice arises from the consequences of being deprived the right to object to the amendments before they were effected. The introduction of a third plaintiff to the action without a joinder application also renders the amended particulars of claim excipiable and it would be cumbersome and costly to launch an exception after the amendment has been effected whereas an objection to the amendment before it is effected would undoubtedly save time and costs.

[20] The plaintiffs countered that the second defendant was not prejudiced as the notice of amendment was filed in terms of the court order. I disagree.

[21] I'm of the view that the second defendant will be prejudiced if the irregular notice is allowed to stand, for the reason that: a substantial amendment which involves an introduction of a new party to extant proceedings can only be granted if it will not cause an injustice to the affected party which cannot be compensated by a cost order. The question of whether or not an injustice may arise can only be determined through the method prescribed in rule 28 (1) which provides the affected party with an opportunity to deliberate on the amendment before it is effected to consider whether to object to it or assent to it. (*Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* **2001 (4) SA 211** (W) at 216; *Devonia Shipping Ltd v MV Luis*

(*Yeoman Shipping Co Ltd Intervening*) **1994 (2) SA 363** (C) at 369F-H; *Imperial Bank Ltd v Barnard NO and Others* **(349/12) [2013] ZASCA 42; 2013 (5) SA 612** (SCA) (28 March 2013) at para 8.

[22] The plaintiffs insist that there is nothing improper about the step they have taken therefore, if the irregular notice is allowed to stand the second defendant will have to embark on a laborious and costly process of launching an exception against the amended particulars of claim which includes serving the plaintiffs with a notice to provide the plaintiffs with an opportunity to remove the cause of complaint within a stated period, the notice must be served within 10 days of receipt of the impugned pleading and only after the *dies* for removal of the cause of complainant or response to the notice has expired can the second defendant launch the exception application. See Rule 23.

[23] In the premises, I'm inclined to exercise my discretion in favour of the second and set aside the plaintiffs' notice of amendment as an irregular step. There is no reason why the costs should not follow the result

[24] The following order is granted:

- (1) The notice of amendment filed by the respondents on 14 April 2021 is declared an irregular step, it is accordingly set aside.
- (2) The respondents shall pay the costs jointly and severally one paying the other to be absolved.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

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