

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2119/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
29 March 2021	
DATE	SIGNATURE

In the matter between:

RIRHANNDZU BEATRICE NGOBENI

APPLICANT

and

GOVERNMENT EMPLOYEES PENSION FUND

RESPONDENT

JUDGMENT

MOGALE, AJ

INTRODUCTION

[1] This is an opposed application for the respondent leave to supplement by the applicant.

[2] There is a court order granted on the 11th December 2019 by Honourable Madam Justice Phahlane where the following was ordered:

2.1. The respondent is to, within 5days of service of this order to comply with Rule 3(5)(a) of the Uniform Rules of Court, to apply for Leave from the above Honourable Court to file futher affidavits.

2.2. In the event that the Respondent fails to comply with the order in Paragraph 1 above, that the applicant may return to court, with the same papers duly supplemented for further relief, including an order Striking out the respondents' opposition to the main application

ISSUES TO BE DETERMINED

[9] The court has to determine whether the respondent complied with the court order within 5days of service and obtain leave to supplement. Whether the court should accept the fact that, the respondent, as a party instituted the proceedings has withdrawn leave to supplement.

EVIDENCE BEFORE COURT

[10] Advocate Rapeo for the applicant submitted that the respondent failed to obtain leave to supplement. Without being granted leave by the cout to file supplementary affidavit, the respondent filed a supplementary answering affidavit on the 17 February 2020. The applicant further submitted that the respondent cannot merely supplement prior leave being granted, further that the respondent application is defective. The applicant contents that, there is no basis for these matter to proceed as there is no compliance with the rules of court and requested the court to disregard the supplementary affidavits

submitted without leave being granted. The respondent also failed to file their heads of arguments

- [11] Advocate Kgomongwe on behalf of the respondent argued that submission of their heads of arguments was is not relevant to this matter. That the respondents initially proposed to supplement their papers dates 28 March 2018 and 29 August 2018 when they seek leave to supplement from Honourable Madam Phahlane but they changed their minds when they file Notice of Withdrawal. In terms of Rule 41 they are the dominis litis in this matter and they have a right to make that decision without the consent of either the court not the applicants. They will only need the consent of the applicants if the matter was set down. Heads of arguments will be submitted in the main application and leave to supplement has been withdrawn.
- [12] The respondents also argued that the applicants failed to comply with the a rules of court by their failure to Join Norah Refilwe Sesabula (Matumba) to this proceedings. The court will be paralised to attend the main application if there is non-joinder.
- 13] Advocate Rapea's replied that, application to join Norah Refilwe Sesabula (Mutamba) has been granted by the the court as per court order 11 March 2021, that the matter is postponed to the 27th October 2021 for Ms Mutamba to be served and further that the applicant is the one being prejudiced by all this. Addressing the issue raised by the respondents that they filed Notice of Withdrawal for leave to supplement, the applicant draw the court attention to the contents of Notice of Withdrawal which reads as follows:
" *BE PLEASED TO TAKE NOTICE that the Respondent herein hereby withdraws its Notice of Motion and Supplementary affidavits dated 29 August 2018 and 28 March 2018*"
- [15] The applicant argued that Notice of Withdrawal does not read that it is a Notice to withdraw Leave to Supplement, that the wording is not clear and the respondent cannot argue that this was withdrawing the present application

- [16] The respondent argued that they filed their supplementary opposing affidavit by 13th October 2020. The applicants omitted to file their replying affidavit within the stipulated time frame, as a result, the respondent argued that their version stands uncontested and must be accepted but the court.

EVALUATION OF EVIDENCE

- [17] It is common cause that the respondent failed to comply with the court order dated 11 December 2019. The issue which is in dispute is whether the respondents' Notice of Withdrawal serves as a Notice to withdraw leave to supplement or not
- [18] Rule 41(1)(a) provides that, a person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs.
- [19] I do not agree with the submissions by the respondent that because they are dominis litis they did not need any permission or consent of either the applicant and or the court to withdraw the application. According to Rule 41, before the matter has been set down and thereafter, consent of the parties is needed or leave of court to withdraw such proceedings. The issue of costs is supposed to be addressed also.
- [20] The wording of the Notice of Withdrawal is clear, it is a withdrawal of notice of motion and supplementary affidavits dated 29 August 2018 and 28 March 2018. I find that, the respondents notice of withdrawal is not withdrawing leave to supplement as ordered by court and therefore, I am not persuaded that the respondent withdrew the leave to supplement. As a result, this court finds that the respondent supplementary answering affidavit filed without leave of the court be strike out.

- [24] I am satisfied that the applicant complied with the rules of court by Joining Mrs Mutamba to the proceedings

COSTS

- [25] Applicant has argued that the respondent failed to comply with the court order, failed to file heads of arguments and further that he does not respect the rules of law, as a result, the applicant argued that punitive costs should be awarded on an attorney and client scale. Respo
- [25] It is also an accepted legal principle that cost is in the discretion of the court. The basic rules were stated as follows in **Ferreira v Levin NO and Others 1996(2)SA 621 (CC) at 624B-C par 3**
- “ The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings*
- [26] Given the conduct of the respondent in this matter i was considering to grant punitive cost award to in favour of the applicant. However, in the exercise of my judicial discretion, i am inclined to make a punitive cost order as requested by the applicant
- [35] In so far as costs are concerned, it should follow the result and be awarded in favor of the applicant.

Consequently, the following order is made:

[35.1] The application for leave to supplement is dismissed

[35.2] The respondent is ordered to pay costs.

K J MOGALE

ACTING JUDGE OF THE
GAUTENG DIVISION,
PRETORIA

Electronically submitted.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 March 2021.

Date of hearing: The matter was heard by way of video conferencing or otherwise, the matter may be determined accordingly. The matter was set down for a court date of 16 March 2021.

Date of judgment: 29 March 2021

Heard on : 16 March 2021
For the Applicants : Adv P Rapea
Instructed by : Sekati Attorneys
For the Respondent : Adv Kgomongwe
Instructed by : State Attorneys
Date of Judgment : 29 February 2021