

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 1512/2018

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED
DATE: <u>5/12/19</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

TIPE SOLOMON BHAKOO MPHEPYA

APPLICANT

AND

STEPHINA MOKHONOANA

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant has brought an application seeking a declaratory order that he be declared the owner of site number 527 Phola Park Section Moshate. The respondent is opposing the applicant's application and has raised two points *in limine*. The first point *in limine* is that of alleged non-compliance with Rule 6(5)

(d) (ii) of the Uniform Rules of Court, and the second one is that of non-compliance with Rule 50 of the Uniform Rules of Court.

- [2] With regard to the first point *in limine*, the respondent is alleging that in terms of the applicant's notice of motion, she was required to file her answering affidavit within 5 days instead of 15 days. With regard to the second point *in limine*, the respondent is alleging that the same dispute has been decided at Mogalakwena district court under case number 443/2011 wherein she was declared the owner of the property. The losing party at Mogalakwena district court lodged an appeal to North Gauteng High Court, Pretoria, wherein the appeal was struck off the roll and the losing party did not take the matter further. It is the respondent's contention that the order of Mogalakwena district court still stand.
- [3] The applicant in his replying affidavit has stated that the 5 days was a typing error, hence they did not take any steps even after the respondent did not file her answering affidavit within 5 days. With regard to the second point *in limine*, the applicant has stated that he was not a party to the proceedings, but the matter was between the respondent and one Hlahla Malatji.
- [4] In terms of the applicant's notice of motion, the respondent was required to file her notice to oppose within 5 days of being served with the application, and thereafter to file her answering affidavit within 5 days of filing of the notice of intention to oppose.
- [5] The respondent has filed her notice of intention to oppose on the 6th April 2018 and the answering affidavit on the 3rd May 2018. The answering affidavit was filed outside the 5 days period as stated on the notice of motion, and also outside the 15 days period as required by the Uniform Rules of Court (the

Rules). The respondent has made an application for condonation for late filing of her answering affidavit, which application the applicant did not oppose.

- [6] In terms of Rule 6 (5) (d) (ii), any person opposing the grant of an order sought in the notice of motion must within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with the relevant documents. It is common cause that the applicant's notice of motion state 5 days instead of 15 days.
- [7] In terms of Rule 27 (3) a court may on good cause shown, condone any non-compliance with the rules. The determining factor is whether the breach of the rule renders the application a nullity, and also what prejudice did the respondent suffer.
- [8] In **Nampak Products Ltd v Sweetcorn (PTY) Ltd**¹ Ackermann J said:
- "In **Kruger v Minister of Police 1981 (1) SA 765 (T)** at 768, a case relied on by Mr Berg, it was held that where what has been done amounts to a nullity it cannot be condoned in terms of Rule 27 (3) but where there is a proceedings or step albeit an irregular or improper one it is capable of being condoned regardless of whether the Rule which has not been complied with is directory or mandatory and whether there has been substantial compliance or not."
- [9] The respondent has filed her answering affidavit. When filing her answering affidavit, she did not comply with the *dies* as stated on the notice of motion and also the 15 days' period provided for in the Rules. In this court counsel for the respondent has conceded that the respondent did not suffer any prejudice as a result of the time period specified on the notice of motion. The respondent has proceeded to file her answering affidavit despite the defective *dies* as stated on the notice of motion. In my view, the 5 days' time period instead of 15 days

¹ 1981 (4) SA 919 (T) at 922

does not render the applicant's application a nullity. I therefore, find that there is sufficient cause to condone the applicant's non-compliance with Rule 6 (5) (d) (ii).

- [10] The second points *in limine* is that of non-compliance with Rule 50. Rule 50 deals with civil appeals from magistrates' courts. The application before court is not a civil appeal from the magistrate court. The point *in limine* based on Rule 50 seems to be misplaced. However, the essence of the point *in limine* seems to be that of *res judicata*.
- [11] It is settled law that the requirements for the defence of *res judicata* are that there must be (i) concluded litigation; (ii) in relation to the same parties; (iii) in relation to the same things; (iv) based on the same cause of action. (See **Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd**)²
- [12] The parties under case number 443/2011 which was decided at Mokerong magistrate court were the respondent, Hlahla Malatji and Mokalakwa Municipality. The applicant was not a party to the proceedings. The cause of action in that matter was an eviction application launched by the respondent against Hlahla Malatji. The matter under case number 443/2011 might have involved the same property which is the subject of the dispute in the present case and the dispute at Mokerong has been concluded. However, it still lacks the other two essential elements which are in relation to the same parties and same cause of action.

² 2017 ZASCA 88 (6th June 2017))

[13] The parties in the present application are not the same as the one under case number 443/2011. The cause of action in the present application is that of a declaratory order, whilst under case number 443/2011 is that of eviction. I am therefore satisfied that the requirements of *res judicata* have not been satisfied for the respondent to succeed with her second point *in limine*.

[14] In the result I make the following order:

14.1 The respondent's two points *in limine* are dismissed with costs on party and party scale.



 MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,
 LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT : ADV MAWELA

INSTRUCTED BY : MAPHOTO INCORPORATE ATTORNEYS

COUNSEL FOR RESPONDENT : MR SH NYOFFU

INSTRUCTED BY : NYOFFU ATTORNEYS

DATE OF HEARING : 04 NOVEMBER 2019

DATE OF JUDGEMENT : 5TH DECEMBER 2019