

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO.: 504/2007

In the matter between:

MASIJADU CECILIA AUGUST

Plaintiff/Applicant

And

MINISTER OF HOME AFFAIRS

Defendant/Respondent

JUDGMENT

MAJIKI J:

1.

“Lord how many times shall I forgive someone who sins against me”, this matter’s background could be a possible example of a difficulty similar to what the biblical Peter was battling within his mind when he asked Christ this question.

The initial summons herein was issued on 30 April 2007. This is probably why on 17 March 2016, this court directed the Registrar to give priority to this “long outstanding matter” when allocating a date for set down.

In considering the present application I have had to look closely as to why we are still where we are with it, by doing so, also giving appropriate response to the applicant's invitation to me, to do so, in her reply to the rule 30 application.

2.

The applicant approached court in terms of **Rule 30** of the Uniform Rules of Supreme Court (rules) seeking an order declaring the fifth defendant's (respondent herein) filing, on 14 April 2016, of a document captioned "defendant's exception to the plaintiff's amended particulars dated 18 November 2014" to be an irregular step and that it be set aside. The application is premised on the fact that the said exception was filed out of time. The application is opposed by the respondent who has simultaneously sought an order postponing the **Rule 30** application and extension of the period for the filing of the exception to 17 days alternatively, condonation for the late filing. The application for the extension of this 15 day period for the filing of the exception to 17 days of the condonation thereof is in turn opposed by the applicant.

3.

It became common cause during the hearing of the matter that when the respondent filed the exception on 14 April 2016, it was two days out of time, of the leave granted to it, to file a plea or subsequent pleading to the plaintiff's amended particulars of claim dated 18 November 2014. The order granting the said leave was made 17 March 2016 following a **Rule 30** application against the respondent. At that time the respondent was late in her filing of a plea to the applicant's particulars of claim. Presently after the expiry of the 15 day period of the leave to file further pleading, granted on 17 March 2016, two days later, on 14 April 2016 the respondent filed the exception, dated 8 April 2016, without an application for condonation. On 19 April 2016, the applicant filed a

notice in terms of **Rule 30(2)** complaining that the filing of the exception was an irregular step, afforded the respondent an opportunity to remove the cause of complaint within 10 days, failing which an application in terms of **Rule 30** would be brought in the present form. On 15 June 2016 the applicant caused the **Rule 30** application to be set down.

4.

Subsequently, the respondent filed the notice of motion dated 27 June 2016, seeking the postponement of the hearing of the **Rule 30** application *sine die*, leave to file an answering affidavit to the **Rule 30** application, extension of the time period granted for the order of 17 March 2016, alternatively the condonation of the late filing of the exception. There is a history to the conduct of the litigation herein, which led to the order of 17 March 2016. According to the respondent the said history bears little relevance to the present application. This cannot be entirely correct, in particular in relation to the application for condonation, as correctly averred by the applicant.

5.

All the papers relevant to the **Rule 30** application had been filed and the application for condonation had also been filed. In the light thereof, there was no need for the postponement of the hearing of the **Rule 30** application. The respondent's application for leave to file the answering affidavit to this **Rule 30** application was granted.

6.

The issue for the application is whether the exception should be set aside as an irregular step and whether for the extension of the time period within which to file the exception or condonation for its late filing should be granted.

7.

It is common cause that due to ongoing failure for late imparting of information to the respondent's department by the State Attorney's office, Mthatha (State Attorney) on 14 November 2014 this court made an order that the State Attorney's office must forward all documentation served on it to the director of the respondent's department litigation. On 8 April (two days before the 12th, that being the expiry day of the days of the order of 17 March 2017), the respondent couriered the exception to the State Attorney for the latter to have it filed and served on 11 April 2016. The exception was served timeously after 12h00 on 12 April 2016, having been received by the State Attorney on that same date. It was however filed two days later, on 14 April 2016.

8.

The respondent was however not aware that the exception was not timeously filed. When it received the notice of set down on 20 June 2016 for hearing on 28 June 2016, as it later transpired in respect of the present matter, it believed that it was in respect of the exception.

It was on 22 June 2016, after investigations prompted by the fact that 28 June 2016 was during recess, when no opposed matters are sitting, and the receipt of an index served on the State Attorney on 20 June 2016, that they became aware that it was the present matter that had been enrolled; that it was in respect of a new **Rule 30** notice served by the plaintiff on 19 April 2016. It also transpired that service of the notice of motion pertaining to the said **Rule 30** notice had been accepted by the State Attorney on 10 May 2016 and was never transmitted to the respondent.

9.

No explanation was given by the State Attorney about the failure to forward the notice of motion and **Rule 30** notice to the director of the respondent's department litigation in compliance with this court order of 14 November 2014. Similarly, no explanation was given as to why the exception was not timeously filed, when it had been timeously served on 12 April 2016. The respondent was therefore not aware of even the notice affording it an opportunity to remove the cause of complaint on the 20 June 2016.

10.

According to the respondent it is incorrect for the applicant to regard the exception, for the reason that it was filed late, as constituting a step "which advances the proceedings one stage nearer completion". In its view the respondent failed to comply with court order, and, had it been aware that the exception was filed late, it would have moved an application for condonation. This is what was done immediately after the 22 June 2016 discovery. The respondent has no knowledge of how it would have removed the cause of complaint in terms of **Rule 30** when the issue related to non-compliance with the court order.

11.

The applicant took issue with the respondent's seemingly denying or trivialising the two day lateness of filing, referring to it as technical and constituting no prejudice on the applicant, she was served timeously.

According to the applicant the respondent has neither stated what steps it has taken to deal with the late or non-imparting of information to her officials by the State Attorney nor is the said conduct confirmed by the State Attorney.

Furthermore, it is not averred that same was not sent timeously to her attorneys of record.

12.

As regards the **Rule 30** application, a determination has to be made as to whether it is a justifiable course of action, in the present circumstances, that of having been filed beyond the 15 day period stipulated in the court order. If it is, whether the applicant has made out a case for the granting of the application.

13.

Rule 30(1) provides:

“party to a cause in which an irregular step has been taken by any other party may apply to court to set aside”.

Petse DJP (as he then was) earlier in this matter when ruling on the application for condonation for the late filing of the exception reasoned as follows: *“Although various dicta on judicta; authorities cited above was made in the non-compliance with the rule it is my judgment that by parity of reasoning they apply with equal force even in relation to non-compliance with orders for the principles is the same”* I agree with this reasoning and am also of the view that it should apply in relation to non-compliance with the time periods stipulated in the court order. The failure to comply with the court order of 17 March 2017, in as far as it relates to the time frames for the filing of pleadings. Such would not be contempt of court order in the normal sense, but more a non-compliance, specifically relating to the time period within which to file, as would otherwise have been stated in the rules. Despite that, it has been correctly held that an exception is pleading. However, its filing and the remedy for non-compliance, in these circumstances, is a hybreed in a sense, because the stage requiring a bar already passed when service of proceeding came into being at the instance of

the court. The effect of the court order was the re-opening for the filing which was previously not lately regulated by the rules. The **Rule 30** application would therefore be an appropriate course of action in the circumstances.

14.

The success or otherwise of the **Rule 30** application would be impacted on by my finding this the application for condonation. Again the principles applicable in determining the application for condonation were clearly restated together with relevant authorities by Petse ADJP in his judgment. Firstly, the party seeking condonation has to place before court cogent reasons explaining in full why the prescribed time frames could not be complied with. Secondly, the application for condonation must be brought immediately upon realising that she has not complied with the rules.

15.

The respondent has applied for leave to file answering affidavit and in that affidavit also deposed to facts seeking to have her late filing of the exception condoned. According to the respondent she only received the notice of set down on 20 June 2016 having been served on the state attorney on 15 June 2016. She was of the view that it was her exception that was to be heard, the date of set down being the 28 June 2016. On 22 June 2016 she received an index which indicated that it was a **Rule 30** application that was enrolled. It was only then that she became aware that her exception was not filed timeously and there had been a **Rule 30** notice served already, on 19 April 2016, upon the State Attorney.

16.

On the same 22 June 2016, her attorneys addressed the applicant's attorneys of record, recording that the respondent would oppose the **Rule 30** application and

that it should be postponed and tendered costs on an unopposed application scale, amongst others. On 24 June 2016 the applicant's attorneys responded advising that they would proceed with the matter and any application or representations with regard thereto should be made in court. They also turned down a request to have the pleadings and all correspondence forwarded to the respondent's department and her attorneys, by email. Later in the replying affidavit to the **Rule 30** application the applicant indicated her refusal was for lack of a substantive application.

17.

On 27 June 2017 the respondent's signed a notice of motion seeking a postponement of hearing of the **Rule 30** application and extension of time within to file, directed in the order of 17 March 2017, alternatively, condonation for the late filing of the exception. There is no indication of when it was served but the notice of application thereto was filed on 28 June 2016.

18.

The reason for filing the exception two days late, on 14 April 2017, the filing of the condonation application on 28 June 2016 has been furnished to be that the applicant was not aware until 22 June that the exception was not timeously filed. This has met strenuous resistance from the applicant. According to the applicant, the respondent waited until towards the end of *dies* to prepare the exception. There is no explanation why the state attorney, who was timeously served, did not transmit the **Rule 30** notice to the respondent or her attorneys.

19.

According to the respondent, immediately when it came to her official's attention that the exception did not find its way to court timeously, they started the process leading to the application for condonation dated 27 June 2016.

20.

The applicant on the other hand is of the view that the respondent has had a long history of breaches and non-compliance with court order in this matter. Petse ADJP had refused a previous application for condonation and strongly disapproved the conduct of the respondent. The respondent continues to flout rules and disobey court orders and simply ask for condonation thereafter. Even the order of 17 March was allowing the respondent indulgence on one of her breaches. The application is not *bona fide*.

21.

It was submitted on behalf of the respondent during the hearing of argument that the exception is good. The respondent had no duty to oversee the actions of the members of South African Police Services who arrested the plaintiff. No allegation has been made which causally link the respondent to the conduct complained of by the applicant. There is no link between the actions of the respondent, as an authority responsible for issuing the identity document and the damages the applicant alleged that she suffered as a result of being arrested, detained and charged.

22.

I would like to revert to the issue relating to the history of the matter. Regarding the most proclaimed judgment of Petse ADJP, at Par.7 the learned Judge made the following comment “..... *there is not a shred of evidence tendered by Gwebindlala as to why the application for condonation of **Rule 23(1)** notice or exception (depending on whatever the real intention of Gwebindlala) was not instituted upon him realising that the filling of the defendant’s **Rule 23(1)** notice on Monday 2 February 2009 was out of time by the day*”.

The learned Judge took a swipe at the conduct of the respondent's erstwhile attorney for filing condonation after 9 months, in the main. Unfortunately, the respondent had to bear the consequences of the court's wrath.

23.

Following the refusal of condonation application the applicant decided to re-open the matter by amending her particulars of claim. Further, the order of this court of 14 November 2014 (also sought and granted in circumstances where the respondent had failed to comply with the rules) ordering the state attorney to forward all documentation served on it to the respondent's litigation department, together with the request on 22 June 2016, albeit after circumstances leading to the genesis of issues in this matter had occurred, indicate that there had been a problem with the forwarding of documents by the state attorney to the respondent. The respondent has averred that it is a statutory requirement that the service of documents on the respondent be effected on that office, hence over and above, she sought means to ensure that documents are somehow also forwarded to her department. Finally, in this regard, despite the existence of the judgment of Petse ADJP, this court on 17 March 2017 in the exercise of its discretion deemed it reasonable and appropriate to allow the respondent an opportunity to file further pleadings.

24.

The other relevant aspect in the history of this matter is the conduct of the applicant herself. She has submitted that the matter has taken too long at the instance of the respondent which offends the principle of finality in litigation. This cannot be, the applicant herself has changed the version of her claim no less than three times since the commencement of her action in 2007 up to 18 November 2014 when her final further amendment to particulars of claim was filed.

25.

In the final analysis, I am of the view that despite the many chances that the respondent has been in breach of the rules in the conduct of this matter, I must still arrive at a finding that is informed by the circumstances specifically relevant to the particular default at hand, taking into account the issue of fairness. Unlike in the matter before Petse ADJP the application for condonation herein was made immediately after the respondent became aware that the **Rule 30** application was enrolled. This was communicated to the applicant's attorneys on the same day of receipt of the index of **Rule 30** application, which gave the respondent knowledge for the first time of late filing of the exception. The respondent's averment, supported by the facts surrounding the attempts to have documents also forwarded by the applicant to her officials, remain undisputed. Those throw out any doubt with regard to the fact that out relevant documents, timeously served on the state attorney were not forwarded to the respondent or her officials. The state attorney timeously received the exception and served it but failed to file it.

26.

I agree that with the respondent that there is merit in the exception and is worthy of being tried.

27.

In the circumstances, I am satisfied that the respondent has made out a case for condonation for the late filing of the exception. I also agree that no prejudice was suffered by the applicant. She was timeously served with the exception. To the applicant's comfort, condonation of the respondent's failure is not granted without qualification. Unlike Christ's answer to Peter's question, which said continue to forgive without putting it any conditions to it. There are

fundamental requirements which had to be met by the respondent for her to be given another chance.

28.

With regard to costs, I am mindful of the fact that a party who seeks indulgence has to go to pay the costs for such. However, in the circumstances of this case, the applicant was approached on 23 June advising the rule 30 application would be opposed and condonation would be sought for the late on the exception. The removal or postponement of the matter was requested and unopposed scale costs were tendered. The reasons for the request and failure to file timeously were given in full, but the applicant decided to have the matter run full course as an opposed application. When she unsuccessfully opposed it I find no reason to spare her from paying the costs of its opposition.

IN THE RESULT IT IS HEREBY ORDERED:

1. The respondent's application for leave to file answering affidavit to the **Rule 30** application is hereby granted.
2. The late filing of the exception is hereby condoned.
3. The applicant is hereby ordered to pay the costs of application for the condonation application.
4. The **Rule 30** application is hereby dismissed with no order as to costs of the application being made.

B. MAJIKI

JUDGE OF THE HIGH COURT

HEARD ON : 31 AUGUST 2017

DELIVERED ON: 30 JANUARY 2018

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