

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO:1194/2016

In the matter between:

NDORUM JOINT VENTURE

APPLICANT/PLAINTIFF

AND

MINISTER OF TRANSPORT,

NATIONAL & 3 OTHERS

RESPONDENTS/DEFENDANTS

JUDGMENT

DAWOOD, J:

1. The Applicant herein brought an application for an order in the following terms:
 - a) That the Exceptions filed by the Second and Third Respondent be and are hereby set aside.
 - b) That the Second and Third Respondent are directed to file their pleas to the particulars of claim, if, any within 15 days of grant of this order.
 - c) That costs of this application are reserved for determination by the trial court.
2. At the hearing of the opposed matter and after argument was presented by the respondent the applicant sought to amend the relief sought to read:
 - a) That the purported exception filed the purported exception filed by the Third Respondent be and is hereby set aside.
 - b) That the Third Respondent is directed to file its plea to the particulars of claim (if any) within 15 days of the grant of this order.
 - c) The Applicant also sought costs of the application despite asking for it to be reserved for determination by the trial court in the notice of motion.
3. The Respondent brought a counter application wherein they sought an order in the following terms:
 - a) That the Third Respondent be granted leave to amend its exception dated 18 April 2017 in line with the proposed amendment in its notice of intention to amend dated 12 June 2017
 - b) That the third respondent be condoned for failure to comply with time periods as contemplated in the rules.

- c) That any party opposing this application be ordered to pay costs.
 - d) Further and or alternative relief.
4. I have taken due cognisance of the voluminous averments made in the papers and the extremely helpful heads of arguments presented by both sides.
 5. For the sake of brevity I do not propose to refer to them extensively.
 6. Suffice it to say that the Applicant made cogent arguments that the conduct of the litigation on behalf of the third defendant was without doubt to put it very mildly unacceptable and bordering on an abuse of the court process.
 7. The Applicant clearly sought more than simply a dismissal of the exception so it was correctly argued on his behalf that section 30A accordingly was not applicable since they did not merely seek the dismissal of the exception but a direction that the third defendant files its plea.
 8. The Applicant accordingly was not precluded by the provisions of Rule 30 from bringing the present application. This application went beyond the ambit of Rule 30 and accordingly their failure to utilise the provisions of Rule 30A prior to the launching of the application is not fatal to the launching of this application nor does it render the application defective without giving the Respondent one final opportunity to put its house in order.
 9. I however am of the view that it will be going to far if this court were to preclude the party from utilising procedures such as an exception that are provided for in the rules and compel them to file a plea in exercising its powers in respect of Rule 27.

10. The Applicants/Plaintiffs frustrations in the manner in which this purported exception and the previous ones have been filed is perfectly understandable having regard to the history of this matter with the 3rd defendant even to date not getting it right and now seeking to amend and file a proper exception and have the late filing condoned.
11. The Third defendant has briefly:
 - a) Filed a notice in terms of Rule 23 (1) on the 27 October 2016
 - b) Filed a second notice in terms of Rule 23 (1) on the 14 February 2017 on the same terms.
 - c) Filed an exception on the 20 March 2017.
 - d) Filed a notice of withdrawal of exception on the 23 March 2017
 - e) Filed a third notice in terms of Rule 23 (1) on the 23 March 2017
 - f) Filed a second exception not signed in terms of the rules on the 19 April 2017.
12. The third defendant has clearly made a mockery of the rules of court and glibly states that it has not been barred thereby implying that it can continue flouting the rules of the court with impunity until the other party bars them from doing so.
13. This attitude on the part of a state organ that has constitutional obligations is to be frowned upon. The applicant has set out these obligations quite clearly in their application papers and it shall not be repeated herein.
14. The Third Respondent/Defendant flouted the rules of court and made a mockery of the same by flagrantly disregarding the same in the manner they utilised the rules.

15. When they realised they were out of time instead of applying for condonation at that stage they simply re-issued their notice to bring it back with the ambit of the Rules. They then simply withdrew the same and filed a further defective one.
16. The manner in which they have approached this matter clearly not a situation that was envisaged in any of the cases referred to by the Third Defendant/Respondent.
17. It is well after the Applicant launched the application that the third defendant sought to amend and then brought an application for condonation and even at that stage did not properly deal with the reasons for failing to comply with the rules and filing and withdrawing the exceptions.
18. I however accept at the same time that the Third Defendant has throughout expressed a firm intention to raise these exceptions and it cannot be gainsaid that it was indeed communication issues with their local state attorney, even in the absence of confirmation to that effect from the local state attorney, that led to these exceptions not being properly before court timeously.
19. I am extremely loath in the circumstances despite my prima facie views with regard to the exception, to shut the door on the third defendant despite the blundering, inept, inexcusable, and incomprehensible manner in which this litigation has been approached by the Third Defendant thus far.
20. I accordingly, albeit reluctantly, am disposed to grant the Third Defendant one final indulgence by granting the condonation and allowing them a final opportunity to file a proper exception in its amended form within 5 court days of grant of this order despite the appalling manner in which the Third defendant has conducted this

litigation thus for which boards on an abuse of the process of this Court.

21. In order to further ameliorate the prejudice that the applicant has suffered as a result of the delays in bringing this exception to court, the DJP has agreed that he may be approached on or before the 13th April 2018 by the parties to grant this matter a preferential date for the hearing of the Exception on the opposed roll with the parties to be placed on such terms as are deemed appropriate for the filing of further documents and heads of argument as may be agreed upon or ordered.
22. The conduct of the third defendant despite the fact that I am albeit reluctantly, disposed to granting it a final indulgence clearly warranted the bringing of the application and despite my granting the indulgence sought by the third defendant as a mark of my displeasure of the manner in which the litigation was conducted, I am nonetheless disposed to in the circumstances of this case to order the third defendant to pay the plaintiff's/applicant's costs.
23. I am further of the view that to bring about finality to this matter and to prevent further delays being caused by the third defendant flouting the rules of this Court an exercise of the powers in terms of Rule 27 is warranted in the event that the third defendant does not comply with the order timeously and put its house in order and file a proper timeous exception.
24. The order accordingly will grant the third defendant the indulgence it seeks but at the same time in the event of its non-compliance with the order grant the relief sought by the Applicant.
25. I accordingly make the following order:
 - i) That the Third Defendant's failure to comply with the time periods contemplated in the rules be and is hereby condoned.

- ii) The Third Defendant is granted leave to amend its “exception” dated 8 April 2017 in line with the proposed amended in its notice of amendment dated 12 June 2017 and to serve and file its duly signed and amended Exception within 5 court days of granting of this order.
- iii) The Plaintiff and Third Defendant are directed to approach the DJP of Mthatha on or before the 13th April 2018 to accord the matter such preference as he deems appropriate.
- iv) In the event of the Third Defendant failing to file his exception within 5 court days of the grant of this order he shall:-
 - a) *Ipso facto* be barred from filing any further exceptions; and
 - b) The Third Defendant shall have to file his plea within 20 court days upon the lapse of the 5 court days with no further indulgences being entertained.
- v) The Third Defendant is directed to pay the Plaintiff’s/Applicant costs of the application inclusive of the costs of the hearing of the opposed motion on the 15 march 2018 and the filing of heads of argument and core heads of argument such costs to include the costs of two counsel.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

15 MARCH 2018

JUDGMENT DELIVERED:

29 MARCH 2018

FOR THE PLAINTIFF:

MS OLSEN WITH MR KEMP

PLAINTIFF'S ATTORNEYS:

SMITH TABATA ATTORNEY

34 STANDFORD TERRACE

MTHATHA

FOR THE DEFENDANT:

MR KUNJU – 2ND

MR L NMUSI – 3RD

MR MTSHABE – 5TH

DEFENDANT'S ATTORNEYS:

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