

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

14/9/12
CASE NUMBER: 15290/2011

In the matter between

V J MASEMOLA

and

MINISTER OF POLICE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	PLAINTIFF
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
14/9/2012 DATE	 SIGNATURE

DEFENDANT

In Re:

CASE NUMBER: 15291/2011

In the matter between

R M MAPODILE

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

KUBUSHI, J

- [1] Two matters, case number 15290/2011 and case number 15291/2011, were set-down for hearing before me on the 22 August 2012. The parties had at a pre-trial conference held on the 29 August 2011 agreed that the two matters must be consolidated and heard together for purposes of the merits. A day before the hearing the parties concurred that because of certain discrepancies in the pleadings the cases should not be proceeded with and must be postponed *sine die*. The parties could however, not agree about costs.

- [2] On the said date two applications were placed before me, namely, an application to consolidate the two cases under case number 15291/2011 and an application to postpone the consolidated case *sine die*. Both applications were granted. The issue of costs, in regard to the postponement was left for my determination.
- [3] The plaintiff's counsel contended that the defendant occasioned the postponement and should bear the wasted costs. The defendant's counsel was initially of the view that costs should be costs in the cause. However, when the plaintiffs' counsel insisted on the costs being borne by the defendant, he then argued for the wasted costs to be awarded against the plaintiffs because they requested the postponement.
- [4] According to the plaintiffs' counsel the matter had to be postponed because, firstly, the defendant did not effect its amendment to the plea in time; secondly, the defendant's discovery was defective and the documents discovered were inadequate and illegible; lastly, the defendant had not replied to the plaintiffs' request for further particulars.
- [5] I am of the opinion that this is not a case where costs should be awarded to either of the parties in this matter. Both parties adopted a *laissez faire* attitude in the manner they handled the pleadings and left it too late for proper service to be effected in respect of the pleadings mentioned by the plaintiffs' counsel.

- [6] On the 8 June 2011, more than a year before the hearing of this matter, the defendant's attorneys were served with a notice to discover. They, however, failed to discover within the time stipulated in the notice. The plaintiffs' attorneys did not raise this issue with the defendant's attorneys. Nor did they take advantage of rule 35 (7) of the Uniform Rules of Court to compel the defendant to discover.
- [7] The parties held a pre-trial conference on the 29 August 2011. On the same date the defendant's attorneys were served with another rule 35 (1) notice. The defendant failed to discover and again the plaintiffs did not compel it.
- [8] On the 12 July 2012 the defendant served the plaintiffs with a notice of intention to amend its plea. The plaintiffs did not object to the proposed amendment. The defendant failed, however, as required by the rules, to effect the amendment within the time stipulated. This resulted in the plaintiffs not being able to effect consequential amendments to their pleadings.
- [9] The parties held another pre-trial conference on the 8 August 2012 where the plaintiffs' attorneys raised the defendant's failure to effect the amendment and to file its discovery. The parties agreed that the defendant would discover on or before 16h00 on the 16 August 2012.

- [10] On the same day, that is the 8 August 2012, the plaintiffs served the defendant with a request for further particulars. It was further agreed, at that conference, that the defendant would consider the request and decide the course to take. The plaintiffs were to be advised of the course taken on or before 16h00 on the 20 August 2012, that is, two days before trial. As at the date of trial the defendant had as yet not reverted to the plaintiffs. The plaintiffs' counsel contended that this request was occasioned by the defendant's failure to discover. This argument, in my view, is not sustainable. The plaintiffs' way out of this impasse, if indeed there was an impasse, was, as explained hereunder, to compel the defendant in terms of rule 35 (7) to discover. There was no need for them to request further particulars if as their counsel say they were trying to remedy the defendant's failure to discover.
- [11] On the 13 August 2012 the defendant effected the amendment to its plea. In terms of rule 28 (8) the plaintiffs had fifteen days within which to effect any consequential amendments to its pleadings, however, the amendment was effected only five court days before the trial date. The plaintiffs' counsel contended that the amendment was effected out of time and as such the plaintiffs had to start the whole process afresh. Whilst on the other hand the defendant's counsel was of the opinion that it had filed timeously. My view is that at this late a stage nothing could really be accomplished. If the amendment was effected in time, the plaintiffs would not have had sufficient time to effect

any consequential amendments to their pleadings. If the amendment was effected out of time the defendant would also not have had enough time to apply for condonation for effecting the amendment out of time or for extension of time within which to effect the amendment. In both these scenarios postponement was unavoidable.

- [12] On the 14 August 2012, four court days before the trial date the defendant served its discovered documents. There was, however, no proper discovery according to the plaintiffs' counsel because, firstly, the discovery was not on oath as required in terms of rule 35 (1) and (2) and secondly, the discovered documents were inadequate and not legible. His contention was that discovery was very important and without it the matter would not be proceeded with. Failure by the defendant to file proper discovery, according to him underscored the importance of discovery and the matter ought to be postponed. He referred me to the judgment in **BURGER v KOTZE & ANOTHER** 1970 (4) SA 302 (W).

- [13] The defendant's counsel on the other hand contended that the defendant had discovered within the time agreed to at the pre-trial conference and that the issue of the eligibility and the inadequacy of the documents should have been taken up with the defendant before the date of trial.
- [14] My view, however, is that both counsel's argument does not have merit. Both parties were in default. The defendant failed to discover within twenty days after service of the rule

35 (1) notice on it. The notice was served twice and each time the defendant failed to comply.

[15] The plaintiffs on the other hand also had a duty to have raised the defendant's failure to discover by compelling it to do so in terms of rule 35 (7). They could have used this process anytime since 7 July 2011, twenty days after the first service, or at the least since 27 September 2011, twenty days after the second service, but they failed to do so. They had almost a whole year within which to implement this process. A party must take reasonable steps in the circumstances of the case to avoid a postponement, and should not be self-righteous and remain silent when he or she knows the other party is in default, especially when such a default has continued over a lengthy period, as in this case. See WEBSTER v WEBSTER 1992 (3) SA 729 (ECD) at 734F – H.

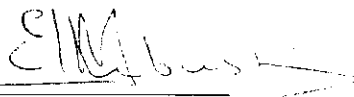
[16] I, respectfully, differ with the reasoning of Colman J in BURGER v KOTZE & ANOTHER *supra*, that, the plaintiff in such circumstances is under no obligation to make use of a remedy available to him or her under rule 35 (7). It has been held that the rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the court. See Federated Trust Ltd v Botha 1978 (3) SA 645 (A) at 654D – F.

[17] In this instance, the plaintiffs being not satisfied about the defendant's discovery, the available remedy for them then was to compel the defendant for a proper discovery in terms of rule 35 (7) or to try to cure the illegibility and inadequacy of the discovered documents by using the rule 35 (3) process. However, I am mindful of the fact that the time left then would not have been enough to can accommodate any of these two processes. In such circumstances, a postponement was inevitable.

[18] To my mind, both parties were at fault. They had been aware of the date of trial since 6 September 2011, almost a year before the trial, and should have circumvented this postponement. My view is that each party must as a result bear its own costs for this postponement.

[19] Consequently I make the following order:

19.1 Each party to pay own costs.


E.M. KUBUSHI

HEARD ON THE	: 22 AUGUST 2012
DATE OF JUDGMENT	: 13 AUGUST 2012
PLAINTIFFS' ATTORNEYS	: L J LESO ATTORNEYS
PLAINTIFFS' COUNSEL	: ADV H VAN TONDER
DEFENDANT'S ATTORNEYS	: STATE ATTORNEY, PRETORIA
DEFENDANT'S COUNSEL	: ADV Z Z MATEBESE