

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

DATE: 17 November 2009
CASE NO: 33714/08

UNREPORTABLE

In the matter between:

O MAGAGULA

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

J U D G M E N T

PHATUDI (J)

- [1] The plaintiff instituted these legal proceedings against the Defendant claiming delictual damages he sustained as a result of his unlawful and wrongful arrest occasioned by members of the South African Police Services.

- [2] At the commencement of the hearing, Mr Geach, counsel for the Plaintiff, placed on record that this matter was before Ismail AJ on the 29 April 2009. He submitted that the court ordered separation of merits and quantum as envisaged in terms of Rule 33 (4) of the Uniform Rules of this court.
- [3] Mr Geach further placed on record that determination of liability and special plea is what is before this court. He further placed on record that the Plaintiff was ordered to bring a condonation application for the late filling of notice as required in terms of Section 3 of **INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGAN OF STATE ACT 40 OF 2002** (the Act). The matter was then postponed **sine die** with the sole purpose of bringing such application. The Plaintiff was, a result thereof, mulcted with punitive costs.

[4] Subsequent thereto. Mr Geach handed in a copy headed;

“PLAINTIFF REPLICATION (AS AMENDED)” dated 7 February 2007. It is noted that the said “Replication” has neither been signed by the Plaintiff nor the Plaintiff’s legal representative and has not been served on the Defendant.

[5] Mr Mokotedi, counsel for the Defendant, objected to the handing in of the said document. He placed on record that on the 29 April 2009, the special plea was fully argued before Ismail AJ. He further said that the Plaintiff then requested for postponement to afford them (Plaintiff) an opportunity to bring an application for condonation of the late filling of “NOTICE OF INTENDED LEGAL PROCEEDING TO BE GIVEN TO ORGAN OF STATE” as provided in terms of Section 3(4) (a) of Act 40 of 2002.

- [6] He further submitted that nowhere in the papers or the record is there a do we find “**NOTICE OF INTENTION TO AMEND REPLICATION.**” He said he is surprised to note the handing in of document dated 7 February 2007 purporting to amend the replication.
- [7] Mr Mokotedi further submitted that since the order dated 29 April 2009 up to and until 16 November 2009, there is no application for condonation that was served on the defendant. He referred me to and read the provisions of Section 3(1) (a) and (b) as well as those of subsection 4 (a) on record.
- [8] Further thereto, Mr Mokotedi submitted that no application for condonation in terms of Section 3(4) (a) of Act 40 of 2002 was instituted despite the court order of 29 April 2009. He further submitted that the document handed in is not an application but a pleading (replication).

[9] He submitted further that the application must be supported by affidavit explaining, among others,

“Why the notice in terms of Section 3(1) (a) and (b) read with subsection 2(a) was not instituted within 6 months”.

He said that there is not such an application before court.

[10] He lastly submitted that the Defendant had indicated to the Plaintiff that they will still raise the special plea which they intend that it be dealt with before considering liability when the matter stood down on 11 November 2009.

[11] Mr Mokotedi finally submitted that the special plea be upheld with costs ***de boniis propriis*** in that,

11.1 The Special plea was argued before Ismail AJ on the 29 April 2009.

11.2 The court postponed the matter **sine die** to afford the Plaintiff an opportunity to bring an application for condonation of the late filing of the notice envisaged in terms of Section 3(1) (a) and (b) read with subsection (2) (a) of Act 40 of 2002.

11.3 The Plaintiff applied for date of trial and proceeded to set the matter down instead of bringing the application as ordered.

11.4 He referred me to **Khan v Mzovuyo Investments (Pty) Ltd 1991 (3) SA 47 (TKCD)** where the court awarded costs **de boniis propriis** due to the Plaintiff's "attorneys slack and unconcerned handling of his client's case... namely to enrol the matter while it was not right for hearing... and postponed on previous occasion, amounts to such unreasonable conduct as to warrant the present order as to costs."

[12] In rebuttal thereto, Mr Geach conceded that there is no formal application for amendment. He, from the bar, drafted and handed in a hand written **“NOTICE OF INTENTION TO AMEND”** seeking an order to amend the replication by deleting “the second sentence of First paragraph (AD paragraph 1) and by adding the following at the end of paragraph 2.2, alternatively Plaintiff seeks condonation in terms of Section 3(4) of Act 40 of 2002.

[13] He referred me to paragraph 4, 5 and 8 of Particulars of Claim and a letter of intention to sue as the evidence that the court should consider as being relevant for application for condonation.

[14] He further submitted that the idea of handing in the **PLAINTIFF REPLICATION (AS AMENDED)** is to bring the amendment to the pleadings. He submitted that the said “amendment” be accepted, alternatively, the application as

per hand written **NOTICE OF INTENTION TO AMEND**
handed in be accepted.

[15] He conceded that the Plaintiff sought postponement on the 29 April 2009 with the sole purpose of applying for condonation of late filing of the notice envisaged in terms of Act 40 of 2002.

[16] He, however, submitted that no where has it been stated that a “Notice of Motion” application be brought.

[17] Mr Geach further referred me to the Pre-trial minute dated 11 November 2009 indicating that there is,(i) “no complaint” of non formal application and (ii) that there is no suggestion that special plea be separated from the determination of liability.

[18] On perusal of the Court Order dated 29 April 2009, as noted on the Court's file, it is ordered:

“3. Matter is postponed sine die. Plaintiff to pay wasted costs on attorney and client basis. **Plaintiff to bring application for condonation for late filing of Notice of intended proceedings against organ of state.**”

[19] I further noted that the last portion was not recorded by the Registrar when typing the order. It is however, common cause that the matter was so postponed with the sole purpose of granting the Plaintiff an opportunity to bring an application for condonation of the late filing of the **NOTICE OF INTENDED LEGAL PROCEEDINGS TO BE GIVEN TO ORGAN OF STATE.**

[20] It is further common cause that this order was occasioned by the argument advanced by the Defendant on its Special Plea.

[21] Mr Geach concedes that there is no such application before court but handed in **PLAINTIFF'S REPLICATION (AS AMENDED)**.

[22] The issue to consider is what the court on 29 April 2009 meant by "Plaintiff to bring application for condonation for late filing of Notice" as envisaged in term of Section 3 (1) (a) and (b) read with subsection (2) (a) of ACT 40 OF 20023.

[23] I am of the view that the court (on 29 April 2009) intended the Plaintiff to bring an application on "Notice" supported by affidavit as required in term of Rule 6 (II) of the Uniform Rules of this court which provides that

"Notwithstanding the foregoing subrules, interlocutory and other applications may be brought on notice supported by such affidavits..., as the case may require and set down as directed by the judge."

[24] In my view, I find that my brother Ismail AJ's order intended the Plaintiff to state its "reasons" for late filing of the notice as required, on affidavit to enable the sitting court to consider whether to grant such condonation or not.

[25] The "evidence" set out in paragraph 4,5 and 8 referred to by Mr Geach as sufficient in granting the condonation, is not "evidence under oath" and thus could not be accepted by the court. The court (on 29 April 2009) would have accepted paragraph 4, 5, and 8 of Particulars of Claim as sufficient enough to proceed with the determination of liability if the said "evidence" was sufficient for the court to proceed. I am not inclined to accept the amended replication as same is not signed by Counsel or Plaintiff's attorney with right of appearance in the High Court or the Plaintiff himself. The rules provide that the pleadings be signed by the counsel or Plaintiff himself. This has not been done.

[26] Having considered the plaintiff's concession of not having brought the said application as ordered, I find the Plaintiff's conduct to be slack to set this matter down while the matter is not ripe for hearing. Mr Mokotedi submitted that the Plaintiff, instead of filing the application for condonation, he, on the 6 May 2009 applied for trial date. He, on the 15 July 2009 proceeded to set the matter down with pre trial minute being served on 4 November 2009. This court is not in a position to determine liability and adjudicate on the special plea without the said application for condonation.

[27] In my final analysis, I find the Plaintiff to have failed to bring the application for condonation for the late filing of the **NOTICE OF INTENDED LEGAL PROCEEDINGS AGAINST THE ORGAN OF STATE** as envisaged in terms of Section 3 (4) (a) of Act 40 of 2002, and as such, the matter stand to be removed from the roll.

[28] It is trite that costs follow the event. The Plaintiff's conduct of setting the matter down without bringing the application for condonation as ordered, warrant a punitive cost order.

[29] I as a result, thereof, make the following order;

[29.1] The matter is removed from the roll;

[29.2] Plaintiff is again ordered to bring an application, supported by affidavit, for condonation for late filing of notice as envisaged in terms of Section 3 (4) (a) of Act 40 of 2002 within 10 days from date hereof;

[29.3] Plaintiff is ordered to pay the Defendant wasted costs including the costs of 11 November 2009 on Attorney and client scale.

AML PHATUDI
JUDGE OF THE NORTH GAUTENG HIGH COURT