

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5186/07

In the matter between:-

MALUTI-A-PHOFUNG MUNICIPALITY

Applicant

and

PRELLEX 192 CC t/a
PELLEX 192 CONSULTING SERVICES
(CK2004/058223/23)

Respondent

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 25 SEPTEMBER 2009

[1] This is an opposed application for condonation for the late filing of the applicant's notice of objection to the respondent's notice of intention to amend its summons.

[2] The respondent issued summons for R396 818.00 and obtained default judgment for payment of the aforesaid amount. The applicant then brought an application for rescission of that judgment. By mutual consent, an order for rescission of

judgment was granted, after which the respondent served and filed its declaration.

- [3] The respondent then served a rule 28 notice notifying the applicant of its intention to amend paragraphs 1 and 2 of the summons, the intention being to bring the amount stated in the summons in line with the one mentioned in the declaration. After the expiry of the prescribed 10-day period within which the applicant could file an objection to the proposed amendment, the respondent proceeded to amend the summons in accordance with the notice of intention to amend. On the same day, the applicant then filed its notice of objection to amend the summons. The respondent accordingly filed a notice in terms of rule 30 on the basis that the notice filed by the applicant was irregular. The applicant then brought this application for condonation of its late filing of the objection. The only relief prayed for in that application is that the applicant's non-compliance with the rule 28 time-limits be condoned.

[4] If the relief sought by the applicant were to be granted, then the applicant's non-compliance would be condoned. The problem here is that the applicant filed its notice of objection four days too late, by which time the summons had already been properly amended in accordance with the rules. Granting an application for the condonation of the late filing of the notice of objection would therefore not change the fact that the summons has already been amended. This on its own is a sufficient ground to dismiss this application.

[5] As stated above, the applicant only seeks condonation of its late filing of the objection to amend. No other remedy is sought. Assuming I was prepared to grant the relief sought, such relief would serve no useful purpose for the applicant as it has not sought an order "varying or cancelling the amendment". The granting of such a relief would, clearly lead nowhere. This, in my view, is another ground on which this application falls to be dismissed.

[6] It is trite law that for condonation to be granted, “good cause” must be shown. The court has a discretion to grant condonation and in exercising this discretion has regard to:

- 6.1 the degree of non-compliance;
- 6.2 the explanation of the delay;
- 6.3 the prospects of success;
- 6.4 the importance of the case;
- 6.5 the nature of the relief;
- 6.6 the other party’s interest in finality;
- 6.7 the convenience of the Court;
- 6.8 the avoidance of unnecessary delay in the administration of justice;
- 6.9 the degree of negligence of the persons responsible for the non-compliance

SEE: HARMS: CIVIL PROCEDURE IN THE SUPREME COURT at p. B-182 (par. B27.7 – at fn. 17 to 20)

The degree of non-compliance is slight – being only five days.

The explanation for the delay (not filing an objection on **6 November 2008**, but only on **10 November 2008**) is that one of the applicant's officials was not available to provide full instructions. This explanation is, in my view, wholly insufficient.

The Applicant avers that for the whole period between **23 October 2008** and **6 November 2008** he could not obtain instructions, which he got by **6 November 2008**, but only filed the objection on **10 November 2008**. There is thus an absolute dearth of explanation for the passing of time since **23 October 2004**.

- [7] The Applicant's current complaint is that the Respondent, by way of the amendment, introduced a new cause of action and should have issued a fresh summons and complied with Act 40 of 2002. The respondent is adamant that it actually did not introduce a new cause of action.
- [8] In the original summons, the cause of action was set out as follows:

“Payment of the sum of R396 818,00 (three hundred and ninety six thousand eight hundred and eighteen rand) in respect of services rendered by Plaintiff to Defendant during the period February 2007 to July 2007 on Defendant’s special instance and request.”

As already amended, it now reads:

“Payment of the sum of R310 852,00 (three hundred and ten thousand eight hundred and fifty two rand) in respect of services rendered by Plaintiff to Defendant during the period February 2007 to July 2007 on Defendant’s special instance and request.”

It is for exactly the same period, namely services rendered ‘... during the period February 2007 to July 2007 ...’. In effect only the amount was changed. An invoice, i.e. no. 8, was attached to the declaration. This invoice 8 is for the amount of R310 852-00). Respondent’s claim is thus for R310 852-00 arising from its invoice 8, relating to serviced rendered in the period 20/3/07 to 28/6/07. Respondent’s claim is not for R396

818-00 relating to its invoice 7, as stated in the summons, relating to services rendered in the period 16/3/07 to 4/5/07.

What is more critical, in my view, is that both invoices 7 and 8 related to **services rendered** albeit for placing certain people in different positions employment. It is thus obvious that the Respondent in the amendment does not rely on a new cause of action.

[10] In my view, the amendment that has already been effected, does not introduce a new cause of action at all. There are thus no prospects of success. As stated before, the explanation for the late bringing of the condonation application was also not satisfactory. I find that the applicant has not made a proper case for the granting of condonation.

I accordingly grant the following order:

The application is dismissed with costs.

M.B. MOLEMELA, J

On behalf of the applicant:

Adv. M.J. Ponoane
Instructed by:
Ponoane Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Adv. H.J. Benade
Instructed by:
Naudes
BLOEMFONTEIN

/sp