

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

Case No. 482/2022

In the matter between:-

ANDILE GATTERY HARRY

Applicant/Plaintiff

and

DETECTIVE NOZUKO BOOI

First Respondent/First Defendant

MINISTER OF POLICE

Second Respondent/Second Defendant

JUDGMENT

BANDS J:

[1] The applicant, as plaintiff, sued the first and second respondents, as defendants, for damages arising out of an alleged defamation, contending that on or about 6 April 2022 at the Boxer Superstore, Peddie, Eastern Cape, the applicant was wrongfully and maliciously defamed by the first respondent, who at all relevant times was acting within the course and scope of her employment with the second respondent.

[2] The applicant, at paragraph 10 of his particulars of claim, in dealing with his compliance with section 3(1) of the Legal Proceedings against Certain Organs of State Act 40 of 2002 (*“the Act”*), pleads that:

“The plaintiff has complied with the statutory provisions relating to notice to an organ of state prior to the institution of proceedings. Notwithstanding demand and/or statutory notice delivered to the minister of police in terms of the Institution of Legal Proceedings against Certain Organs of State Act read with the State Liability Act the defendant has refused, ignored, and/or neglected to pay the aforesaid sum or any portion of it.”

[3] This was met with a special plea of non-compliance by the respondents, the gravamen of which appears from paragraphs 3 to 5 thereof, which read as follows:

- “3. The 2nd defendant herein is not in receipt of the notice contemplated by section 3(1) of Act 40 of 2002 and has not consented to the institution of legal proceedings without such notice.*
- 4. Alternatively, the said notice has not been served on the National Commissioner and the Provincial Commissioner as required by Act 40 of 2002.*
- 5. In the premises, the plaintiff has failed to comply with section 3(1) of Act 40 of 2002 and his claim stands to be dismissed with costs.”*

[4] In response, the applicant filed a replication attaching the required statutory notices addressed to National and Provincial Commissioner of the South African Police Services, together with proof of their transmission via registered mail. For reasons discussed later, it is necessary to quote the body of the replication:

“AD SPECIAL PLEA FOR NON-COMPLIANCE WITH ACT 40 OF 2002

AD PARAGRAPHS 1-2 OF THE SPECIAL PLEA

- 1. The contents of these paragraphs are admitted.*

AD PARAGRAPHS 3-5 OF THE SPECIAL PLEA

2. *The contents of these paragraphs are denied.*
3. *In amplification thereof, the plaintiff sent the required statutory notices to the National and Provincial Commissioner of the South African Police Services in line with the Act 40 of 2002. The plaintiff attaches hereto letters to the National and Provincial Commissioner dated the 14th April 2022 as annexures “AGH1” and “AG2”, respectively.*
4. *The above referred letters were sent to the National and Provincial Commissioner via registered mail. The Plaintiff attaches hereto copies of registered mail postage slip (sic), to the National and Provincial Commissioner which were sent on the 28th April 2022 as annexures “AGH3” and “AGH4”, respectively.”*

[5] The respondents, being satisfied that the applicant had complied with the statutory provisions, gave notice of their intention to amend their plea, which ultimately had the effect of the withdrawal of the special plea, without a tender for costs.

[6] Aggrieved, the applicant gave notice of her intention to apply for an order that the respondents pay the costs occasioned by the withdrawal of their special plea in accordance with rule 41(1)(c) of the Uniform Rules of Court. The respondents opposed the application. It is this dispute, with which I am seized.

[7] At this juncture I must mention that the costs forming the subject matter of the dispute between the parties are limited to those incurred in the drafting and delivery of the applicant's replication, which is hardly extensive in its ambit (as is evident from

the above). This was conceded by the respective counsel appearing on behalf of the parties. That the matter escalated into a full-blown opposed application, with the incurrance of the unnecessary costs attendant upon doing so, which must far outweigh the costs forming the subject matter of this application, can hardly be said to be justifiable. Moreover, the resultant loss of valuable court time, and resources is regrettable.

[8] This is aggravated by the fact that the application was, in my view, ill-conceived from inception given that the applicant's reliance on rule 41, in the circumstances of this case, is misplaced. This is an aspect which escaped both parties.

Uniform Rules 41(1)(a) and 41(1)(c) and their applicability

[9] The relevant subsections to the Rule provide as follows:

“41(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal any may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party;

(b) ...

(c) If not such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.”

[10] Self-evidently, in order to seek redress under rule 41(1)(c), the subject matter of the withdrawal must constitute a “*proceeding*” within the context of rule 41(1)(a). The general principle is that the party withdrawing is liable to pay the costs of the

proceedings unless very sound reasons exist as to why the other party should not be entitled to his/her costs. The reason for this is manifest and appears from the headnote of *Germishuys v Douglas Besproeiingsraad*,¹ which correctly reflects what is stated by van Rhyn J at 300D-E:

“Where a litigant withdraws an action or in effect withdraws it, very sound reasons must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff’s or applicant’s institution of proceedings.”

[11] It is this hurdle that the applicant in the present matter does not pass, for the simple reason that a special plea, by its very nature, is a special defence raised on the pleadings by a defendant, which has as its object the delay of proceedings or the quashing thereof² - a special plea is neither *instituted* by a defendant, nor does its withdrawal amount to a withdrawal of a “*proceeding*” for the purposes of rule 41(1)(a).

[12] Whilst the reason for this appears to me to be axiomatic, the fact that neither party was alive to this aspect in the present proceedings, both of whom enjoyed legal representation, seems to illustrate that a certain level of confusion regarding the interpretation and applicability of the rule prevails. For this reason, I deal, in brief, with the interpretation of the subrule under consideration.

¹ 1973 (3) SA 299 (NC).

² *Brown v Vlok* 1925 AD 56.

[13] The Supreme Court of Appeal, in *Chetty v Hart*³ reiterated the well-established approach to statutory interpretation as follows:

“It is helpful to reiterate that the method of attributing meaning to the words used in legislation involves, as a point of departure, examining the language of the provision at issue, the language and design of the statute as a whole and its statutory purpose. So when the lawmaker uses particular words to achieve its purpose they must be given effect. In so doing a court will apply ordinary rules of grammar and syntax. It is not permissible to ignore or distort the meaning of the words to achieve its purpose. For in so doing a court will be substituting its own words for those of Parliament. But if the words used are reasonably capable of bearing more than one meaning, the consequences of the divergent interpretations must be examined so that a meaning that is likely to further rather than hinder its purpose is adopted. In this regard a meaning that is more sensible and business like is to be preferred over one that has a contrary effect.”

[14] Simply put, and as repeatedly endorsed by the Constitutional Court, a purposive approach is to be adopted in statutory interpretation with the wording of the provision in question being construed harmoniously with the apparent scope and objects of the law.⁴

[15] The court in *De Lange v Provincial Commissioner of Correctional Services, EC*,⁵ whilst considering section 276A(3) of the Criminal Procedure Act 50 of 1977, held that “*proceedings*”, for the purposes of rule 41(1)(a) are those envisaged by the rules “*in which there is a lis between the parties, one of whom seeks redress or the enforcement of rights against the other.*” As the applicant had no right enforceable

³ 2015 (6) SA 424 (SCA).

⁴ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC); and *BE obo JE v MEC for Social Development, Western Cape* 2022 (1) SA 1 (CC).

⁵ 2002 (3) SA 674.

against the respondent in the proceedings under section 276A(3), the court rejected the applicant's contention that they constituted proceedings falling within the ambit of rule 41.

[16] The word "*proceedings*" is not defined in the rules of court, however the definitions of "*action*" and "*application*", in rule 1, provide a suitable starting point for the enquiry. Whilst an "*action*" is defined as a proceeding commenced by summons, an "*application*" means a proceeding commenced by notice of motion or other forms of applications provided for by rule 6. It follows, somewhat obviously, that the aforesaid are proceedings for the purposes of rule 41. This is congruous not only with the finding of the court in *De Lange*, but also with the definition of "*legal proceedings*" as contained in Black's Law Dictionary,⁶ being "[a]ny proceedings authorised by law and instituted in a court... to acquire a right or to enforce a remedy." The word "*instituting*", which precedes the words "*any proceedings*" in rule 41(1)(a), denotes the commencement of such proceedings.

[17] Where the confusion appears to arise is the reference to, and categorisation of, a particular step, or series of steps (which step/s neither constitute/s the institution of an action nor an application), within the broader context of the enforcement proceedings as a "*proceeding*" in itself, for the purposes of rule 41. This could never be so.

[18] The correct meaning to be attributed to the word "*proceedings*" is further illustrated with reference to the Afrikaans text of the rule, which reads as follows:

⁶ Bryan A Garner *Black's Law Dictionary* 9 ed.

“41(1)(a) Iemand wat 'n geding ingestel het, kan dit voor terrolleplasing te eniger tyd en daarna met die toestemming van die partye of verlof van die hof, terugtrek. In elke geval moet hy 'n kennisgewing van terugtrekking aflewer, en hy kan daarin inwillig om koste te betaal. Die takseermeester takseer die koste op versoek van die ander party.

[19] In drafting rule 41(1)(a), the Rules Board utilised the word “*geding*” for “*proceedings*”, which directly translates into English as a “*lawsuit*”. Accordingly, in amplification of the findings of court in *De Lange*, and with the risk of being tautologous, there can be no doubt that what the rule envisages are the withdrawal of legal proceedings instituted by way of action or application (proceedings) in the High Court, in which there is a *lis* between the parties, the purpose of which is to seek redress or the enforcement of rights against the other. Upon the withdrawal of such proceedings, the *lis* between the parties comes to an end. Notwithstanding this, rule 41(1)(c) provides a mechanism whereby a successful litigant, by reason of the withdrawal, is able to pursue the costs associated with the proceedings.

[20] This is dissimilar to the position which follows the withdrawal of a special plea, in which the *lis* between the parties remains extant. In such circumstances, the court seized with the proceedings is best placed to deal with the costs associated with the withdrawal as part of its enquiry into costs at the conclusion of the proceedings. To attribute any other meaning to the word under consideration, within the context of the rule and with due regard to its purpose, would be, at best, non-sensical and arbitrary leading to untenable results.

Conclusion

[21] Having come to the above conclusion, the respondents were not bound by rule 41(1) in withdrawing their special plea. Concomitantly, the remedy provided for under rule 41(1)(c) is not available to the applicant and accordingly the application must fail.

[22] In light of the fact that neither party to these proceedings was alive to the above issue, coupled with what I have stated in paragraphs [7] and [8] of this judgment, I am of the view that it would be appropriate that each party should be ordered to pay their own costs of the application.

[23] Accordingly, the following order is issued:

1. The application is dismissed.
2. Each party is ordered to pay their own costs of the application in terms of Uniform Rule 41(1)(c).

I BANDS
JUDGE OF THE HIGH COURT

Date heard: 29 February 2024

Date of judgment: 8 April 2024

For the applicant: Mr C Nohaji

Instructed by: Cinga Nohaji Inc.
36 Chamberlain Road

Berea
East London

For the respondents: Adv C.C Young

Instructed by: State Attorney
Old Spoorinet Building
17 Fleet Street
East London