



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case No: JS 889/11

In the matter between:

**ELS, SUSARAH**

**Applicant**

and

**GAUTENG DEPARTMENT OF EDUCATION  
(SEDIBENG EAST)**

**Respondent**

**Heard : 12 February 2014**

**Delivered : 12 February 2014**

**Date edited: 28 March 2014**

**Summary:** Notice of exception set aside. Respondent barred from delivering opposing papers.

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***EX TEMPORE JUDGMENT***

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STEENKAMP, J:

[1] This is a two-fold application that has been set down for hearing

today. That is a point *in limine* raised by the applicant in the main application, that is Ms Susarah Els, to whom I shall refer as the employee; and an exception raised by the respondent. The respondent is the Gauteng Education Department, Sedibeng East. I shall refer to the respondent in the main action as the Department.

[2] The application set down for hearing today arises from a statement of claim that was delivered by the employee as long ago as October 2011. Despite that statement of claim having been properly served on the Department, the Department did nothing to oppose it for a year. On 17 October 2012, I made an order in the following terms:

“The matter is removed from the roll by agreement.

The respondent, that is the Department, is ordered to pay the applicant’s wasted costs.

The respondent is ordered to file opposing papers and an application for condonation within ten days, failing which it will be barred from doing so.”

[3] The Department and the State Attorney did not comply with that court order. The State Attorney delivered a document headed “Notice of intention to oppose” on 4 November 2012, after the *dies* in terms of the court order had expired. It also delivered a “Notice of exception” on 1 November 2012. It did not deliver an application for condonation. The exception raises grounds of exception that may well be valid. It may well be that the employee’s statement of claim is vague and embarrassing and it may not even disclose a course of action. But given the point *in limine* raised by Mr *Goldberg*, this Court is not in a position to decide on the merits of the exception today.

[4] The simple fact is that the State Attorney and the Department did not comply with the order of this Court of 17 October 2012. In this regard, Mr *Goldberg* helpfully referred me to the case of *McNally N.O. & others v Codron and Others* [2012] ZAWCHC 17, a judgment of 9 March 2012 of Yekiso J. In that judgment, Yekiso J noted (in para 17) that, in terms of High Court Rule 26, any party who fails to deliver a subsequent pleading within the time stated in Rule 25 shall be *ipso facto* barred.

“If any party fails to deliver any other pleading within the time laid down in these rules or within an extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleadings within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such period as may be agreed between the parties shall be in default of filing such a pleading and *ipso facto* barred.”

[5] Yekiso J goes onto say at paragraph 18:

“It will be noted that a failure to deliver a replication or subsequent pleading, as required in terms of Rule 25 of the Uniform Rules, will result in an automatic barring of a party failing to deliver a replication or subsequent pleading.”

[6] The learned judge then goes on to find that an exception is in fact a pleading as contemplated in the rules. In this Court, in a number of cases, for example, in *Eagleton v You Asked Services*, (JS309/05, 18 July 2008), Basson J held that while this Court’s rules do not deal specifically with exceptions, the High Court rules have to be adopted. And Basson J referred in that regard, in paragraph 15, to the principles dealing with exception and the purpose of a statement of claim set out by Waglay J, as he then

was, in *Harmse v City of Cape Town* [2003] 24 ILJ 1130 (LC) at paragraphs 6 to 10.

[7] Very recently on 6 January this year, my brother van Niekerk J gave judgment in the case of *Makhanye v South African Airways* (JS 265/13), and dealt with an analogous position where an earlier order of this Court granted one party, the applicant in that case, leave to amend his statement of claim within 30 days of the date of the order, failing which the claim would be regarded as dismissed. In that case, as in this one, the party did not comply with the time period set down in an order of Molahlehi J.

Van Niekerk J then goes on to say in paragraphs 8 to 10:

“There is no application for condonation that accompanied the amendment to the statement of claim, and at no stage has the applicant sought condonation from this Court for what amounts to a breach of the order. We are not dealing here with the breach of a regulation or a rule or a directive. The applicant has acted in breach of a court order, thereby placing himself technically in contempt of this Court.

The terms of the order granted by Molahlehi J on 24 July 2013 are clear - if the applicant failed to file the amended statement of claim within the prescribed period of 30 days, his claim would be regarded as being dismissed.

I see no reason, given particularly the absence of any application for condonation or indeed any explanation whatsoever for the late filing of the amended statement of claim to consider that the consequence foreshadowed by Molahlehi J's order should be any different. On that basis alone, the referral of the applicant's claim stands to be dismissed.”

[8] The same pertains to this case. The order of this Court of 17 October 2012 could not have been any clearer. It says in terms:

“The respondent is ordered to file opposing papers and an application for condonation within ten days, failing which it will be barred from doing so.”

[9] The respondent did not comply with that order. It is barred from filing opposing papers. *Caedit questio*.

[10] With regard to costs, I must unfortunately note that Mr *Pheto*, who argued valiantly and eloquently before me today, did so without any proper instructions from the State Attorney. It appeared quite clearly that he was not even aware of the point *in limine* that was pertinently raised by the employee as long ago as November 2012, and reiterated in Mr *Goldberg*’s heads of argument delivered to the State Attorney in September 2013. That conduct is simply inexcusable. Neither party addressed me on the question of a possible *de bonis propriis* cost order, and that is the only reason why I decline addressing the question of whether that would have been appropriate.

[11] As it stands, the reason why the respondent is barred from proceeding with any opposition to the employee’s statement of claim or from having its exception heard is simply the negligence of either the State Attorney or the Department or both. There is no reason why they should not be ordered to pay the employee’s costs.

#### Order

[12] I therefore make the following order:

- 12.1 The notice of exception is set aside as an irregular step.
- 12.2 The respondent (the Department) is barred from delivering any further opposing papers.
- 12.3 The respondent (the Department) is ordered to pay the costs of the applicant (Ms Els).

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Steenkamp J

#### APPEARANCES

APPLICANT: A Goldberg (attorney)

RESPONDENT: A M Pheto

Instructed by the State Attorney, Johannesburg.