REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

Case number: 22258/02

In the matter between:

GREENBERG, L.G. Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
11/05/2012 DATE SIGNATURE

KHUMALO, A.T. First Respondent

THE MINISTER OF POLICE Second Respondent

and

Case number: 23302/02

In the matter between:

GREENBERG, L.G. Applicant

and

DU PREEZ, R. First Respondent

THE MINISTER OF POLICE Second Respondent

JUDGMENT

POTGIETER, AJ:

[1] The above two applications have been enrolled together and involve the same disputes for decision. The applicant in both applications is the same party. The applicants and respondents respectively are represented by the same legal representatives.

[2] Both applications concern substantive applications for condonation of the non-compliance by the applicants with certain provisions of the South African Police Service Act (Act 65 of 1995), plus alternative or ancillary relief.

[3] The merits of the relief applied for is not now under consideration. To be decided firstly is an objection *in limine* raised by the respondents in both matters on the same grounds. At issue is the application of a practice directive applicable in this Court concerning matters struck off the roll by reason of non-appearance.

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[4] In this application, the applicant filed an affidavit styled "*Affirmation in respect of re-instatement of application for condonation plus costs and additional facts in support [sic] application for condonation.*" This affidavit is dated 15 March 2012. The relevant background facts set out in this affidavit are the following:

4.1 The application for condonation was first set down for hearing on 16 November 2010. On that occasion, the application was postponed as an indulgence to the respondents.

4.2 The application was thereafter set down by agreement between the parties on 23 November 2010. On this occasion the application was struck from the roll by reason of the non-appearance of the applicant's representative, at the behest of the respondent's representative.

4.3 The matter was re-enrolled for hearing on 1 March 2011. On this occasion the Court refused to hear the matter as no explanation was available explaining the circumstances as to why the matter had been struck from the roll on 23 November 2010.

4.4 The matter was then re-enrolled for a fourth time for hearing on 10 April 2012, when it came before me.

[5] The explanatory affidavit sets out the reasons for the non-appearance pursuant to the set down for 23 November 2010. On the face of it, an acceptable explanation is given. It is unnecessary to say anything more about this.

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[6] The applicant seeks similar relief in this application to the relief sought in the first mentioned application.

[7] A similar explanatory affidavit was filed as in the first application and styled the same. This affidavit is dated 17 February 2012. The following background facts are set out:

7.1 The application for condonation was first set down for hearing on 11 November 2010. As an indulgence to the respondent, the matter was postponed on that occasion.

7.2 By agreement between the parties, the matter was again set down for hearing on 23 November 2010. As in the first application, the matter was struck from the roll by the Court and for the same reasons.

7.3 The matter was re-enrolled, together with the first application, for hearing on 10 April 2012, when it came before me together with the first application.

[8] As is the case in the first application, the explanatory affidavit sets out the reasons for non-appearance on 23 November 2010. I say nothing about them.

OBJECTION *IN LIMINE*

[9] As alluded to, at the hearing before me on 12 April 2012 (on Tuesday 10 April 2012 I allowed the matters to stand down until Thursday 12 April 2012), the respondents raised an objection *in limine*. The objection was to the effect that the applicants had failed to comply

with the applicable practice directive set out in Chapter 9.22 of the Practice Manual of the South Gauteng High Court ("*the practice manual*"). Counsel for the respondents submitted that both applications should be dismissed in the result or, alternatively, be struck from the roll again.

[10] The relevant provisions of the practice manual under consideration are the following:

"9.22 STRIKING FROM THE ROLL

...

4. *If a matter has been struck from the roll, counsel in the course of the week in which the matter was struck from the roll, may seek that the matter be re-enrolled. The matter will only be re-enrolled if a proper explanation for non-appearance is given. In appropriate circumstances, the explanation must be on oath.*

5. *If a matter has been struck from the roll it may only be re-enrolled for a subsequent week if simultaneous with the filing of the J118, an affidavit explaining the previous non-appearance is filed.*

6. *The negligence or ignorance of the practice manual of counsel or legal representative will not necessarily constitute an acceptable explanation for the non-appearance.*

..."

[11] Counsel for the respondents in broad terms submitted the following:

11.1 That the implementation of the practice directive required of the applicants not only to file affidavits of explanation, but also to have adopted the procedure of a formal interlocutory notice of application, served on the respondents (containing the affidavits of explanation), requesting leave for enrolment and allowing the respondents to oppose this by filing opposing affidavits.

11.2 That, failing the procedure outlined, and/or failing the respondents having been given a prior and adequate opportunity to oppose the enrolment, and/or failing a proper explanation by the applicants in the affidavits of explanation, the matters could not be enrolled again, which would in effect constitute "the end of the matters" (counsel's words, meaning the end of the road for the applications).

[12] This objection brings into focus a consideration of the meaning, status and effect of the practice directive to which I have made reference to ("the practice directive").

[13] Rule 6(5)(f) of the Uniform Rules of Court ("the Rules of Court") provides that parties (whether the applicant or the respondent) may apply to the registrar to allocate a date for the hearing of an application. The registrar is an officer of the High Court appointed in terms of Section 34

of the Supreme Court Act (Act 59 of 1959). The appointment of the registrar is to meet the requirements for the administration of justice or the execution of the powers and authority of the High Court.

[14] The requirements in order to apply for a date to be allocated for the hearing of a matter are set out in Rule 6(5)(f). All that is required in the case of a standard opposed application following the usual course is the delivery of a replying affidavit or the expiry of the period allowed for the filing thereof. On the face of them, the requirements of paragraph 5 of chapter 9.22 of the practice manual are not consistent with Rule 6(5)(f). What is the effect of this? How should the inconsistency be resolved?

[15] Chapter 1 of the practice manual deals with the "*application of the practice manual*". The stated objective is to achieve uniformity amongst judges in respect of practice rulings. It states that the judges of this court strive for uniformity in the functioning of the courts and their practice rulings. However, it emphasises that no judge is bound by the practice directives and that, accordingly, the practice manual is not intended to bind judicial discretion.

[16] As I see the matter under consideration the point that arises is not whether I should, in the exercise of my judicial discretion, consider whether or not I should apply the practice directive. The point is rather whether a practice directive inconsistent with the Rules of Court has any legal force or effect. Litigants need to know whether or not such a directive is to be followed, or, if not followed, what the consequence would be.

[17] The Supreme Court Act empowers the judge president of a provincial division to make rules regulating proceedings with reference to the times for the holding of courts, the placing on the roll of actions for hearing and the extension or reduction of time periods in terms of the Rules of Court.[1] In terms of Rule 1 of the Rules of Court "*action*" is defined to mean "*a proceeding commenced by summons or by writ in terms of rule 9*". Accordingly, the provisions of the Supreme Court Act as to the powers of the judge president to make rules are not relevant to the matters under discussion.

[18] It is trite that the High Court has inherent power to regulate its proceedings for the more effective administration of its judicial functions. These powers existed at common law and have been constitutionally entrenched[2]. However, although the High Court has inherent power to regulate its procedure:

"*There are... clear and definite limits to this power and the Court is not, merely in the interests of justice, at large to do or undo as it wishes in the field of adjectival law. The Rules of Court are delegated legislation, have statutory force and are binding on the Court....Thus, where a particular matter is provided for by the Rules and can therefore not be said to be deficient in that respect, the scope for the exercise of inherent powers is*

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[1] Section 43 of the Supreme Court Act 59 of 1959.

[2] Section 173 of the Constitution of the Republic of South Africa Act 108 of 1996. *Harmony Caterers (Pty) Ltd v Ford* 2002 (5) SA 536 (W) at 540 D-E (para 13).

limited to prevention of abuse of its process...[3]"

[19] Further, although a Court has inherent powers to grant relief not specifically provided for in the Rules of Court, such power will not be exercised as a matter of course:

"*The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly.*"[4]

[20] Also, neither a party nor a Court nor any 'practice' can simply avoid the application of the Rules of Court.[5]

[21] In my view, Rule 6(5)(f) of the Rules of Court provides authoritatively for the circumstances when a party may apply to the registrar for the allocation of a date for hearing ('set down' or 'enrolment') of an application. A party following the provisions of the rule is

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[3] *Western Bank Limited v Packery*, 1977 (3) SA 137 (T) at 141 B – G, 142 C-E. Since the promulgation of the Rules Board for Courts of Law Act 107 of 1985, the authority for making rules for the High Court vested in the Rules Board for Courts of Law, and not the heads of the High Court.

[4] *Moulded Components v Coucourakis and Another*, 1979 (2) SA 457 (W) at 462 H – 463 A.

[5] *Leppan v Leppan*, 1988 (4) SA 455 (W) at 457 G-H.

accordingly entitled to have its application allocated for hearing in accordance with the rule. There is no suggestion in the rule that the registrar has a discretion not to allocate a date for hearing and/or to impose a condition therefor.

[22] The wording of paragraph 5 of chapter 9.22 of the practice manual conveys a requirement additional to those contained in Rule 6(5)(f) of the Rules of Court in order to obtain an allocation for the hearing of an application which has been struck from the roll. I refer to the wording of the directive which suggests that such an application "*may only be enrolled... if ... an affidavit explaining the previous non-appearance is filed*".

[23] I do not see where the power to impose a requirement in addition to and inconsistent with that contained in Rule 6(5)(f) of the Rules of Court derives from, unless it has to do with the prevention of the abuse of this rule. However, non-appearance when a matter allocated for hearing is called does not to my mind without more constitute an abuse of process which requires or justifies the inherent powers of the High Court to be harnessed to supplement the requirements of Rule 6(5)(f) on a blanket basis.

[24] On my analysis the practice directive under discussion is procedurally incompetent, has no legal force or effect, and should not be applied by either the registrar or a Court to constitute a bar to (or additional requirement for) the allocation of a date (enrolment) for the hearing of an application.

[25] I pause to remark that our Courts should be focused on the speedy administration of justice and the avoidance of unnecessary costs. A literal application of the practice directive under discussion may have the undesirable consequence of impeding the expeditious processing of litigious matters. I am reminded of the comments by this Court in *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others*[6].

"*The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.*"[7]

[26] It follows in my assessment that any failure by the applicants in the matters under discussion to have filed explanatory affidavits, such as required by the practice directive, could not legally have been a bar to or a requirement for the enrolment of the applications to be heard. This is so despite the wording of the directive.

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[6] 1982 (3) SA 353 (W) at 355 G-H.

[7] See also *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 278 F-G.

[27] I have little doubt that one of the reasons for the introduction of the practice directive was to promote an orderly and disciplined approach by parties and their representatives to ensure that matters are dealt with timeously when enrolled and called. This is no doubt a salutary practice and non-compliance may influence costs orders to be made or disciplinary complaints to be laid with professional bodies. However, in my view, non-compliance cannot legally constitute a bar to re-enrolment and lead to a refusal by a Court to hear the matter. This would be tantamount to denying litigants the procedural rights they derive under the Rules of Court.

[28] I reiterate that in both the applications under discussion the applicants filed explanatory affidavits when they enrolled the matters. However, to my mind, this takes the matter no further, as the filing of the affidavits could not have constituted a valid requirement for proper enrolment.

[29] For these reasons I am of the view that the objection *in limine* is devoid of any merit.

[30] Accordingly, I make the following order:

30.1 The objection *in limine* is dismissed with costs.

DATED AT JOHANNESBURG ON THIS THE 11th DAY OF MAY 2012.

MvR Potgieter, AJ
Judge of the South Gauteng High Court, Johannesburg

APPEARANCES

For the applicants: C. Snoyman

Instructed by:

Larry Marks Attorneys

For the respondents: D.J. Joubert

Instructed by:

The State Attorney

Date of hearing: 12 April 2012

Date of judgment: 11 May 2012