



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNNESBURG**

CASE NO:

43238/2018

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

17 August 2020
DATE


SIGNATURE

**Heard on: 22 June 2020
Delivered on: 17 August 2020**

In the matter between:

KWAZIKWAKHE COMMUNITY PROJECTS (NPC)

APPLICANT

And

THE WASTE GROUP PROJECTS (PTY) LTD

RESPONDENT

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] The applicant brings this application that the filing of the amended pages to the respondent's particulars of claim dated 10 September 2019 be set aside.

[2] The applicant in this application is the defendant in the main action whereas the respondent herein is the plaintiff in the main action.

FACTUAL BACKGROUND

[3] The respondent instituted an action against the applicant in this court for damages in the amount of R 1 813 968-00 and ancillary relief sought. The applicant entered an appearance to defend the said action and the pleadings subsequently became closed.

[4] On 15 August 2019 the respondent served a notice in terms of rule 28(1) and (2) of the uniform rules of court, giving notice of its intention to amend its particulars of claim. The applicant did not file any objection to the proposed amendment. On 16 September 2019 the amendment was effected by serving the respondent's amended pages.

[5] On 20 September 2019 the applicant launched an application against the respondent to set aside the latter's notice in terms of rule 28(1) and (2) and the amended pages, which application the respondent opposes.

THE APPLICANT SUBMISSIONS AND *POINTS IN LIMINE*

[6] The applicant argues that the respondent's notice in terms of rule 28 served on 15 August 2019 fails to comply with rule 28(2) in that the applicant was not afforded an opportunity to object to the proposed amendment.

[7] The applicant further contends that the respondent's amended pages which were served on it on 16 September 2019 were served out of time. As a result of the late service of the respondent's amended pages, the applicant contends that it has suffered prejudice.

[8] The applicant further contends that the respondent's answering affidavit, in the present application, is not properly before Court in that:

8.1 The answering affidavit was served out of time; and

8.2 The answering affidavit does not comply with the regulations promulgated in terms of the Justices of Peace and Commissioners of Oaths Act 16 of 1963 in that the attestation clause in the answering affidavit refers to the deponent as "HE/SHE".

[9] In respect of paragraph 8.1 above, the applicant submits that whereas the respondent served its notice to oppose on 1st October 2019, it however only filed its answering affidavit on 18 October 2019, despite it having only 10 days within which to do same after having filed its notice to oppose. The applicant argues that on this basis the respondent's affidavit

is not properly before court, since the respondent did not invoke the provisions of rule 27 to seek condonation for non-compliance.

[10] With regard to the respondent's counter-argument that the applicant should have served it with a notice to remove the cause of complaint prior to taking the next step in terms of rule 30A, the applicant argues that equally the respondent had a duty to notify the applicant of its non-compliance with rule 30A regarding its launching of this application.

THE RESPONDENT SUBMISSIONS AND POINTS *IN LIMINE*:

[11] In reply to both the applicant's points *in limine* and main issues, the respondent contends that it is in fact the applicant who has failed to comply with the rules in launching this application, given what is provided for in rule 28(8). The respondent raises a point *in limine* arguing that the applicant ought to have complied with, *inter alia*, the above provision by giving the respondent a notice to remove the cause of complaint prior to taking the next step, which the applicant failed to do.

[12] The respondent further argues that the applicant is thus disentitled to the relief it seeks having regard to its failure to comply with rule 28(8), rule 30(2)(b) and rule 23 of the uniform rules and that such non-compliance renders its application fatally defective and stands to be dismissed with costs.

[13] Regarding compliance with Justices of Peace and Commissioners of Oaths Act 16 of 1963 and Regulations, the respondent argues that this issue is purely technical in nature, especially when regard is had to *inter alia*, paragraph 1 of the respondents' answering affidavit wherein it is clearly stated that the deponent is a major male attorney. The respondent argues that the failure in the attestation in the affidavit to identify the correct gender of the deponent cannot render the entire affidavit invalid. The respondent submits that the applicant's point *in limine* is not material and stands to be dismissed with costs.

[14] Regarding the applicant's complaint in its replying affidavit that the respondent's answering affidavit was served out of time in non-compliance with the uniform rules and thus not properly before court, the respondent submits that this point *in limine* is unfounded in that its notice of intention to oppose was delivered on 1 October 2019 and that the 15 days period in which the respondent ought to deliver its answering affidavit ought to have lapsed on 22 October 2019. It submits that its answering affidavit was served on 18 October 2019, a day earlier than the due date.

RE COMPLIANCE WITH RULE 28(1) AND (2)

[15] As already touched on in paragraph 11 above, the respondent argues that the notice in terms of rule 28 served on the applicant on 15 August 2019 substantially complies with rule 28 provisions and that despite it serving the amended pages one day late, it is not *ipso facto* barred from filing its amended pages outside of the time period provided for in such a rule. The respondent contends that regardless of its argument above, the applicant

elected not to object to the proposed amendment since it ought to have served a notice in terms of rule 30 prior to launching this application.

PREJUDICE

[16] The respondent submits that the amended pages were only served on 16 September 2019, one day after the due date of the 12th. It argues therefore that applicant did not suffer any prejudice resultantly, especially in light of the fact that the applicant did not allege a single fact in support of its alleged prejudice as it asserts. There is nothing substantive about the applicant's challenge of the respondent's amendment and the respondent asks that this application be dismissed with costs on an attorney and client scale, given the circumstances.

LEGAL PRINCIPLES/ GENERAL APPROACH TO PLEADINGS

[17] In **WM Mentz & Seuns (Edms) Bpk v Katzake 1969 (3) SA 306 (T)**, the Court held that non-compliance by a commissioner of oaths does not *per se* invalidate an affidavit and that a court could condone non-compliance.

[18] Rule 6(5)(d)(ii) provides that '*any person opposing the grant of an order sought in the notice of motion must within 15 days of notifying the applicant of his/her intention to*

oppose the application, deliver his/her answering affidavit, if any, together with any relevant documents'.

[19] Rule 30A provides that *'where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with'.*

[20] Rule 28(8) provides that *'any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the Court may determine, make steps contemplated in rule 23 and 30'.*

[21] Rule 28(2) provides that *'the notice referred to in sub-rule (1) shall state unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected'.*

ISSUES FOR DETERMINATION

[22] The following are the issues to be determined:

1. Whether the respondent's notice in terms of rule 28 served to the applicant on 15 August 2019 failed to comply with rule 28(2) of the uniform rules;
2. Whether the respondent's amended pages served to the applicant on 16 September 2019 were served out of time;
3. Whether the defendant suffered prejudice as a result of the late service of the respondent's amended pages; and
4. Whether failure to state the gender of the deponent of the answering affidavit is fatally defective.

ANALYSIS

[23] The nub of the applicant's contention is that the notice in terms of rule 28(1) and (2) of the respondent's amended pages be set aside since same does not comply with the uniform rules of court which non-compliance effectively constitutes an irregular step. It is common cause that despite the respondent stating that his notice is somewhat substantially compliant with the rules, it however argued against the contention that its amended pages set to be set aside. The respondent contends that the applicant itself equally fell foul of non-compliance in that on noticing the respondent's non-compliance, it ought to have served a notice in terms of rule 30 prior to launching this application in respect of the irregular step. However, the applicant elected not to object to the proposed amendment, which failure in itself constitutes an irregularity.

[24] It is my view that the issue of non-compliance with the rules cannot be considered outside the conspectus of the facts of the matter. It is common cause that to arrive at a just determination relating to non-compliance, the question of prejudice suffered by the applicant arising from such non-compliance becomes central and key. From the facts and the submissions made, it cannot be gainsaid that the respondent served the amended pages on 16 September 2019, that is, one day after the due date of the 12th. What I find to be astounding is that nowhere in the applicant's extensive arguments does it make a case regarding what sort of prejudice it suffered flowing from the service of the amended pages just a day after the due date. All it does is to make a sweeping statements regarding the alleged prejudice. It is my view that non-compliance does not give rise to prejudice *per se*, except where a party alleging same can adduce facts supporting such alleged prejudice, which in this application is nothing but unsubstantiated and bare allegation.

[25] On the facts, I fail to appreciate how service of a pleading just one day after its due date did or could have resulted in the applicant being prejudiced as alleged. In fact, I am of the view that, as argued by the respondent, the applicant's non-compliance with rule 30 is more damning, particularly in light of the fact that the applicant is the party which launched this application. Without venturing into the realm of speculation, it could well be that had the applicant complied with rule 30, perhaps the parties would not be where they currently find themselves

[26] Regarding the applicant's complaint in its replying affidavit that the respondent's answering affidavit was served out of time in non-compliance with the uniform rules and thus not properly before court, and considering the fact that the applicant reluctantly conceded during arguments that the respondent did indeed serve its answering affidavit in terms of rule 6(5)(d)(ii), I am of the view that this issue has become moot.

[27] Regarding compliance with Justices of Peace and Commissioners of Oaths Act 16 of 1963 and Regulations, I am of the view that the deponent's correct gender has been identified and clearly stated in that paragraph 1 of the respondents' answering affidavit, that is that the deponent is a major male attorney. In the premises, I find that there is nothing to justify the rendering of the affidavit invalid, in its entirety or otherwise.

[28] Regard being had to my findings and views above, I fail to appreciate why the applicant's particulars of claim including the amended pages should be set aside. Accordingly, I am satisfied that the applicant's points *in limine* including the main application stand to be dismissed with costs. However, the respondent does not succeed in its prayer regarding a punitive costs order against the applicant. In the result I make the following order.

ORDER

1. The application is dismissed with costs



Livhuwani Vuma

Acting Judge

Gauteng Local Division, Johannesburg

Head on: 22 June 2020

Judgment delivered: 17 August 2020

Appearances

For Applicant/ Defendant: Adv. P. Baloyi

Instructed by: Mphoke PK Magane Attorneys

For Respondent/Plaintiff: Mr Ndabeni

Instructed by: M. Ndabeni Attorneys