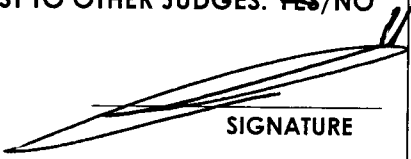




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>12 / 04 / 2016</u>	
DATE	SIGNATURE

12/4/16

CASE NO: 21578/12

In the matter between:

T OOSTHUIZEN

PLAINTIFF

AND

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MAVUNDLA. J.

[1] This matter was set down for hearing on the 22 March 2016. However, on the day of trial, the plaintiff, without filing a substantive application, sought a postponement of the matter, without tendering costs, as it is traditionally expected of a party seeking a postponement, further seeking a punitive costs order against the defendant on attorney and client scale contending that the defendant is to blame for the plaintiff's predicament in seeking the postponement.

[2] The reasons advanced for the postponement are that:

2.1 The defendant was on the 16 October 2013 ordered,¹ *inter alia*, to:

- (a) to amend its plea on or before the 18 November 2013;
- (b) reply to the plaintiff's pre-trial questions as contained in the pre-trial minutes conference held on the 11 September 2012, on or before the 18 November 2013;
- (c) reply to the plaintiff's request for further particulars for purposes of trial on or before the 18 November 2013;
- (d) file and serve its supplementary discovery affidavit on or before the 18 November 2013;
- (e) bring a substantive application seeking condonation for failure to comply with the conditions set out above, should he fail to comply with the current Court Order.

2.2 the defendant filed:

¹ Bundle A-Pleadings pages 1-104 paginated pages 103-104.

- (a) its notice of intention to amend its plea on the 19 November 2013;
- (b) its amended plea in terms of rule 28(7) on the 4 March 2016.²
- (c) replied to the plaintiff's request for further particulars on the 19 November 2013³.
- (d) its supplementary discovery affidavit on the 15 March 2016,⁴ which contained additional documentation not initially discovered.⁵ The additional documentation included copies of the bank notes allegedly found in the possession of the plaintiff on the day of his arrest.

2.3 It was further submitted that:

- (a) the defendant's late complying with the court order of the 16 October 2013, although it was one day late, is an irregular step which was not preceded by an application for condonation;
- (b) the filing of the intention to amend its plea and the supplementary discovery affidavit was also prejudicial to the plaintiff's preparation for trial in that it was served few days before the trial date.

[3] The defendant opposed the application for postponement, contending that although it was one day late in serving the notice of intention to amend and the reply to the plaintiff's further particulars it had substantially complied with the Court order. It further contended that the plaintiff, by filing various notices it had taken certain procedural steps to advance the proceedings and thereby condoned the defendant's

² Bundle A-Pleadings pages 1-104 paginated pages 16-20.

³ Bundle A-Pleadings pages 1-104 paginated pages 75-80.

⁴ Bundle B –General Notices pages 1-105 paginated pages 56-105..

⁵ Vide pre-trial conference minutes dated 17 March 2016 paginated 58 -68 in particular admission at paginated page 66 of Bundle A-Pleadings page 1-104.

late amended plea. It was further submitted that the plaintiff filed a request for further particulars for purposes of trial-quantum on the 23 February 2016. It was further contended on behalf of the defendant that the plaintiff at all relevant times knew what case it had to meet because the plaintiff has on more than one occasion furnished with the police docket. The plaintiff failed to request to be furnished with the relevant bank notes much earlier.

[4] It is common cause that the defendant filed its notice of intention to amend its plea and the reply to the plaintiff's request for further particulars on the 19 November 2013, one day late. The plaintiff on the 22 November 2013 proceeded to file a notice in terms of rule 30(2)(b) contending that the defendant's service and filing on the 19 November 2013 was an irregular step, inviting the defendant to remove the cause complained of.

[5] Whilst it is so that the defendant did not apply for condonation, its notice of intention to amend its plea was one day late. In my view, the defendant, although having been one day late, had substantially complied with the Court order. The defendant was in contempt of a court order, in filing outside the 18 November and without bringing a substantive application. That does not make the filing an irregular step, as contemplated in rule 30(2)(b). At worst for the defendant, it was in contempt of a court order.

[6] In the matter of *Clement v Clement*⁶ Lord Denning L.J. is cited as having said, *inter alia*, in the matter of *Hadkinson v Hadkinson* 1952 (2) A.E.R. at 571 that:

“It is wrong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance... Applying this principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of Court is not of itself a bar to his being heard,...”

[7] In my view, the Court has an inherent power to condone noncompliance with its order. In this regard vide s173 of the Constitution⁷. *In casu*, the defendant has substantially complied with the order to file its amended plea, save for the fact that it was one day late. In my view, the fact that there was this substantial compliance, and no inordinate delay, it can be inferred therefrom that there was no deliberate intent to be in contempt of the Court order.

[8] I further bear in mind the fact that the plaintiff was accused of being in possession of allegedly counterfeit money, although the charges were withdrawn. It is a matter of public policy that those accused of serious crimes, must be brought to book. It is for the prosecutors, not the police, to decide whether there is enough evidence to secure a prosecution. *In casu*, it would be travesty of justice, in my view, were the defendant to be barred from presenting its defence simply because it was one day late in filing its amended plea. The plaintiff on the other hand would not be prejudiced were this Court to uplift the “*ipso facto* bar” because, in any event he was

⁶ 1961 (3) SA 861 (TPD) at 864H- 865.

⁷ Constitution of the Republic of South Africa , Act 108 of 1996.

seeking a postponement. I accordingly find that the defendant's notice of intention to amend its plea filed on the 19 November 2013 was substantially in compliance with the Court Order and therefore the lateness of one day, in the exercise of this Court's inherent discretion, is condoned. In this regard, my view is bolstered by the decision in the matter of *Mynhardt v Mynhardt*⁸ the Court held that besides its powers in terms of Rule 27(3) to grant condonation, through its inherent powers.

[9] Assuming that I am wrong in the conclusion reached herein above, which is not conceded, there is merit in the contention by the defendant that the plaintiff by filing various notices, had thereby condoned the defendant's noncompliance with the Court order regarding the filing of its amended plea. It is common cause that the plaintiff filed the following notices:

- 9.1 Notice in terms of Rule 35(9) served on 04 November 2014;
- 9.2 Notice in terms of Rule 35(10) served on 11 November 2014;.
- 9.1 Notice in terms of rule 37(1) dated 02 March 2016;
- 9.2 Notice in terms of Rule 37(2)(a) served on 02 March 2016;
- 9.3 Notices in terms of rule 35(3) served on 12 March 2015 et 02 March 2016,*inte alia*;
- 9.4 Notice in terms of Rule 36(6)(a) served on 02 March 2016;
- 9.5 Notice in terms of Rule 35(12)) served on 09 March 2016;
- 9.10 Notice in terms of Rule 35(10) served on 04 March 2016.

⁸ 1986 (1) SA 456 (TPD) at 463H.

- [10] In my view, the filing of the aforesaid notices amounted to procedural steps which advanced the proceedings forward. The plaintiff has therefore, in my view, condoned the defendant's belated notice of intention to amend its plea filed on the 4 March 2016.
- [11] It is common cause that the defendant filed on the 19 November 2013 a purported supplementary affidavit. An affidavit is a written statement sworn to by the deponent in the presence and before a commissioner of oath who has authority to take such oath. The commissioner must state underneath his name that the deponent has sworn before him that he or she understands the oath and considers it binding on his conscience. In this regard vide *Goodwood Municipality v Rabie*;⁹ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*.¹⁰ *In casu*, the document is not signed or deposed to by the deponent nor commissioned by the commissioner of oath, nor does it reflect the names of the deponent and the commissioner of oath. This document can hardly be regarded as an affidavit as prescribed by Regulations Governing the Administration of an Oath or Affirmation R1258 gg21 July 1972. The document is not an affidavit and is *pro non scripto* because it is materially flawed.
- [12] In the matter of *Cyril Smiedt (Pty) Ltd v Lourens*¹¹ it was held that the irregularity envisaged by rule 30 is a procedural step which advances the proceedings forward.

⁹ 1954 (2) SA 404 (C) at 406B-F

¹⁰ 1999 (2) SA 279 (T) at 336A-B.

¹¹ 1966(1) SA 150 (CPD) at 152E.

In the matter of *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*¹² it was held that the subrule 30 (1) does not apply when the irregularity step complained of in the proceedings amount to a nullity or the defect is such that the opposing party cannot cure the defect even though he were to waive his right to object thereto. *In casu*, the supplementary affidavit of the defendant is fundamentally flawed and is therefore *pro non scripto*. That being the position, it still remains a fact that the defendant has not complied with the Court order to file its supplementary affidavit. However, the plaintiff contended that the supplementary affidavit filed on the 15 March 2016¹³ contained the alleged fake notes found in the possession of the plaintiff. It was further contended that the purported discovery affidavit contained further documents which were not discovered earlier, and as a result the plaintiff is prejudiced in its preparation for trial by such late discovery.

- [12] The supplementary affidavit filed by the defendant on the 19 November 2013 is a defective. In the matter of *Cyril (Pty) Ltd v Lourens (supra)* 1966(1) SA 150 (OPD) at 152 E it was held that rule 30 envisages a procedural step taken which advances the case forward. A defective affidavit is a nullity and does not advance the proceedings any further. It was further held in this Cyril matter (*supra*) that an annexure of an unsworn statement to an affidavit is not an irregular proceeding under the sub rule 30(2)(a). Accordingly I find that the purportedly filed supplementary affidavit is fundamentally flawed and there is no irregularity, as contended by the plaintiff. All it means is that there was no compliance with the Court order and therefore the

¹² 1974 (2) SA 376 (C) at 379D-G.

¹³ Bundle B- General Notices Pages -1-105 at paginated pages 56-105.

defendant will have to bring a substantial application to file its supplementary affidavit.

- [13] It is trite that a party, who seeks a postponement, must bear the costs occasioned by the postponement. It is equally trite that a party seeking to amend its pleadings must bear the costs occasioned by the amendment¹⁴. *In casu*, the plaintiff having raised the issue of irregularity, failed to have this issue ventilated in the un-opposed motion court and preferred to have it canvassed on the trial date. Certainly the plaintiff was remiss in this regard and has contributed to the matter being postponed. Equally too, the defendant was also remiss in failing to file a proper supplementary discovery affidavit. The defendant failed to discover well in advance to the trial date all documents, such as the copies of the money allegedly found in the possession of the plaintiff. That as much was conceded by the defendant in the minutes of the pre-trial conference held on the 17 March 2016¹⁵. I am, however, of the view that the defendant was more remiss in various ways than the plaintiff. For instance, defendant failed to make full disclosure of the docket contents and chose to do so piecemeal. It also failed to amend its plea timeously well on time and only did so on the 4 March 2016 although it filed its notice of intention to amend on the 19 November 2013. In the circumstances it is proper that the defendant should be mulcted with costs on attorney and client scale.

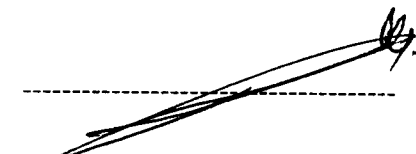
¹⁴ Vide Rule 28(9) of the Uniform Court Rules.

¹⁵ Bundle A-pleadings pages 1-104 at paginated page 52 clause 9.5; et Minutes of pre-trial conference held on 22 March 2016, paginated pages 58-68 in particular page 66 clause 9.5.

[14] In so far as the postponement is concerned, this is a matter falling within the court's discretion. In my view the circumstances of this case dictate that, although the plaintiff did not file an application for postponement, supported by an affidavit, the dictates of fairness and justice warrant that this Court in the exercise of its discretion should grant the postponement, as it did.

[15] In the result the following order is made:

1. That the matter is postponed *sine die*;
2. That the defendant is ordered to file a substantive application for condonation of the late filing of its supplementary discovery affidavit within 10 days of the delivery of this order.
3. That the defendant is ordered to pay the costs occasioned by the postponement on attorney and client scale.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 22 MARCH 2016

DATE OF JUDGMENT: 12 APRIL 2016

PLAINTIFF'S ADV : ADV M FOURIE

INSTRUCTED BY : GILDENHUYS LESSING MALATJIE INC

DEFENDANT'S ADV : ADV N MTSHWENI

INSTRUCTED BY : STATE ATTORNEY PRETORIA

(Ref 6093/11/Z9/SR