



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: yes

18 March 2021

DATE

SIGNATURE

CASE NO: 43093/10

Hearing before Rabie J by way of Zoom conference.

In the matter between:

THE MINISTER OF POLICE

First Applicant

THE NATIONAL COMMISSIONER OF THE SAPS

Second Applicant

and

B.P. SITHOLE

First Respondent

U.M. MALATJI

Second Respondent

M.J. SITHOLE

Third Respondent

L.P. MAKHUBEDU

Fourth Respondent

C.B. KHUMALO

Fifth Respondent

In re:

B.P. SITHOLE

First Plaintiff

U.M. MALATJI

Second Plaintiff

M.J. SITHOLE

Third Plaintiff

L.P. MAKHUBEDU

Fourth Plaintiff

C.B. KHUMALO

Fifth Plaintiff

and

THE MINISTER OF POLICE

First Defendant

THE NATIONAL COMMISSIONER OF THE SAPS

Second Defendant

JUDGMENT

1. On 20 July 2010 the respondents, as plaintiffs, instituted a damages claim against the applicants, as defendants, arising out of the alleged unlawful arrest and assault of the plaintiffs by members of the South African Police Services acting in the course and scope of their duties. At the time of the issuing of the combined summons a photocopy of the summons and particulars of claim was made. Some time later the parties noted that on the one summons the Case Number was written in as 43093/10 while on the other copy the Case Number was written in as 40937/10.

2. During the ensuing years the parties referred in documents relating to the action to case number 43093/10 but on the odd occasion also to case number 40937/10. On 3 July 2019 the defendants launched an interlocutory application which is the application presently before this court. In this application the defendants, as applicants, apply for an order that the proceedings under case number 43093/2010 be stayed; that the Legal Profession Council be ordered to investigate the conduct of the attorneys acting for the respondent in the matters under case number 43093/2010 and 40937/2010; and that the costs of the application be paid de bonis propriis by the instructing attorneys and the correspondent attorneys of the plaintiffs. For ease of reference I shall refer to the parties as they were cited in the action proceedings.
3. In the founding affidavit, under the heading "Lis Pendens" the defendants referred to the aforesaid two summonses and attached the combined summons under Case number 40937/2010 as annexure NG 1 and the combined summons under case number 43093/2010 as annexure NG 2. Both these documents are photocopies and the defendants have not annexed the original summons and particulars of claim to the papers. It was submitted that NG 1 was served on the State Attorney on 23 July 2010 whilst NG 2 was served on the State Attorney on 2 August 2010.
4. It is common cause that NG 1 and NG 2 are exact copies of each other. Or, more correctly, since NG 1 and NG 2 are both photocopies, that both are

photocopies of the same original summons and particulars of claim. I shall refer below to the differences that appear on these two documents.

5. In the founding affidavit the defendants stated that at a pre-trial held on 15 August 2017 the attorneys of the plaintiff's were informed of the duplication of the action and that the summons under case number 43093/2010 is susceptible to a special plea of lis pendens. According to the founding affidavit the plaintiff failed to deliver a notice of withdrawal of the summons under case number 40937/2010 and have instead persisted with proceedings under case number 43093/2010. Consequently, so it was submitted by the defendants, they had no choice but to approach this Court in the present application for an order to stay the proceedings in case number 43093/2010 pending the finalisation of the action under case number 40937/2010.
6. It is appropriate that I first refer to the two summonses and thereafter to the chronology of events. Exhibit NG 1, case number 40937/10 and exhibit NG 2, case number 43093/10, as I have mentioned, are exact copies. The typed portions are the same. Furthermore both summonses were signed on 20 July 2010 by the attorney of the plaintiffs and these signatures and the dates are also identical, i.e., the same photocopy. The photocopies of the documents were clearly made after the signature had been appended on the summons. The first difference between these documents is that Annexure NG 2, case number 43093/10, was signed by the Registrar of this Court whilst annexure NG 1, does not bear his signature. Secondly, under the reference to the State

Attorney stamps occurred but it is not legible. What is legible is what appears to be the signature of an employee of the State Attorney which noted that the time of the signature was 12h 35. The stamps do not appear to be the same but the time of 12h35 is the same. Both summonses were thus received by the State Attorney on the same hour and minute. As mentioned, the defendants submitted that NG 1 was received on 23 July 2010 and NG 2 was received on 2 August 2010. From the copies available to me it is not possible to verify this statement but in my view not much turns on when NG1 and NG2 had been received by the State Attorney.

7. After 10 years it is not possible to establish what exactly happened. What is clear is that NG 1 and NG 2 are photocopies of the same summons and particulars of claim signed by the plaintiff's attorney and not two separate actions instituted by the plaintiffs against the defendants. The two documents were furthermore, as mentioned, signed only once by the plaintiffs' attorney and only one of them, NG 2, was signed by the Registrar. Furthermore, both documents bear a note indicating that the documents were served on the State Attorney at the exact same hour and minute. The particulars of claim are also clearly photocopies of the same documents.
8. The only real difference in the two sets of pleadings, i.e. NG 1 and NG 2, is the case number written in by hand at the top of the first page of the respective summonses. How that came about and who the person or persons responsible for these two numbers, were, is impossible to establish. Neither of the attorneys

who presently represent the parties was involved during the initial stages of the process, except for the plaintiff's instructing attorney. That attorney has no knowledge of any case under case number 40937/10.

9. I should add at this stage that after the launching of the present application the attorney of the plaintiffs approached the office of the Registrar and established that NG 2, i.e. case number 43093/10, is indeed the correct case number for the action between the parties as it appears in the records of the Registrar. Case number 40937/10 (NG1) exists in the records of the Registrar of this Court but had been allocated to a different case between different parties. According to the records of the Registrar case number 40937/10 (NG 1) is the case number allocated to an action between Nedbank Limited and a certain R. Buys. Against these facts it is quite significant that only NG 2, i.e. the summons in case number 43093/10 had been signed by the Registrar of this Court. There can thus be no doubt that somebody had erroneously written the wrong case number on one of the copies of the summons namely NG 1. I shall revert to this issue again below.
10. It is the defendants' case in the present application that the first summons served was NG1, i.e. case number 40937/10 and that, consequently, the proceedings under NG 2, i.e. case number 43093/10, should be stayed pending the finalisation of the action under case number 40937/10.
11. It is appropriate to now deal briefly with the history of events and in that regard I shall only refer to certain salient features thereof. Subsequent to the service of

NG 1 and NG 2 during July and/or August 2010, the defendants delivered their notice of intention to defend and indicated the case number to be that of NG1 namely case number 40937/10.

12. I have indicated above that it is obvious that two case numbers had erroneously been written on the front page of the two photocopies of the same summons in the same case, i.e NG 1 and NG 2. This error was picked up by Mr Paul Cavanaugh of the State Attorney and in a letter dated 22 September 2010 from him to the attorney of the plaintiffs, he noted the following:

"Finally, I have in my possession two High Court case numbers in the present Sithole matter and wish to enquire where the case number 43093/10 originates, as the parties and particulars are precisely the same, but the latter case number was only served on this office on 2 August 2010."

13. In a letter dated 28 September 2010 the erstwhile attorney of record of the plaintiffs responded to the aforesaid letter, inter alia, as follows:

"With regard to the different case numbers, the correct case number is 43093/10. The incorrect case number which is 49034/10 (sic) originated from the notice to defend that we received from your office. We suspect it was a typing error on the part of your secretary."

14. This letter supports the plaintiffs' version that their attorney had at all times been unaware of the existence of NG 1 i.e. case number 40937/10, which was the case number allocated to the matter of Nedbank Limited versus R. Buys.

Furthermore, the letter shows unequivocally that the correct case number for the action between the parties was 43093/10 as written on the summons marked NG 2 and signed by the Registrar of this Court. The summons NG 1 bearing case number 40937/10, (which is the case number of the Nedbank Limited versus R. Buys matter), and unsigned by the Registrar, was clearly an erroneous document which, having regard to its case number, was not and could not have intended to embody a summons and particulars of claim in an action between the plaintiffs and the defendants.

15. On 29 September 2010 Mr Cavanagh replied as follows to the attorney of the plaintiffs:

"I take note of the case number you consider to be the correct one".

16. This letter by Mr Cavanagh brought the whole saga of the "phantom" summons and particulars of claim (NG 1) bearing case number 40937/10, to an end. The parties were ad idem that there was only one case between them and that was the case under case number 43093/10 as set out in NG2.
17. Confirmation of the fact that the issue of the "phantom" summons and particulars of claim (NG 1) bearing the wrong case number 40937/10, had been laid to rest, is to be found in the fact that all the further documents exchanged between the parties in the action, except for a few exceptions, reflected the case number 43093/10. The minutes of the pre-trial conference held on 5 August 2016 also does so. This conference was attended by Mr Govender, the

deponent to the defendants' founding affidavit in the present application. In the minute of the pre-trial conference not a word was mentioned about the existence of another action under case number 40937/10 and/or the possibility of a plea of lis pendens or a stay of proceedings. The only inference to be drawn is that this was so because by then both parties knew that there was only one case pending between the parties and that was the case under case number 43093/10. That was also the case number which appeared on the minutes of the pre-trial conference.

18. Almost a year later and in a letter dated 11 August 2017 by Mr Govender to the plaintiffs' attorney, he wrote the following in the last paragraph of the letter:

"3. Finally: The summons issued under Case number 40937/2010 was served on the State Attorney on 23 July 2010. Thereafter a summons under a different Case number 43093/2010 was served on the Office of the State Attorney on 2 August 2010. The latter summons is an exact copy of the first summons.

3.1 From the further notices and pleadings delivered it appears the matter proceeded under Case number 43093/2010. We advise that unless you have prove that the initial summons have been withdrawn the defendant reserves the right to amend their plea and raise a special plea of Lis Pendens." (sic)

19. Mr Pearton, the plaintiffs' attorney, who had not represented the plaintiffs at the time when Mr Cavanagh represented the State Attorney, responded in a letter dated 6 September 2017, inter alia, as follows:

"Please urgently provide our offices with a copy of the purported summons under case no 40937/2010 as referred to in your attached letter.

20. Mr Govender did not reply to this letter.

21. On 21 September 2017 Mr Pearton again wrote to Mr Govender of the State Attorney stating the following:

"Please urgently revert on my email below".

22. Again Mr Govender ignored this request.

23. On 30 July 2018 Mr Pearton wrote another letter to Mr Govender in which he, inter alia, dealt with the purported case under case number 40937/10. The relevant part of this letter reads as follows:

" 4. Your offices continues to refer to another summons which you allegedly have in your possession. Despite various requests you have refused to provide same to our offices in order to verify the veracity of your allegation.

5. It is our view that the second case number you refer to in your letter originated through an error on the side of your predecessor (before he retired) and was elucidated upon in correspondence between your offices and that of

JM Masombuka Attorneys in September 2010. Your offices and your counsel have vowed to provide our offices with the alleged second summons and you have not done so to date hereof. You are continuing to delay the matter due to your refusal to produce something that is clearly on your version of events in your possession and readily available.

6. Our offices would have expected you to attach such a document to the letter in order to place the plaintiffs in a position to withdraw same had it been done contrary to their instructions or without their knowledge by their attorney. This would have been the collegial thing to do as you were at all times aware that our offices entered appearance on behalf of the plaintiffs as the correspondent attorneys in 2016, well after the alleged second summons was served, or the dispute in respect of the alleged second summons arose. In any event, how can the defendants claim to have suffered prejudice if both summons are in the specific practice of the same State Attorney, taken over from the same predecessor and currently in possession of the defendants' counsel?"

24. Mr Govender again ignored the aforesaid requests.

25. On 3 July 2019 Mr Pearton wrote another letter to Mr Govender in another attempt to resolve the issue. It is clear that at this point Mr Pearton had become quite desperate and framed his letter in very strong terms and threatened Mr Govender with serious action should he continue to ignore the issue.

26. It appears, as I have mentioned, that since the time that Mr Cavanagh of the State Attorney and the plaintiffs' attorney had resolved the issue of the erroneous summons, i.e. NG 1, the parties have exchanged papers and correspondence under case number 43093/2010. Consequently, since 2010, i.e., for the past 11 years the defendants had not defended themselves in respect of a case with case number 40937/10 and except for the phantom summons, no pleadings had been filed, and except for a few exceptions, no documents had been filed and no proceedings had been conducted under that case number. In my view nothing turns on the fact that certain notices had from time to time referred to the erroneous case number. It is surely not unknown that an author of a notice or a letter would often simply take a document from the office file to establish the case number. Being unaware of the erroneous "phantom" case number which had made its appearance from time to time, an author can hardly be blamed for this mistake. What is clear is that neither of the parties ever regarded the case with number 40937/10 as an action between the parties.
27. Approximately one week before the plaintiffs filed their answering affidavit in the present application, the plaintiffs served a Notice of Withdrawal of Summons under case number 40937/2010. This notice reads as follows:
- "KINDLY TAKE NOTICE that the Plaintiffs hereby withdraws the summons, if found to be validly served and existing, under the above case number and only in respect of the above persons."

28. This notice of withdrawal and especially the wording thereof, reinforces the fact that there was not and had never been a second action between the parties. It also reflects the fact that Mr Govender had failed to present the original or a copy of NG1 to the defendants' attorney. The plaintiffs were clearly aware of the dilemma that they cannot simply withdraw a case with a case number which had not been allocated to the case in which they were the parties.
29. The aforesaid was the correct course of action to be taken by the plaintiffs' attorneys. After all, they could hardly withdraw a case with a different case number in which they had no interest. To do so would have had the result that a case between unknown parties was withdrawn without the knowledge of such parties.
30. In my view it is not necessary to refer further to the submissions made on behalf of the respective parties. It is clear that NG 1 was a photocopy of the original summons and particulars of claim onto which somebody, probably a person in the office of the Registrar of this Court, had written a wrong case number. The case number written on NG 1 was in fact the case number which had been allocated by the Registrar to a different case between different parties.
31. There were consequently never two actions which had been instituted by the plaintiffs and this was realised at a very early stage by Mr Cavanagh, the State Attorney appearing on behalf of the defendants and the attorney on behalf of the plaintiffs. They made short shrift of the difficulty by agreeing that NG 1 could be ignored as erroneous and that the action between the parties would proceed in

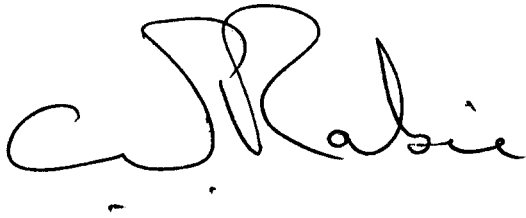
terms of NG 2 under case number 43093/10. They had dealt with the difficulty of the wrong case number on a copy of the summons, which probably originated in the office of the Registrar, without incurring any significant costs for their clients, if any. That was the proper manner to deal with the difficulty which had arisen.

32. Since there was never a pending lis between the parties other than the action embodied in NG2 under case number 43093/10, that had been the understanding of the parties for almost 6 years until Mr Govender came onto the scene and wanted to make something of the summons in NG 1. If Mr Govender had studied his file he would probably have discovered the letters between his predecessor, Mr Cavanagh, and the attorney of the plaintiffs wherein the issue of the wrong case number on a copy of the summons had been put to bed.
33. In these circumstances the defendants' application was totally misconceived. It was submitted on behalf of the plaintiffs that the application should also be dismissed for the reason that the issue of lis alibi pendens is not something which could be the subject of an interlocutory application but is a dilatory plea which should be pleaded in a defendant's Plea and adjudicated by the court hearing the action.
34. In the light of my findings above that there had in reality never been a second action between the parties with the result that one action between the parties should be stayed, it is not necessary to make a finding as to whether motion proceedings are appropriate to decide the issue of lis alibi pendens.

35. However, should I be wrong in my earlier findings I find that the application of the defendants should in any event be dismissed for the reason that it is not appropriate to institute motion proceedings in circumstances like the present. In casu a defence of *lis alibi pendens* has not been pleaded in case number 43093/2010 and such a defence is thus not a triable issue on the pleadings. In my view the motion court could hardly be expected to consider the stay of an action if such a defence had not been pleaded. This is not a matter where an abuse of the process of the Court can be alleged.
36. Furthermore, the defence of *lis alibi pendens*, if properly pleaded, is a matter within the discretion of the trial court and in respect of which the trial court has a discretion as to whether an action brought before it should be stayed pending the decision of another action or process previously brought between the same parties, for the same cause and in respect of the same subject matter, or whether it is more just and equitable or convenient that the action should be allowed to proceed. The plea of *lis alibi pendens* is a dilatory plea which must be adjudicated by the trial court in the exercise of its judicial discretion. In exercising its discretion considerations of fairness and convenience are fundamentally important. Cf *Van As v Appollus & andere* 1993(1) SA 606 (C) and the authorities therein cited.
37. In respect of costs the defendants moved for costs to be paid on an attorney and client scale by the attorneys of the plaintiffs. The plaintiffs moved for the cost to be paid on an attorney and own client scale by Mr Govender and the

defendants. In my view the court should show its displeasure with the manner in which the case had been conducted on behalf of the defendants. I have already referred to the fact that a proper awareness of the contents of the attorney's file and more specifically the fact that the issue of the wrong case number had already been resolved, would have prevented the application. This Court must also frown upon the failure of the defendants' attorney to respond to the requests of the plaintiffs' attorney when it was clear that he desperately wanted to resolve the new issue mentioned by the defendants' attorney. Inter alia for these reasons a punitive order for costs against the defendants is justified. Costs of senior counsel would also be justified.

38. I have considered whether an order for costs de bonis propriis should in addition be made. The submissions in this regard on behalf of the plaintiffs are not altogether without merit but on a conspectus of all the facts and circumstances I am of the view that such an order should not be made.
39. In the result, the following order is made:
 1. The application is dismissed.
 2. The applicants are ordered, jointly and severally, to pay the defendants' costs of the application which cost shall be on the scale of attorney and own client and which costs shall include the cost of Senior Counsel.

A handwritten signature in black ink, appearing to read 'C.P. Rabie'. The signature is fluid and cursive, with the first part being a stylized 'C' and 'P' followed by 'Rabie'.

C.P. RABIE

JUDGE OF THE HIGH COURT

18 March 2021

Attorneys for Applicant: Gildenhuis Malatji Inc jpearson@gminc.co.za

Attorneys for Respondent: State Attorney

N Govender NeGovender@justice.gov.za

Adv M Botma mbotma@law.co.za