IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 67331-2018

DATE: 2022-06-08

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) ~~OF~~ OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 27/7/2022
SIGNATURE

In the matter between

JOEL THABO MOHALALELO

and

JOHN TSIETSI APHIRI T/A APHIRI ATTORNEYS

J U D G M E N T

HOLLAND-MUTER AJ:

In this matter, case number 67331/2018, it is the matter of Joel Thabo Mohalalelo versus John Tsietsi Aphiri trading as Aphiri or formerly trading as Aphiri Attorneys. The matter was allocated by the acting Judge President to myself on 2 June 2022. That is last Thursday. When informed by my registrar the case number as is practice in this division I

accessed the pleadings in the matter on the CaseLines system which is an operation in this division.

The reason why I had to access the documents electronically is because no hard copies of the filing system is any longer in operation in this court.

During the course of myself acquainting myself with what was the case, the pleadings *et cetera* the plaintiff's counsel Mr Bouwer accompanied by his attorney and assistant as well as the defendant in person called to my chambers to introduce themselves.

There a discussion occurred between myself and the parties in particular with Mr Bouwer at first with regard to the *locus standi* of the parties and as to whether the Legal Practitioners Council should not have been joined as a second defendant.

In view thereof that as at that stage I determined that the plaintiff's claim against the defendant in person arises out of when the defendant then still an admitted and practicing attorney represented the plaintiff in another case against the Road Accident Fund.

It is common cause between the parties that that case was

finalised during 2015/2016, I am not at the moment in possession of the specific date but be that as it may. It is common cause that the Road Accident Fund made certain payments towards the defendant's then trust account as the attorney on behalf of the third party.

That amount was in excess of R1 600 000 consisting of a capital of about 1 400 000 and 202 000 tax cost amount. Difficulties arose between the now plaintiff, plaintiff in that matter then and his then instructing attorney, the defendant before Court of the payment of the award being made and paid out on behalf of the plaintiff towards the trust fund of Mr Aphiri.

Without venturing into much detail at some stage during 2018 there was an agreement, a settlement agreement reached between the plaintiff and Mr Aphiri in person and just after that Mr Aphiri had the unfortunate repercussion of being struck off the roll as a practicing attorney by this division.

Only one payment, substantial payment was made, R200 000 and two small payments of R10 000 subsequently was made towards the plaintiff and the plaintiff avers that the defendant not honouring the agreement, the subsequent

agreement between them forced him to issue summons against the plaintiff.

The fact that out of the papers it came to my notice that Mr Aphiri was struck off the roll as a matter of precaution I asked the parties on Thursday 2 June to file before close of business the following day, this is Friday 3 June answers to the questions which I posed.

Those questions predominantly related to the position of the Fidelity Fund of the Legal Practitioners Council, whether or not they should be a party to this and secondly I raised the concern and said that I may consider reporting or handing over this matter or directing it to be handed over to the Legal Practitioners Council as well as the Director of Public Prosecutions because it may amount to theft of money, monies which were paid into a trust account but were not in terms of trust account regulations paid to the person to whom it accrued.

During the late afternoon of the 2nd after having discussion with a colleague of mine, a judge in this division who was, before I was appointed involved in the management of the Legal Practitioners Council and the Fidelity Fund I decided, and it is correct that Mr Bouwer indicated that the rules are

there to serve the Court and the parties and I decided that the parties must come today that is on the 8th so that we can continue with this matter.

I did not have contact details of the defendant and without any other intention phoned Mr Bouwer just to request him to arrange with the defendant so that they both be here today so that if possible the matter can proceed.

I have indicated that I received written heads from both parties but yesterday afternoon after lunch while my registrar was occupied with other duties out of her office there was a knock on the door and it was the defendant in person who wanted to serve an application for the recusal of myself in the matter.

I refused to accept such service because it is not how service is done. It should be served at the general office, not even at the office of an individual registrar ...[indistinct] a judge.

I directed Mr Aphiri that he may have copies available today when proceedings proceed. The gist thereafter of the discussion and which I had to reprimand Mr Aphiri several times with regard to the manner in which he addressed the

Court I was furnished with the application of the notice of motion in which requested that I recuse myself.

The application and the affidavit accompanying the application, the affidavit is nine pages and it is a two pager application. Although the bundle which was handed up to the Court today annexed thereto is a copy of the combined summons, notice to defend, plea, amended particulars of claim, pre-trial minutes, the notice to amend though I do not know what to amend and the defendant's notice in terms of rule 23(1) and 30(2)(b) and then another notice of motion, the kind not known.

The application is brought on three grounds. Now if I can refer to paragraph 6 on page 6 thereof.

> 5.1. Hostility towards the party.
>
> 5.2. Expression of an opinion indicative of biasness.
>
> 5.3. The conduct indicative of biasness."

5.1 and 5.2 in my view is mere semantical proposition. It is basically the same aspect. If you look at 4.6.1.1:

> "There must be a suspicion that the judicial officer might be biased."

That is basically 5.2 and or 5.3.

> "4.6.2. The suspicion must be that of a

reasonable person in the position of a litigant.

5.6.3. The suspicion must be based on reasonable grounds."

That is the gist of the application to recuse myself. The applicant or the defendant in this matter was granted more than enough opportunity to argue his matter and the Court allowed him to refer to certain clauses in the Constitution. Starting with equality, no discrimination is to be there and unfairness and in terms of section 165 of the Constitution the independence of the judges to the Constitution.

The independence of the Court there was no grounds forwarded in the argument by Mr Aphiri to this Court that the independence of this Court is jeopardising anything what I did as from last Thursday until this morning.

I see no factual averment on this. The fact that I called Mr Bouwer is only because I did not have, and I still at this stage do not have the personal contact number of the defendant and I just made a courteousy call to Mr Bouwer so that we can see if we can advance the matter today.

The question of hostility I reject such an allegation towards

me; I reject an unsubstantiated allegation of racism to such an extent that I take exception to such an accusation against myself.

I never in this matter in any way directly or indirectly mentioned anything or did anything from which it can be inferred that my handling of the matter was biased and or based on racism towards the defendant.

There is nothing about that. The fact that I mentioned that the matter, I consider referring it to the National Director of Public Prosecutions there is nothing wrong with that because any trust money paid into a trust on behalf of a recipient, in this instance the plaintiff if it was not paid out to him but utilised as it is done rather commonly by practicing attorneys is to finance other matters which they have and then later to a recalculation that amounts to theft because they are not allowed in terms of the conditions of a trust account to use trust funds which accrued to client A to finance and or to subside the litigation of client B, C or D. It is quite clear that that is theft.

In various instances in my acting capacity since 2015 in this court where matters were brought to this Court by the Legal Practitioners Council or the then Law Society it is an

accepted fact that utilising trust monies for other purposes than that for the purpose of which it was deposited into the trust account amounts to theft.

Be that as it may, and that is why I considered it and I made the remark that it may be referred to the Director of Public Prosecutions and the Legal Practitioners Council so that they can attend to this if necessary.

I have not done so but the future will tell. The defendant or the applicant in this, the defendant gave a long, long, long argument on his side to try and show any biasness on my side. I am not, I am not at all persuaded in any way that I was hostile or biased or discriminatory towards any of the parties before the Court in particular the defendant, now applicant.

The fact however is that there is an application in terms of rule 36(2) by the defendant at a very late stage, roundabout 26 May 2022, that is less than 10 days before the trial had to proceed for the plaintiff to be subjected to a medical examination, still unresolved.

There is also the fact that the defendant also gave notice of his intention to amend his plea and that the 15 days

awarded there for by the plaintiff for him to take the necessary actions to correct his documentation takes us way beyond 2 June.

The only, the only reasonable inference to be drawn for this late application and notice to amend on behalf of the respondent can be taken back to the pre-trial of 13 May 2022 between the parties in paragraph, please just bear with me, paragraph 6 where the defendant was of the view the estimation of the duration of the trial, plaintiff said one to two days, defendant was of the view the matter is not ready due to pending interlocutory aspects regarding rules 30, 57(8) and so on and ...[indistinct].

When roll call was conducted on the morning of 2 June Mr Aphiri does not deny that he was not present, it was only Mr Bouwer and the information which my registrar received from the acting Judge President's registrar when the matter was allocated to this Court is that it was, the view was that it could be one to two hours and that is why I was not only allocated one matter but two matters because of the time frames which were addressed to the acting Judge President.

To summarise then with regard to the application that I must recuse myself I am not convinced that any reasonable Court

under the circumstances would consider it favourably and that application is dismissed.

The question of costs with regard to the allegations made by the applicant or the defendant in this matter I reluctantly will only award party and party costs against the applicant in this matter.

I have been considering a cost order on an attorney and client scale but in view of everything before the Court party and party scale would suffice.

With regard to the new aspects which now arose which was not mentioned at roll call, which was not mentioned on Thursday the 2nd before me that the outstanding, and in view thereof that the defendant orally indicated to Court that he is subtracting his application in terms of rule 30, 36(2) and rule 57 with regard to the *compos mentis* state of the plaintiff it seems now from what he argued today and what is in his heads of argument is that he has reconsidered that position and is persisting with that.

I am not going to pronounce any verdict on that but my *prima facie* view is that it is without substance such an application but also in all fairness to grant him the

opportunity with his application to amend he will be granted the opportunity and that can be, it is a small skirmish which can take place in the interlocutory and or motion court.

To conclude this matter will not proceed today. This matter will not proceed, not that I am not willing to but I will grant the defendant the opportunity to bring these applications and as it works here the possibility of this matter being awarded to myself unless I specifically request to do so is so remote that it can be neglected, the only aspect now to the parties, I will give you the opportunity starting with Mr Bouwer is to address me on the costs, the wasted costs because of the non-attendance of roll call by the defendant to indicate to the acting Judge President that the matter was not right for hearing and his outstanding issues with regard to the application or the amendment notice of the plea and a special plea, to demonstrate my fairness and unbiasness towards the defendant I will grant him that opportunity to have those applications heard but unless he convinces me, and that is why I am going to give both parties the opportunity to address me, he knew long before 13 May 2022 when the pre-trial was conducted that he was of the opinion that the plaintiff may, or should be assessed by a neurologist to determine whether he may or may not be in a position to give proper instructions.

That is not something new, it has been coming for a long time and the conduct of the defendant at this late stage being the spoke into the wheel which brings or grinds this matter to a halt that it cannot proceed to its full conclusion on the merits, also in view of certain admissions made in the pre-trial minutes I am *prima facie* of the view that the defendant should be liable for attorney and client costs occasioned by the, the wasted costs occasioned by the proceedings of the 2nd and of today. Mr Bouwer anything from your side with regard to costs?

(ADDRESS TO FOLLOW)

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In this matter, case number 67331/2018, matter between Joel Thabo Mohalalelo and plaintiff John Tsietsi Aphiri, defendant I have already ruled that an application for recusal of myself is dismissed with costs. With regards to the matter not being right for trial I have read the pre-trial minutes between the parties embodied in the document dated 13 May 2022.

It is also so that the defendant at a very late stage filed a notice of intention to amend his plea to bring in a special plea as well as an application, in my view but be that as it may, incorrectly in terms of rule 36(2) for the plaintiff to be

submitted for medical examination.

I am not closing the doors on the defendant with regards to this but it is also so that the defendant is not a layperson. He should know that there are times when you act proactively and not as we have heard it over the last couple of years, make use of Stalingrad defence and that is defence at number 99.

This could have been done, the application to have the plaintiff examined by a medical expert to determine whether he is of full mental capacity to give proper instructions and secondly the application which was at number 99 filed, or the notice which was at number 99 filed by the defendant to have his plea amended with the insertion of a special plea, there is no other reasonable inference that this is to a large extent delaying and the fact that the matter or the reason that the matter cannot proceed either on last Thursday or today on the merits because of the reluctance of the defendant to get out of the blocks and to do things according to the timeframe which is necessary of which he is known to because of his previous experience.

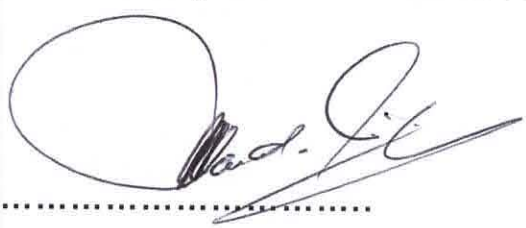
Under these circumstances it would be proper that the following order be granted:

1. The Application for the Recusal is dismissed with costs against the defendant on a party and party scale;

2. The matter is postponed sine die to enable the defendant to proceed/finalise the Rule 36(2) application and the amendment of his plea;

3. The defendant is to pay the costs occasioned by the postponement on an attorney and client scale. The costs is to include the costs of 2 June 2022 and 8 June 2022, which will include the plaintiff's necessary costs incurred to attend court on the aforementioned dates.

4. The plaintiff is declared a necessary witness.



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HOLLAND-MUTER AJ

JUDGE OF THE HIGH COURT

DATE: 27/7/2022