

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: 15/8/2022
15/8/2022
DATE
SIGNATURE

CASE NO: 67331/2018

In the matter between:

JOHN TSIETSI APHIRI (FORMARLY t/a APHIRI ATTORNEYS)

APPELLANT

and

JOEL THABO MOHALELO

1st RESPONDENT

HONOURABLE JUDGE HOLLAND-MUTER

2nd RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL AND OTHER APPLICATION

[1] The matter is a very unusual matter, what seemed to be a normal run of the mill civil trial, where the appellant completely lost sight of the Uniform Rules of Court and embarked on a mission seldom encountered before.

[2] The matter was referred to this court on 2 June 2022 by the Acting Judge President at trial roll call for adjudication on what seemed to be a normal civil trial. The position in this division is that the Deputy Judge President (DJP), (acting as Judge President at the relevant time) conducts roll call with regard to trial awaiting civil trials and allocates the trials in sequence to the judges listed on the Duty Roster for civil trials. After allocation the matter is brought to the allocated Judge in chambers by his/her registrar. The normal practice (before and now after the Covid-pandemic) is that the legal teams in an allocated matter approach the judge in chambers where informal introductions take place. Each party briefly informs the Judge of their position with regard to the trial. Only trial ready matters are allocated by the DJP. The allocation is done after the representatives inform the DJP during roll call on the readiness of the trial to proceed. The allocated trial judge will not be privy thereto until informed by the representatives in chambers.

[3] On that particular morning, Advocate Bouwer, his instructing attorney and a clerk were present on behalf of the plaintiff while the defendant was alone in person. What transpired thereafter in chambers and in court on the 2nd of June 2022 and the 8th of June 2022 is fully dealt with in the comprehensive *Ex Tempore Judgment* which was uploaded onto Case Lines on 27 July 2022, the day after it was received from the official recording services. It is not necessary to repeat the judgment again.

[4] Suffice to state that although the appellant requested written reasons for judgment on 14 June 2022, no reasons were given awaiting the transcribed ex

tempore judgment and after receiving it, I did not deem it necessary to give further reasons because the *ex tempore* judgment was comprehensive. In **Strategic Liquor Services v Mvumbi T NO and two others 2010 (2) SA 92 CC par (16)**, with reference to **Mphahlele v First Nasiona Bank Ltd 1999 (3) SCA at paras 12 and 67** it was held that there is no express statutory provision requiring judges who have given judgment *ex tempore* to furnish written reasons when later required. In this matter a comprehensive *ex tempore* was given and in my view there is nothing more to add to “clarify” any uncertainty the appellant may have. The appellant was informed that no further reasons would be given.

[5] The appellant filed an application for leave to appeal and it was enrolled for 29 July 2022. On that morning after hearing the appellant the matter was postponed until 4 August 2022 for hearing. The reason for the postponement was at the request of the appellant to study the *ex tempore* judgment.

[6] It is important to note that the appellant, without any written or oral application sanctioned by the court, and without the prior consent of the Judge President of this division, “joined” myself as presiding judge as a respondent to the matter.

[7] On the document purporting to be the Request for Written Reasons I am cited as the first respondent but on the Notice for Leave to Appeal I am cited as the second respondent. These rather unusual citations in my view amount to an irregular proceeding and ought to be struck should the matter proceed in

any way. In **Engelbrecht v Khumalo in re Tarloy Properties (Pty) Ltd v Engelbrecht 2016 (4) SA 504 GP**, Mlambo JP dealt with a request by the applicant to issue a notice in terms of Rule 13(1)(a) of the Uniform Rules of Court against a judge of the division.

[8] If the ill directed citing of the court by the appellant in this matter is compared with the clear process set out in **Engelbrecht supra**, it is clear that the citation cannot stand and I therefore see no reason to deal with it further. Suffice to state that when a party seeks the recusal of a judge it is not required at all to issue Notice of Motion and to obtain the express consent by the Judge President. It is done by way of Interlocutory Application in court without citing the Judge as a party. It however does not do any injustice to my already known decision in the *ex tempore judgment* refusing such request.

AD RECUSAL:

[9] This has been dealt with in the *Ex Tempore Judgment* and no further deliberation is necessary. In my view the appellant failed to advance any compelling reason why this application has any prospect of success in another court.

[10] The obiter remark and subsequent request for written heads of arguments on 2 June 2022 was to enable the parties to address the issue of the position of the Fidelity Fund and possible referral to the Office of the Director of Public

was never said that it is the practice in this division to refer matters of trust deficits to that office. It was said that the matter may be referred to that office if necessary after trial. For the appellant to construe this that I will not be impartial is without any substance.

[11] The appellant's view that the respondent (plaintiff in the main action) should have removed the matter from the roll **before 2 June 2022** is without any merit. The appellant was absent at roll call before the DJP and the DJP allocated the matter to this court on account of what was said at roll call. This court had no input in any allocation at all. For the appellant to make allegations of discrimination and biasness on the part of this court is unfounded without any substance.

[12] The appellant is at no stage denied access to court. It was one of the reasons to postpone the matter on 8 June 2022 to enable the appellant to finalise/proceed with his Rule 36(2) application and the proposed amendment of his plea.

COSTS:

[13] Costs are within the discretion of the court. A court considers all aspects before the court to decide imposing a cost order. I considered all aspects before myself in this matter and exercised my discretion that the appellant was to blame for the postponement because of reasons set out in the *ex*

tempore judgment. The appellant, although in person, cannot escape liability for costs incurred due to his conduct. I am satisfied that the cost order is justified.

[14] The benchmark for the reasonable prospect of success is set out in section 17 of the Superior Court Act 10 of 2013. I am satisfied that there is no reasonable prospect for success and the application for leave to appeal is refused with costs.

ORDER:

The application for leave to appeal is dismissed with costs.



J HOLLAND-MUTER 15/8/2022

Acting Judge of the Pretoria High Court

Application heard on 4 August 2022

Judgment handed down on 16 August 2022

Appearances:

For Appellant: In Person

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For Respondent: Adv M Bouwer

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