NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

CASE NO. 169/2017

In the matter between:

LUZUKO MATINI Applicant/Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH EASTERN CAPE PROVINCE Respondent/Defendant

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JUDGMENT IN RESPECT OF COSTS

HARTLE J

[1] The matter before me concerns the costs of two applications, one initiated by the applicant (who I shall refer to by his designation in the main action as "the plaintiff") and the other (omnibus application) initiated by the respondent ("the defendant"), enrolled for hearing but removed from the roll without a tender of costs.

[2] The first application launched on 22 May 2022 (in its primary form) sought to redress the defendant's ostensible failure to have complied with an order of Mjali J, dated 29 March 2022 ("the rule 30A application"),[1] which included as a consequence a prayer that the defendant's plea to the plaintiff's claim be struck off or dismissed. The need for such an austere measure had fallen away by the time the matter was argued before me, but what remained in contention was the plaintiff's entitlement to the costs of the application, prayed for on the punitive scale of attorney and client.

[3] The second (omnibus) application initiated by the defendant (issued on 25 August 2022 and set down for hearing on 27 September 2022) concerned firstly the rescission of an order by Zilwa J made at trial roll call on 19 August 2022, days before the main action was due to run on trial, certifying that the matter was trial ready. The second part of it purported to seek condonation for a raft of failures by the defendant to comply with prior orders and or directives of this court regarding her lack of compliance with the provisions of uniform rules 36 (2) and 36 (9) respectively.[2]

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[1] Rule 30A deals with non-compliance with rules, requests, notices and orders and was recently amended to include a specific reference to orders made in a judicial case management process referred to in Rule 37A. a party on the receiving end of the non-compliance of orders arising in a case management setting can invoke this rule to seek an order directing that a case management directive *inter alia* be complied with or that the defaulting party's claim or defence as the case may be, consequently be struck out.

[2] I was handed this pack of applications on 28 August 2022 in the trial court.

[4] It is a misconception that either of the defendant's applications were withdrawn. They were indeed enrolled at the time of their issue in August 2022 for hearing on 27 September 2022, but the first one for rescission, actually referenced by the defendant as an application for postponement, was extensively dealt with in court on 28 August 2022 when the main action served before me upon trial.[3] I granted a postponement on terms as I will demonstrate below. The application for condonation was also addressed in passing by the defendant's counsel at the trial hearing, in the sense of motivating why the defendant believed that the matter was not trial ready and in purporting to explain her lack of compliance with prior orders and directives, although no order of condonation was moved.[4] For some reason however both matters remained on the roll and on 19 September 2022 the state attorney acting on behalf of the defendant filed a notice of removal of *"the application*[5] *from the roll set down for the 27th September 2022,"* prompted no doubt by the fact that on that same day the plaintiff had delivered a notice to oppose and an answering affidavit in respect of each application as if they were still alive.

[5] Referencing the provisions of uniform rule 41 (1)(a) read together with subrule (c), the plaintiff's attorneys thereupon sought to prevail upon the state attorney to tender the costs occasioned by the unilateral supposed withdrawal of "the application"[6] on the attorney and client scale.[7] There was evidently no reaction on behalf of the defendant to correct this supposed irregularity (by the absence of the costs tender insisted upon) and the plaintiff duly filed a notice of

[3] This will be apparent from a transcript of the proceedings before me on that date.
[4] On 19 November 2021 I issued a case management directive ordering the defendant to provide an explanation to the case management judge as to why she had been remiss in complying with the prior case management directives of my colleague, Lowe J. Those advising her no doubt felt a need on her part to account for her failure to comply with several directives relating to her obligation to file an expert notice.
[5] It is not clear which application was meant.
[6] I assume that this is a reference to the rescission application.
[7] The plaintiff's notice of application dated 5 December 2022 refers.

application (as a tangent to or amplification the rule 30A application) to seek such costs.

[6] There is in my view no reason why the plaintiff should not be entitled to the costs occasioned by the *removal* of the matter from the roll as well as the costs of moving an application for such costs when a tender for any costs at all was not forthcoming. A party removing a matter without a cost tender must expect that costs will follow that result unless there is some obscure reason why the other party should bear those costs. None was provided in this instance. I therefore propose to grant the plaintiff's prayer in this respect relative to a removal as opposed to a withdrawal of an application, but I am not prepared to grant costs on a punitive scale as the reasons motivated for these go to the question of why the rescission application was persisted with at all, if indeed the defendant meant to do so. In my opinion I thought it was clear that the efficacy of both applications had served their purpose on 28 August 2022.

[7] To be clear, there was no application *withdrawn* by the defendant's notice of removal.[8] I assume (as I must in the absence of any explanation set forth by the defendant) that the state attorney must have realised that the two applications for rescission and condonation respectively (which in the first respect had become academic and in the other probably did not require a hearing but to simply be given recognition to by the court as an explanation for the defendant's default) should not have remained on the unopposed motion court roll beyond their being dealt with on 28 August 2022. (I cannot rule out the possibility that the defendant wished to remove them in order to enrol them ultimately as opposed applications, but this is

[8] Annexure F to the rule 30A application.

not an aspect I need to determine.)[9] What wasted costs were occasioned by the *removal* will of course be for the taxing master to decide.

[8] Concerning the rule 30A application, the plaintiff claims damages from the defendant in the main action arising from negligent care administered to him by staff at the Stutterheim Hospital to which he was admitted on 23 August 2014 after presenting with a swollen thigh and mass. As a result of a faulty insertion of a drip to his right arm and a failure to monitor and prevent excessive infusions of fluid through this conduit, his blood circulation was compromised, and he permanently lost the use of his arm.

[9] The defendant pleaded a denial that its staff members were negligent in treating the plaintiff.

[10] The matter was ultimately enrolled for hearing, the parties having agreed to separate quantum from merits.

[11] The focal point being whether the defendant's staff were negligent in all the circumstances, the views of an orthopaedic surgeon would have been largely determinative of the matter. The plaintiff's legal representatives thus filed an expert notice and summary of such an expert at the earliest opportunity with the expectation that the defendant would do likewise.

[12] At the point of the filing of the parties' initial Preparation Checklist for Certification of Trial Readiness of Cases Subject to Case Flow Management in June 2020 it was flagged that the defendant, who had already provided an

[9] The defendant's counsel conceded that the applications no longer served any purpose so this is an unlikely scenario.

undertaking that she would do so by 15 July 2020, had yet to file her expert report in respect of the merits.

[13] On the basis of her undertaking aforesaid and indication that she would advise the plaintiff in writing of the progress with regard to such appointment or his referral to any medical experts in preparation for her defence on the merits, the parties agreed to adjourn the case management conference up to the first week in September 2020.

[14] The matter served before Lowe J more than a year later on 6 and 28 October 2021 respectively for case management. Evidently by reason of the fact that the defendant had not yet met her undertaking with regard to the filing of an expert notice or report, he was not satisfied that the matter was trial ready but urged upon her to indicate what experts would be engaged and to advise when her reports would be filed. The defendant was placed on terms on 6 October 2021 (in clause 2) to make her election to call an expert within 7 days of the judge's directive. In the second directive issued on 28 October 2021, he ordered the defendant to comply with his earlier directive and postponed the matter for a period of two weeks.

[15] The matter came before me for case management on 19 November 2021. Based on submissions made before me (and my view formed at that time that the plaintiff was being prejudiced by the defendant's failure to get on with it), I requested the registrar to forthwith allocate a trial date in respect of the merits and issued a further directive in the following terms:

> "The defendant is requested to provide an explanation to the case management judge concerning why the prior directives of lowe J have not been responded to and in any event is directed by the end of the present term to file her notices in terms of rule 36 (9) (a) indicating which experts she intends to call in support of her defence and thereupon to comply strictly with the provisions of amended rule 36 (9)."

[16] The defendant failed to comply with either my directive of those of Lowe J, all of which were collectively focused on getting her to the point of deciding whether she would engage an expert and thereupon comply with the provisions of rule 36 (9) in this respect. On 29 March 2022 pursuant to an interlocutory application launched by the plaintiff to address the defendant's failure to embrace her trial preparation obligations, Mjali J issued an order in the following terms:

> "1. The defendants failure to comply with the directive of this court by Mr. Honourable Justice L Lowe dated 6/10/2021, particularly clause 2 thereof, is hereby declared irregular and reviewed;
> 2. The defendant is directed to rectify such irregular and unlawful conduct, act promptly and comply accordingly with said directive within 15 (fifteen) days from the date of this order;
> 3. The defendant is directed to pay the cost of this application at a punitive scale of attorney-client scale." (Sic)

[17] On 21 June 2022 the matter came before me in motion court pursuant to yet another interlocutory application to redress the defendant's lack of compliance with the court rules and her failure to do what the court had ordered her to in four preceding orders. The defendant had by this stage, quite spectacularly, still not engaged an expert. Counsel appearing on behalf of the parties presented me with a draft order pursuant to which they agreed that the defendant would issue a notice in terms of rule 36 (2)[10] to subject the plaintiff to a medical examination by the defendant's own medical experts on or before 8 July 2022, which draft was made an order by me. The defendant was, once again, ordered to pay the costs of the application on an attorney and client scale, also by agreement.

[18] On 12 August 2022 the matter came before Zilwa J on trial roll call as indicated above. I am advised that there was no appearance by the defendant at

[10] The typist mistakenly typed rule 34 (4).

this sitting and, not surprisingly given the defendant's failure even at that point to have geared itself up for trial, to have complied with numerous orders and directives, and her ostensible flagrant disregard of the uniform rules of court and standard case flow management practices applicable, he issued an order confirming that the matter was trial ready, certainly I imagine from the perspective of the plaintiff who would otherwise have been egregiously disadvantaged.

[19] On 29 August 2022 the matter again came before me in the trial court. Again, quite disappointingly, the plaintiff had not yet been examined by the defendant's expert, but she had had the gall to issue out the application to rescind the order of Zilwas J given at trial roll call certifying that the matter was trial ready.[11]

[20] The plaintiff had also in the meantime filed the rule 30A application in which an order was sought declaring that the defendant's failure to comply with the court order of Mjali J dated 29th March 2022 be declared irregular and reviewed, that her failure to comply with this order be deemed a waiver of her right to defend the plaintiff's claim insofar as the merits were concerned, that her plea and defence to the plaintiff's claim on the merits be struck off or dismissed, and that the plaintiff be granted leave to set the matter down and lead evidence to prove the merits of his claim in respect of the main action if so advised. As I said before, the plaintiff also presaged a costs order on the punitive scale.

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[11] This appears to be a growing new trend at trial where state parties ignore the obligations imposed upon them by the rules of court to make ready for trial, perfunctorily go through the case management processes and agree that matters are ready to run, but at the doors of court decide they need to engage an expert. Instead of dealing with this as a belated decision with huge ramifications for the plaintiff party which will warrant a postponement at the state's expense and an appropriate application for condonation as the amended rule 36 (9) behoves, and despite the fact that the case management regime imposes a mutual obligation on the state itself to ensure that matters are properly ready to run on trial, they instead impugn the order given at trial roll court, made with their consent or implied agreement, that the matter is trial ready. See, for example, *Tyibilika v MEC for Health, EC* (579/2013) [2021] ZAEC BHC 38 (30 November 2021).

[21] The plaintiff had heralded in the parties' Roll Call Trial Preparation Checklist that this rule 30A application would be required to be determined first, prior to the hearing of the action on the merits on 28 August 2022, as a point *in limine* or interlocutory issue anticipated to arise at the hearing.

[22] When the matter was called before me on trial the plaintiff expected me to determine the interlocutory application, but the defendant instead pressed upon me to grant her a further extension to have the plaintiff examined by her expert. This application was firmly resisted by the plaintiff. Evidently arrangements had been made for an orthopaedic surgeon to consult with the plaintiff in East London but vitally the protocol determined in rule 36 had not been followed by the state attorney and it transpired that the plaintiff was instead in Elsies River and would need to be seen there, which was at least an indication in the right direction that some attempt was being made by the defendant, finally, to meet her obligations. In order to secure this win, the parties adjourned to my chambers at my request for a pretrial conference where we engaged with the obstacles standing in the way of the trial proceeding and mapped out a plan going forward. My focus first and foremost was in getting the practicalities sorted so that the much-vaunted examination might happen and yield a report. The plaintiff at my prompting and in these circumstances relented that the rule 30A application (well essentially the determination of the issue of costs in respect of this application) stand over for determination later on.

[23] The defendant was, despite the further pass which I indicated to the parties I intended giving her, not about to be let off lightly. In brief reasons given before

issuing the order granting her a postponement and incorporating a case management directive, I noted as follows:

> "I have listened to the parties' submissions in respect of the application before me. In my view the predicament in which the defendant finds herself cannot be laid before anyone's door but her own. I'm further alarmed at the extent to which the rules of court and case management directives of my colleagues have been flagrantly disregarded by her. The request before me is for a postponement and the ruling that I make herein does not absolve her of her breach and general disregard aforesaid or her patent lack of respect for this court. I suggest that she explains this behaviour and seeks the court's condonation to the extent that this is required.
> For present purposes however I am satisfied that it appears necessary that the defendant appoints an orthopedic surgeon to examine the plaintiff and to form an independent opinion concerning the conditions suffered or injury sustained by him in the Sutterheim Hospital upon his admission for treatment on 23 August 2014. The defendant must however pay the cost for the consequences of her inconvenience and prejudice to the plaintiff and the abuse of this court's institutional processes regarding case management."

[24] In the result I issued the following order/case management directive:

> "[1] The application for a postponement *sine die* is granted, provided that the defendant is to pay the wasted costs occasioned by the postponement on the scale of attorney and own client.
> [2] The defendant, *nomine officio*, is further directed to show cause, on affidavit and/or at her election in court when the matter is called on trial at the latest, why she should not be held liable for the wasted costs envisaged by prayer 1 *de bonis propriis*.
> [3] It is recorded that the plaintiff's opposed interlocutory application dated 30 May 2022 remains extant and may at the plaintiff's election be enrolled for determination if and when necessary.
> [4] The defendant is directed to make her arrangements for the plaintiff to be examined in Cape Town by an orthopaedic expert, and to file the requisite notice in terms of rule 36 (2), within 7 days.
> [5] The defendant, as undertaken, is further directed to file her expert's notice and summary arising from the examination within two weeks of his/her consultation with the plaintiff in Cape Town.
> [6] The defendant records that no other expert testimony will be relied upon save that of an orthopaedic surgeon.
> [7] The defendant records further that the issue of *locus standi* raised by her in the plea will not be persisted with.

> [8] The defendant is directed to discover the Stutterheim Correctional Centre's medical records concerning the plaintiff and to make copies available to the plaintiff's attorneys within one week.[12]
> [9] The defendant is further directed to make these available to her own expert before the plaintiff's consultation inasmuch as they may be relevant and have a bearing on the condition suffered or injury sustained by the plaintiff forming the subject matter of the damages claim.
> [10] The registrar is requested to allocate preference to the plaintiff's request to re-enroll the matter on the trial roll once the defendant has filed her expert notice and report."

[25] Having given the plaintiff leeway to reinstate the rule 30A application he took up the cudgels and enrolled the matter for hearing on 22 November 2022. I point out that the defendant's much anticipated expert report was ultimately only served and filed on 17 February 2023, the defendant remaining in breach of the several preceding orders/directives which also by necessary implication meant that the plaintiff could not request the reenrollment of the action on the trial roll.[13] This much was conceded by her in her answering and supplementary affidavits filed,[14] namely that she was in breach. However, her stance was that she was doing what she could and had already been excoriated and penalized by the punitive costs orders outlined in paragraph [24] above and on the basis that no "further prejudice" had emerged so to speak since the date of my order.

[26] I was informed that when the matter (duly reinstated) served on the motion court roll on 22 November 2022 Beshe J intimated that the rule 30A application was not ripe for hearing since the plaintiff needed to file a replying affidavit. A consensual order was made by the parties that the matter thus be removed from the roll with costs reserved. The reserved costs also fall to be determined by this court.

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[12] It transpired that the plaintiff had been detained at some stage hence the relevance of these records.
[13] See paragraph 10 of my order of 28 August 2022.
[14] The supplementary affidavit is dated 16 November 2022.

[27] The papers were duly supplemented and the notice of application reflected the additional prayers requested to extend its reach to all the ancillary aspects. There was, for example, a request added to condone the filing of the plaintiff's supplementary affidavit and for the late filing of his replying affidavit, none of which relief was resisted.

[28] As I indicated above the defendant continued to remain in breach of numerous orders/case management directives and the rules of court until the report of Dr Bandile Mapekula, specialist orthopaedic surgeon, under cover of a notice in terms of rule 36 (9) (a), was delivered on 17 February 2023. Ironically the report was produced on the same day as the examination of the plaintiff on 1 September 2022, but filed five months later. It confirms that the plaintiff sustained an acute compartment syndrome of his right hand and forearm after the intravenous infusion infiltration. The doctor opines in this respect that: "*This is an avoidable complication with regular monitoring care and assessment of intravenous infusion sites.*"

[29] The outcome of the plaintiff's examination demonstrates the enormous prejudice to him by the unnecessary delay, not to mention the extreme callousness of the defendant in frustrating his right of access to justice for a period of over two years. The court's opprobrium of the defendant's conduct, expressed on numerous occasions and symbolised by punitive costs orders along the way which should have left their mark, were however received by the defendant like water on a duck's back.

[30] The defendant has raised no valid opposition to the plaintiff's request for the costs of his dogged pursuit to have the defendant meet her obligations and to be

censured accordingly. Not only is the defendant obliged as a litigant to comply with the rules of court[15] but she is also constrained under section 2 of the State Liability Act,[16] early after legal proceedings have been instituted against her nominally, in conjunction with the head of department and the state attorney, to take a firm legal position in respect of such litigation.

[31] I am mindful that I was somewhat short with Mr. Nzuzo who appeared on behalf of the plaintiff at the hearing (and to whom I apologise) because the papers before me were voluminous and confusing and the prayers seemed to be inviting to the fore matters that had been overtaken by my order of 28 August 2022 and following, but the defendant could have been in no doubt that her breach had persisted until her expert report was ultimately delivered and that the issue of her liability for costs arising from the rule 30A application had been parked for later determination. I was reminded of this only when I ordered and perused the transcript of the proceedings of 28 August 2022.

[32] Upon a thorough review of the history of this matter the plaintiff was in my view perfectly entitled to invoke the provisions of rule 30A to address the prejudice suffered by him as a result of the defendant's utter disregard of the court rules and prior directives, and is further in these alarming circumstances entitled to ask this court, as a mark of its displeasure, to award costs against her on a punitive scale.

[33] In the result I intend to make an order which more or less coincides with the plaintiff's notice of set down dated 14 February 2023 save for the reservations expressed above concerning the removal rather than withdrawal by the defendant

[15] And more particularly the provisions of rule 37A in respect of case management, which is the focus in this matter.

[16]

of her application(s) and the obvious amendments which I consider suitable and/or necessary. It goes without saying that the condonation requested by the plaintiff is also granted.

[34] I issue the following order:

1. The defendant is ordered to pay the plaintiff's costs of the rule 30A application commenced on 30 May 2022 on the scale of attorney and client, such costs to include the reserved costs of the enrolment of the application on the opposed motion court roll of 24 November 2022.

2. The defendant is liable to pay the costs occasioned by the *removal* of the application(s) initiated on 19 August 2022 from the motion court roll of 27 September 2022, including the costs of the application in terms of rule 41 (1) (c), such costs limited to the party and party scale.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 23 March 2023
DATE OF JUDGMENT : 19 September 2023

Appearances:

For the plaintiff : *Mr. S Nzuzo instructed by Sipunzi Attorneys, East London (ref. Mr Sipunzi).*

For the defendant : *Mr. Z M Maseti instructed by The State Attorney, East London (ref. Ms Yoba).*