IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 2248/12

Heard on: 02/09/13

Delivered on: 26/09/13

REPORTABLE

In the matter between:

SIWAPHIWE MAGWENTSHU Plaintiff

and

MINISTER OF SAFETY & SECURITY Defendant

JUDGMENT

NHLANGULELA J:

[1] On 22 October 2012 the plaintiff issued summons against the defendant seeking payment of delictual damages arising out of bodily injuries sustained in an alleged wrongful assault. The defendant, being an organ of state, delivered a notice of intention to defend on 29 November 2012 through the office of the State Attorney, Mthatha acting in terms of Rule 19 of the uniform rules of the Court. It bears mentioning that the summons had been served at the office of the State Attorney as the plaintiff was obliged to do so in terms of s 2(2) of the State Liability Act 20 of 1957, which reads:

> "The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority or a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney."

[2] The office of the State Attorney is an established legal practice in terms of the State Attorney Act 56 of 1957 whose function is, in terms of s 3 (1) thereof, the performance in any court of work on behalf of the Government of the Republic.

[3] What appears clearly from the State Liability Act and State Attorney Act is that the State Attorney is by operation of law the attorney to represent the Minister of a government department in court. The Minister has no statutory authority to appoint an attorney in the private practice to act for him/her. The provisions of s 8(1) of the State Attorney Act does not alter this legal position. Section 8(1) reads:

> "The State Attorney or the person in charge of a branch or the State Attorney's office shall be entitled in the exercise of his functions aforesaid to instruct and employ as correspondent any attorney or other qualified person to act in any legal proceedings or matters in any place in the same way and, *mutatis mutandis*, subject to the same rules, terms and conditions as govern attorneys in private practice, and shall be entitled to receive and recover from such correspondent the same allowances as he would be entitled to do if he were an attorney in private practice."

[4] On 03 December 2012 the private firm of attorneys, S C Vutula & Company (Vutula) delivered a second notice of intention to defend on behalf of the defendant. This notice triggered the bringing of an application under Rule 30(1) at the instance of the plaintiff wherein he seeks a substantive relief in the following terms:

> "(a) Declaring the Defendant's delivery of Notices of Intention to Defend dated 29th November 2012 and 3rd December 2012; from different firms of Attorneys with respect to the same matter, an irregular step.
>
> (b) Directing the Defendant to remove or withdraw one of the Notices of Intention to Defend from either firm of Attorneys**…**"

[5] The precursor to the Rule 30(1) application were two Rule 30A notices served upon both the State Attorney and Vutula on 10 January 2012 in which the complaint of the plaintiff is stated to be that the filing of two notices to defend is an irregular step that must be removed by the defendant by withdrawing the first notice to defend that was filed on 29 November 2012 within ten days, failing which an application would be brought in court against the defendant for the setting aside of the second notice of intention to defend.

[6] It would be proper to interpose at this stage to deal with the second application filed in terms of Rule 30(1) at the instance of the defendant. On 08 April 2013, whilst the plaintiff's Rule 30(1) application was set down for hearing before the opposed motion court on 29 August 2013, the

plaintiff filed a notice to plead in terms of Rule 26 calling upon the defendant to deliver its plea to the plaintiff's claim within 5 days, failing which it would be barred from filing any pleading. The notice was served upon Vutula. The defendant took the view that the plaintiff was disentitled from calling for a plea as the first Rule 30(1) application had suspended filing of further pleadings until that application was resolved by the court. This attitude led to the launching of the second Rule 30(1) application against the plaintiff. As a result both applications landed in this court on 29 August 2013 for determination. I ordered that both applications be argued simultaneously by consent between of the parties.

[7] It may also be mentioned that after the plaintiff had delivered a Rule 30(1) application to the office of the State Attorney on 19 February 2013 at 08h23 a notice to withdraw as an attorney of record was delivered by the State Attorney at 15h37. That notice reads:

> "Be Pleased To Take Notice That defendant's attorneys herein hereby give their notice of withdrawal as attorney of record.
>
> Further Notice That defendant's attorney last known address is Vuthula and Associates, Nobahle House, Madeira Street, Mthatha."

[8] In argument, it was submitted by *Mr Mtshabe*, counsel who appeared on behalf of the plaintiff, that the first Rule 30(1) application turns only on the determination of costs because the withdrawal by the State Attorney has the effect of validating only the notice of intention to defend that was filed by Vutula on 03 December 2012. It was submitted, by extension, that since the withdrawal of the State Attorney rendered academic the determination of validity of the notice to defend filed by the State Attorney on 29 November 2012, the notice of bar served upon Vutula ought to be treated as a regular step. On these submissions the Court was urged to, firstly, order that the plaintiff was entitled to the costs of the first application and, secondly, to dismiss the second application with costs. *Mr Mtshabe* had the second bite of the cherry with regard to the second application. He submitted that in any event the second application falls to be dismissed by reason that the defendant suffered no prejudice due to the filing of the notice to plead. In this regard the Court was asked to apply the judgment of Eksteen J in *Minister of Safety And Security and 2 Others v Bebeto Mxhego* Case No. 1181/2012 (ECM) dated 14/05/2013 (unreported). I will deal with that case later on.

[9] *Mr Vutula,* who appeared on behalf of the defendant, submitted that plaintiff's attack is directed to the notices to defend, not the legal representation of the defendant by the State Attorney and Vutula. He contended that the notices to defend were not irregular and the filing thereof was meant to show that the two attorneys had been qualified by the defendant to represent it in defence of the plaintiff's claim. He referred to the commentary on Rule 30 by Erasmus: *Superior Court Practice,* at B1-90 contending that the filing of a second notice of intention to defend did not offend against the principle as adumbrated in the case of *Nationale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing En Andere* 2001 (2) SA 790(T) that in Rule 30 applications filing of a document would be irregular if it advances the proceedings one step nearer completion. Further, authorities referred to were the cases of *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw N.O.* 1981 (4) 329 (O), *De Klerk v De Klerk* 1986 (4) SA 424 (W); *Gcezengana v Eagle Insurance Co Ltd* 1995 (2) SA 69 (Tk) in support of the submission that the Rule 30 application should succeed only when there is prejudice suffered which relates to proceedings with litigation. The case of *Mxhego, supra,* which *Mr Mtshabe* referred to re-states these principles.

[10] With regard to the second Rule 30(1) application *Mr Vutula* submitted that since an order setting aside the notice of intention to defend filed by Vutula Attorneys would terminate the mandate between those attorneys and the defendant, in consequence of which any step taken by Vutula in the proceedings would amount to a nullity *ab initio*, the notice of bar was an irregular step.

[11] The provisions of State liability Act and State Attorney Act, to which I have already referred, present a peculiar scheme of legal representation when it comes to the organs of state of which the defendant is one. It came as no surprise to me that the issue of legal representation of the defendant by two sets of attorneys was not pursued during arguments. If it is so that it was within the legal rights of the State Attorney to appoint Vutula as a correspondent there ought to have been no reason for the plaintiff to be confused or prejudiced by the filing of two notices of intention to defend.

[12] The argument advanced on behalf of the plaintiff is that the notices constitute an irregular step because they offend against the provisions of Rule 19(1) which allows the defendant in a civil action to, either personally

or through an attorney, deliver one notice of intention to defend. The provisions of the sub-rule read:

> "Subject to the provisions of section 27 of the act, the defendant in every civil action shall be allowed 10 days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend." (Underlining is mine for emphasis).

[13] I do not agree with that interpretation because although the words "notice" and "attorney" are couched in singular the language employed in the sub-rule is merely directory and permissive. It is neither peremptory nor preventive of the State Attorney and the correspondent, Vutula, from delivering notices to defend. The notices themselves are not irregular because the contents thereof meet all the requirements of Rule 19. It seems to me that the plaintiff's objection would, at best, be that the notices are a prolix, rather than objectionable on their substantive nature or for non-compliance with the days within which they were delivered. If they are a prolix as suggested by *Mr Vutula*, the proper remedy available to the plaintiff

would be to claim the costs thereof at the stage of taxation of the bills of costs.

[14] I do not regard the delivery of a notice of intention to defend as a step advancing the proceedings nearer completion. The courts have long ago expressed this attitude. In *Petterson v Burnside* 1940 NPD 403 at 406 Broome J said:

> "In my opinion a step in the proceedings is some act which advances the proceedings one stage nearer completion. Thus the entry of appearance would not be a step in that sense, but would merely be an act done with the object of qualifying the defendant to put forward his defence. Similarly an objection taken with the object of ensuring that the security required by law will be available to the objector is merely any act which places the objector in a position to resist the petition."

[15] The purpose of the Rule 30(1) application was stated by Flemming J in the case of *S.A. Metropolitan, supra,* at 333G-H as follows:

> "I have no doubt that Rule 30(1) was intended as a procedure whereby a hinderance to the future conduct of the litigation, whether it is created by non-observance of what the Rules of Court intended or otherwise, is removed."

This *dictum* has been followed in a long line of decided cases, including the case of *Mxhego, supra.*

[16] In this case the notice of intention to defend delivered by the State Attorney or Vutula, or by both such attorneys, would never be a hinderance in the taking of further steps to bring the proceedings nearer to completion. The plaintiff could have delivered further pleadings undeterred by any of the two notices of intention to defend, thus making the Rule 30(1) application unnecessary. Discussions could have been entered into in a meeting or through correspondence to dispel any confusion that the notices might have caused to the plaintiff. That was not done. The plaintiff suffered no prejudice in my view. The objection taken by it towards the notices to defend was of a highly technical nature, a reason that is not good enough in piloting a Rule 30(1) application. As observed by the Court in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F:

> "… technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merit."

[17] Even if the Court were to find that the delivery of the notice to defend by Vutula was an irregular step it would still be vested with discretion in terms of Rule 30(3) to set the notice aside or not to do so (*Northern Assurance Co. Ltd v Sonidaka* 1960 SA 588 (A); *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 803(A-C). And it was held in *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G-I; and *S.A. Metropolitan, supra,* at 334A-C that prejudice is a prerequisite to succeed to an application in terms of Rule 30.

[18] In this case the nature of prejudice allegedly suffered by the plaintiff is not set out in the founding affidavit. In any event the steps taken by the plaintiff after the receipt of the second notice to defend, and beyond, do not disclose any prejudice. The lodgment of Rule 30 application was not necessary. As observed in the case of *De Klerk, supra,* when non-litigious remedial options could have been taken by the objector to obviate the lodging of a Rule 30 application, and were not taken, the application will be refused.

[19] The case of *Mxhego, supra,* re-states the principle of law that when in a Rule 30 application prejudice is absent, a decision to set the irregular

proceeding aside will not be given; the irregularity may be overlooked. There the objector (the Minister) to a replying affidavit delivered by Mxhego out of time brought a Rule 30 application asking the court to set the replying affidavit aside on the basis that it was an irregular step. It was found that the Minister had suffered no prejudice due to the late filing of the replying affidavit. It was held that the objection that the late filing of the replying affidavit was an irregular step was correct, but the step did not warrant that it be set aside as the Minister had suffered no prejudice. The costs of the application were awarded against the Minister.

[20] The case of *Mxhego* does not assist the plaintiff in this case regardless of the fact that the State Attorney later on withdrew its notice to defend. The withdrawal did not remove a hinderance as envisaged in the case of *S.A. Metropolitan, supra*. The same cannot be said about the second application. I do not see how the defendant could have been expected to deliver a plea in the circumstances where it had been prevented by the plaintiff's Rule 30 application from doing so. In my view as long as the first application was not resolved the defendant would not be entitled to arrogate to itself a right to deliver a plea. By the same token the plaintiff could not demand filing of a plea without the directive(s) of the court issued at the hearing of the first

application. To the extent that the issuance of the notice of bar was not authorized by the Court, it shall be of no force and effect.

[21] Paragraph (a) of the notice of motion in the first Rule 30 application cannot be granted for the reasons that have already been given. It is indeed correct that paragraph (b) of the same notice of motion has been rendered academic due to the withdrawal of the first notice of intention to defend. The defendant has achieved success in the first and second Rule 30 applications.

[22] In the result the following order shall issue:

1. **The plaintiff's Rule 30 application be and is hereby dismissed.**

2. **Paragraph (a) of the defendant's Rule 30 application be and is hereby granted.**

3. **The plaintiff to pay the costs of both Rule 30 applications, except the costs incurred on 02 September**

2013 in respect of the defendant's appearance in court for the second Rule 30 application.

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the plaintiff	:	Adv N. Z. Mtshabe c/o N.Z. Mtshabe Inc MTHATHA.
Attorney for the defendant	:	Mr S.C. Vutula c/o S.C. Vutula & Co MTHATHA.