IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

Case No: CA 15/2024

NOT REPORTABLE

In the matter between:

MINISTER OF POLICE Appellant

And

MONGEZI KATI Respondent

JUDGMENT

TOKOTA ADJP

[1] Drafting of pleadings is a matter of style. However, whatever style one adopts, the pleadings must be clear and concise with a measure of

brevity to enable the opposite side and the court to understand what case, if any, calls for an answer. Allegations of a repetitive and contradictory nature can be swept aside in a whirlwind of anarchy and often obfuscate rather than clarify issues and may result in erratic judgments. Brevity lubricates the wheels of justice. It is trite that affidavits in motion proceedings constitute both pleadings and evidence.[1] As will become clearer in this judgment the pleadings in this matter fell short of defining the issues for determination in a clear and concise manner.

[2] Although we do not have the benefit of the pleadings in this matter and moreover the founding affidavit does not set out in clear and concise manner what the dispute was between the parties, it can be gleaned from the magistrate's judgment that the respondent was claiming damages from the appellant arising from his unlawful arrest and detention. I assume that at the close of the pleadings, the appellant was called upon to make the Occurrence Book (the OB), referred to as SAPS10, available for inspection by the respondent. The appellant failed to discover the same.

[1] *Minister of Land Affairs & Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) ([2007] ZASCA 153) para.43; *Seale v Van Rooyen NO; Prov Govt, NW Prov v Van Rooyen NO* 2008 (4) SA 43 (SCA) ([2008] 3 All SA 245) para.10

[3] According to the magistrate's judgment on 21 November 2022 appellant was served with a notice calling upon him to make available for inspection the OB. He failed to do so. On 20 April 2023 an order compelling the appellant to comply was sought and obtained.

[4] Despite the court order obtained on 20 April 2023 the appellant failed to comply therewith. The respondent then on 24 May 2023 served the appellant with a notice of an application to strike out the appellant's defence which was to be made on19 June 2023. The appellant failed to appear in court on the date in question. The application was then granted in the absence of the appellant.

[5] On 29 August 2023 the appellant launched an application for the rescission of the order of 19 June 2023. The application was dismissed with costs. This appeal is against that order.

[6] According to the notice of motion the application that was before the magistrate was couched in the following terms:

"1. That the late filing of SAPS 10(OB) is hereby condoned.

2. That the Court order striking off the Defendant's Defense is hereby rescended [sic].

3.That the defense is hereby re-instated.

4. The Defendant is hereby granted Leave to defend the main action.

5. The costs be in the cause.

6. That the Court grants such further and/or alternative relief."

[7] As can be seen from the notice of motion the application was for the condonation of the late filing of the OB. There was no application for condonation for the late filing of the rescission application of the order dated 19 June 2023. The founding affidavit in support of the application is bereft of any explanation as to why the appellant did not attend court on 19 June 2023. The only explanation proffered is that the appellant was not in possession of the OB as the same was with IPID.

[8] In the answering affidavit the respondent took the point that the appellant filed his application for rescission out of time and there was no application for condonation for the late filing thereof. Moreover, no facts were advanced in the papers upon which the court could exercise its discretion to reinstate the appellant's defence. The appellant made no

attempt whatsoever to deal with the prospects of success or whether there was any bona fide defence to the respondent's claim.

[9] In the replying affidavit the appellant belatedly asserted that the application was an application for the rescission of the order of 19 June 2023 in terms of Rule 49(8) of the Magistrates' Court rules. Consequently, so he asserted, there was "no need for an application for condonation if the application is made within a period of one year after having knowledge of the order".

[10] In the same replying affidavit the appellant raised the point that the respondent "has deliberately failed to comply with Rule 60(2) and (3) of the Uniform Court rules." In the heads of argument, the attorney for the appellant contended that: "[s]ince the appellant failed to avail the SAPS10 timeously, the respondent applied for an order for the striking out of the appellant's defence and such order was granted by the Honourable Magistrate Meyer on the 19th of June 2023."

[11] At the hearing of the appeal we tried in vain to find out from Mr Mankanku, who was representing the appellant, as to what was it that the

respondent did not comply with in terms of rule 60(2) and (3). The founding affidavit did not deal with the substance of noncompliance with rule 60(2) and (3). The magistrate in his judgment seems to accept that there was compliance with rule 60 and such a finding is not attacked by the appellant.

[12] Rule 60(2) provides that where a party has failed to comply with an order of the court, any other party may notify the defaulting party that he/she intends to apply to court, after the lapse of 10 days of such notice, for an order, inter alia, striking out his/her defence. Rule 60(3) provides that a court can make an order it deems fit in the circumstances of the case.

[13] In any event, the contention that the application for rescission was brought in terms of rule 49(8) was not covered in the founding affidavit. Therefore, such contention constituted a new matter in the replying affidavit. It should not have been allowed because the respondent was prejudiced thereby in that he did not have an opportunity to respond to it. It has been consistently held that a new matter cannot be raised in the replying affidavit. See, in this regard, *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)*[2].where it was stated:

[2] 1978 (1) SA 173 (W) at 177; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 269A-H; *Swissborough Diamond Mines (Pty) Ltd v Govt of the RSA* 1999 (2) SA 279 (T) at 338.

'It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out.'

The Learned Judge continued and said:

'This is not however an absolute rule. It is not the law of Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances.'[3] The respondent in casu was not afforded an opportunity to deal with the new matter.

[14] In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd*[4] Schutz JA remarked:

'There is one other matter that I am compelled to mention - replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the

[3] Ibid note 2 at 177I-178A
[4] 2003(6) SA 407 (SCA) Para 80.

applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.'

[15] In *Van Zyl and Others v Government of the Republic of South Africa and Others*[5] Harms ADP (as he then J was), said:

'A reply in this form is an abuse of the court process and instead of wasting judicial time in analyzing it sentence by sentence and paragraph by paragraph such affidavits should not only give rise to adverse costs orders but should be struck out as a whole . . . mero motu.'

[16] Needless to mention that a striking-out of a defence is a drastic remedy[6] and, accordingly, the court must be apprised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. It has been found that the relevant factors, when orders of this kind are considered, will be (a) the reasons for non-compliance with the rules, request, notice, order or direction concerned and, in this regard, whether the

[5] 2008(3) SA 294 (SCA) Para 46

[6] *Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* 1971 (3) SA 455 (T) at 462H; *MEC, Dept of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB) ([2022] 3 All SA 760) Para.18

defaulting party has recklessly disregarded his obligations; (b) whether the defaulting party's case appears to be hopeless; and (c) whether the defaulting party does not seriously intend to proceed. In addition, prejudice to either party is a relevant factor.[7]

[17] The appellant did not make out a case for the rescission. He never explained why he did not attend court on 29 June 2023. He never explained what his defence was. He never explained the basis upon which it was alleged there were prospects of success in the main case. The contention that the application was based on rule 49(8) must be rejected for the following reasons: this is an afterthought as it is not contained in the founding affidavit; besides, the basis for reliance on rule 49(8) is not stated anywhere. Consequently, in my view, there is an insurmountable hurdle in the 'new' version being accepted. It is trite that the applicant must stand or fall by the averments made out in its founding affidavit.[8]

[7] *Smith NO v Brummer NO; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357; *Gefen and Another v De Wet NO and Another* 2022 (3) SA 465 (GJ) para.27
[8] *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) (2011 (3) BCLR 264; [2010] ZACC 23) para 29; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30.

[18] In my view the magistrate was correct in dismissing the application. Consequently, this court is not entitled to interfere with that order. The appeal must fail.

[19] Accordingly, the following order will issue:

The appeal is dismissed with costs.

B R TOKOTA
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
EASTERN CAPE DIVISION.

I Agree

M HINANA
ACTING JUDGE OF THE HIDH COURT

Appearances:

For the appellant: Mr N Mankanku

Instructed by N Mankanku Attorneys

For the respondent: Mr M Siwahla

Instructed by State Attorney

Date Heard: 3 May 2024.

Date delivered: 15 May 2024.