



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 42542/2018

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED |

2 October 2023
DATE

SIGNATURE

In the interlocutory application of:

KENNETH DAVID BRAUDE N.O

First Applicant/First Defendant

JULIAN RICHARD POLATINSKY N.O

Second Applicant/Second Defendant

and

JAMES BLACKWOOD-MURRAY

Respondent/Plaintiff

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 October 2023.

JUDGMENT

MALINDI J

Introduction

- [1] The applicants in this section 47(4) application are the defendants in the main action brought by the respondent herein under case number 42542 / 2018. For convenience the parties shall be referred to as in the main action.
- [2] On 30 September 2022 the court ordered the plaintiff, Mr James Blackwood – Murray to furnish security for costs in his action against the defendants before 14 October 2022.
- [3] The plaintiff has failed to do so. In pursuance of the court order, in particular the provision that should the plaintiff fail to comply, the defendants are granted leave to set down their application in terms of Rule 47(4) of the Uniform Rules of Court, they did so on 18 October 2022.
- [4] The plaintiff belatedly filed his notice of intention to oppose the application on 14 November 2022. In addition, he filed a Rule 41A notice on 8 November 2022 seeking a referral of the matter to mediation.
- [5] On 15 November 2022 the plaintiff's attorney, Ms Noa Kinstler, filed an answering affidavit. Its late filing is condoned.

Consideration of the issues

- [6] The first issue for determination is whether the defendants have satisfied the requirements of rule 47(4) which reads as follows:

“The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.”

- [7] The second issue is whether the plaintiff's section 41A notice and application seeking a referral of the matter to mediation is competent.
- [8] The plaintiff urges the court to exercise its discretion in terms of rule 47(4) carefully and not in the strict sense as to grant the application would be tantamount to closing the doors of court against the Plaintiff in circumstances where the defendants have not presented strong grounds to justify such an order. An alternative remedy is proposed, that is, to allow the plaintiff sufficient time to try and raise the amount required for security.
- [9] First, I consider the Rule 41A application to be another delaying tactic by the plaintiff. Were the plaintiff of the belief that this matter is capable of mediation he would have delivered the notice simultaneously with his summons as required by the rule. The notice and application stand to be refused on this ground alone.
- [10] Even if the notice to mediate were to be entertained, mediation cannot be forced on the parties. It is a process entered into by agreement between the parties. On 8 November 2022 the plaintiff proposed mediation to the defendants. That was not acceded to by letter of 11 November 2022. The plaintiff's criticism of the defendants for rejecting mediation without considering its merits and stating the reasons for rejecting it does not avail the plaintiff in the face of his dilatory conduct in these proceedings. Rule 41A(3)(a) applies if the parties agree after commencement of proceedings to go for mediation. I am unable to grant leave in these circumstances. Subsection (3)(b) requires agreement of the parties even if a judge may consider mediation appropriate

after commencement of proceedings. As a voluntary process, the court cannot force it upon the parties.

[11] Regarding the merits of the Rule 47(4) application, great prejudice has been caused to the defendants. Their desire that this matter come to finality deserves clear and decisive consideration. It is also in the interests of justice and that of the public that matters reach finality expeditiously without compromising any of the parties' rights to a fair hearing.

[12] The rule 47(4) application follows upon a long history of litigation in this matter, including several interlocutory applications and rulings. I have considered all these circumstances. The application has been brought in the face of a court order that has not been complied with by the plaintiff. No cogent explanation has been proffered in the answering affidavit, save for a vague statement that the plaintiff recently lost his job. This is most unsatisfactory, especially that it does not come from the plaintiff himself but from his attorney. The averment is not even confirmed by any confirmatory affidavit of the plaintiff.

Conclusion

[13] For all of the above reasons, the defendants' application to dismiss the plaintiff's action under case number 42542/2018 is granted and the following order is made:

1. The plaintiff's claim under case number 42542 / 2018 is dismissed.
2. The plaintiff is to pay the costs in the action on the attorney and client scale.

3. The respondent is to pay the costs of this application.

**G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

APPEARANCES

COUNSEL FOR THE APPLICANTS: Adv R Shepstone
Adv N Jongani
INSTRUCTED BY: Fairbridges Wertheim Becker
Attorneys

COUNSEL FOR THE RESPONDENT: Ms N Kinstler
INSTRUCTED BY: Noa Kinstler Attorneys

DATE OF THE HEARING: 16 November 2022
DATE OF JUDGMENT: 2 October 2023