



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: 24 July 2023 Signature: _____

CASE NO: 030636/2022

In the matter between:

THE FOUNTAIN PRIVATE HOSPITAL

Applicant

and

MMABATHO NGOANANOKA PORTIA RATAU-DINTWE

Respondent

JUDGMENT

TERNENT, AJ:

- [1] The applicant sought an order from this Court in an interlocutory application which it instituted against the respondent declaring the

combined summons issued and served by the respondent as irregular in terms of the provisions of Rule 30(2)(b) of the High Court Rules. The irregularity stemmed from the manner in which the particulars of claim had been signed by the respondent's attorney, Ms Mmatlou Hellen Phaleng. In essence, the complaint was that the attorney had failed to designate that she was authorised under the repealed section 4(2) of the Right of Appearance in Courts Act 62 of 1995 and presently required by section 25(4) of the Legal Practice Act 28 of 2014, to sign the particulars of claim as required in terms of the provisions of Rule 18(1) of the Uniform Rules of the above Honourable Court.

[2] Rule 18(1) provides:

“A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party.”

[3] As a consequence, the applicant sought an order that the combined summons was non-compliant with Rule 18(1) and furthermore should be set aside as an irregular step. Should this Court be inclined to grant this relief, an order was also sought that the respondent deliver a new combined summons within 10 (ten) days and furthermore that this irregularity entitled the applicant to a costs order on the attorney client scale.

[4] The summons reflects the signature of the attorney under the attorney's practice's name Phaleng-Podile Attorneys, is dated 29 September 2022 and reflects the necessary address, contact numbers and e-mail addresses and file reference on page 4 thereof. The particulars of claim

reflects on page 14 thereof that the attorney again signed the particulars of claim, on 29 September 2022, reflecting her practice name and the identical information as contained in the summons.

[5] Having entered an appearance to defend on 1 November 2022, the applicant then filed its notice in terms of Rule 30(2)(b) setting out the aforesaid irregular step. In so doing it afforded the respondent a period of 10 (ten) days within which to remove her cause of complaint. The notice is dated 11 November 2022. As such the cause of complaint was to be removed by 25 November 2022. The applicant contends that it is prejudiced because the combined summons is not properly before the Court and is not a pleading and therefore it cannot defend the action until this irregular step has been regularised. It moves for an adverse attorney- client costs order on the basis that the respondent has failed to adhere to the Rules of Court and omitted to do so in the face of its notice in terms of Rule 30(2)(b).

[6] It is common cause that on 14 November 2022 the respondent's attorney addressed a letter to the applicant's attorney. Aside from raising the point that the applicant itself could not take this point as it had entered an appearance to defend and had therefore taken a further step in the cause, a point to which I will later return and which has no merit, the attorney dealt with the crux of the purported irregularity by attaching her certificate in terms of section 4(2) of the Right of Appearance in Courts Act which confirmed therefore her authority and capacity to sign the summons and particulars of claim. The certificate is dated 23 April 2013 and was issued by the Chief Registrar, North Gauteng High Court, Pretoria by one S D Mniki and confirms the attorney's right of appearance in accordance with section 4(3) of the Right of Appearance in Courts Act 62 of 1995. The respondent also requests that the applicant withdraw its Rule 30 notice. This did not occur.

[7] On 14 November 2022, applicant's attorney addressed a letter by e-mail

to the respondent's attorney in response wherein it correctly disregarded the point that a further step had been taken in the cause by the filing of a notice of intention to defend and insisted that the respondent remove the alleged cause of complaint by 25 November 2022 failing which it would institute this application.

- [8] On 30 November 2022, the application was launched.
- [9] The respondent contends that as the attorney has rights of appearance, the Rule 30 notice and subsequent application were frivolous and unnecessary. Further, on receipt of the relevant certificate, the Rule 30 notice should have been withdrawn by the applicant.
- [10] As a consequence, the respondent contends that the applicant's attorney of record should pay the costs of this application *de bonis propriis* on the attorney client scale. In this regard, the applicant's attorney's conduct is labelled as "*intransigent*" and amounting to a technical indulgence which simply has a dilatory effect on the running of the merits of the action. In bringing the application, the respondent contends, the applicant has abused the Court process and in effect wasted the Court's time.
- [11] At the outset and prior to dealing with the relief sought, I requested the respective counsel to deliver supplementary heads of argument addressing me on the repeal of the Right of Appearance in Courts Act by the Legal Practice Act. Supplementary heads were filed and it was common cause that insofar as the reference to the Right of Appearance in Courts Act had been made in the application, this was incorrect and that the attorney's rights of appearance were now dealt with by the provisions of the Legal Practice Act and more particularly section 114(5).
- [12] Section 114(5) provides:

“(5) *Every attorney who, on the date referred to in section 120(4), has the right of appearance in the High Court of South Africa, the Supreme Court of Appeal or the Constitutional Court in terms of any law, retains that right after the commencement of this Act.*”

[13] The date referred to was the date on which the amendment to the Legal Practices Act had been promulgated being 17 January 2018, the Legal Practices Act having come into law on 22 September 2014.

[14] In argument, I enquired of the respondent’s counsel why the respondent had not simply filed amended pages in which reference was made to the relevant section of the Legal Practice Act. The respondent’s counsel referred me to the decision of ***Quill Associates (Pty) Ltd v Dawid Kruiper Local Municipality***.¹ As set out in the judgment, Chwaro AJ held that:

“[24] *It cannot be gainsaid that the signatory to the respondent’s pleadings was and still is an attorney having the right of appearance in the High Court and was thus, as at the time of appending his signature to the said pleadings, entitled and authorised to sign such pleadings on behalf of an advocate and as an attorney in his own right in this division of the High Court. The fact that he did not identify himself as such was, in my view, properly cured by the correspondence that was transmitted to the applicant and dated 8 April 2020.*

[25] *In the premises, the alleged irregularity complained about by the applicant has no merit and the applicant did not demonstrate to have suffered any prejudice whatsoever on any course of action which it might be advised to undertake in*

¹ (2009/2022) [2020] ZANHC 87 (20 November 2020)

relation to the contents of the plea filed on behalf of the respondent. Resultantly, this application falls to be dismissed.”

- [15] In so doing, the application was dismissed and costs were ordered to follow the result.
- [16] The ***Quill Associates*** decision was made by this division in the Northern Cape, Kimberley and, accordingly, is not binding on me but is persuasive.
- [17] In the decision of ***Moloi v The Municipal Manager, Fezile Dabi District Municipality***² a decision by Molitsoane J in the Free State Division, Bloemfontein, the judge also dealt with a combined summons which did not reflect that the signatory, an attorney, had right of appearance in terms of section 4(2) of the Act. There it was stated that the

“... crisp issue in this question of signatures is whether the summons and the particulars of claim were signed by an attorney of record with a right of appearance in terms of the Act.

- [15] *It is indeed that in practise the attorney with a right of such appearance would usually have it reflected in the combined summons that he has such right of appearance. Rule 18(1) does not in my view say that the pleading must indicate ex facie that the person who signs, if he is an attorney, has a right of appearance in terms of the Act.*

- [16] *The application in this case was issued in 2021. Both Messrs Noge and Modise had by then been issued with certificates in terms of s4(2) and both thus had the right of audience in the High Court. The fact that they did not indicate such right in the*

² 2022 JDR 1018 FB

summons does not, however, render the summons defective. Rule 18(1) simply requires that the combined summons be signed by an advocate and an attorney, or by the attorney with a right of appearance in terms of the Act. Noge and Modise are such attorneys. If this court were to insist that they should reflect their right of appearance in the summons, then in that case, such a move would be elevating form over substance. It is, however, good practise that the right of appearance in terms of the Act should ideally be reflected in the combined summons and pleadings in order to obviate the necessity to bring the applications like the one before this court.”

- [18] In the ***Moloi*** matter a Rule 30(A) notice was delivered on receipt of the combined summons in which it was alleged that the attorney had not complied with Rule 18(1) by reflecting that he had rights of appearance and was authorised to sign the summons. The respondent did not respond to the Rule 30(A) notice by amending the summons but instead wrote a letter informing the applicant that the attorney did have the relevant certificate and complied with the provisions of section 4(2) of the Right of Appearance Act and promptly delivered a notice of bar. The applicant then proceeded to deliver a further notice in terms of Rule 30 calling upon the respondent to remove the notice of bar as this too was an irregular step to which there was no reaction. As a consequence the Court was then faced with an application similar to this.
- [19] The learned Judge found that because the respondent had not dealt with the concerns raised by the applicant and could have prevented the application this brought about an opposed application. The application was dismissed and each party was ordered to pay its own costs. Again, this decision is not binding on me but is persuasive in its ambit.
- [20] In my view, the Rule is clear in that it provides that the summons must be signed either by an advocate or by an attorney with rights of

appearance. It is common cause that the respondent's attorney did have right of appearance. Once this information was disclosed to the applicant, that should have been the end of the matter. Instead, both parties have incurred unnecessary legal costs on a technical issue which halted the progress of the action and did no justice to either of the parties thereto. I would have anticipated that the attorneys of record would have been more collegial to one another which would have halted the costly bringing of an application to Court. As set out in the *Moloi* matter, there is a practice in this division too for attorneys to reflect that they have right of appearance in accordance with the Legal Practice Act. However, the Rule does not specifically require that the practice must be complied with.

- [21] I am, accordingly, of the view that because the attorney did have rights of appearance albeit not glaringly apparent from the combined summons and particulars of claim, the combined summons is not irregular and is a pleading. There was no prejudice to the applicant who was alive to this information on receipt of the attorney's letter dated 14 November 2022. In those circumstances the application must be dismissed.
- [22] As stated above, the point that was taken by the respondent in the letter dated 14 November 2022 and also raised in the answering affidavit, that in entering an appearance to defend to the summons the applicant had taken a further step is patently flawed. A party must deliver such a notice to indicate its defence of the action and to place its attorney on record. This is trite. As such the point taking by both attorneys did nothing to aid and advance the litigation but simply clouded and delayed its path.
- [23] Insofar as costs are concerned, it is the usual practice that costs follow the result. However, in making a costs award, the Court has a discretion in this regard. I am of the view that both attorneys expressed a level of intransigence with one another – the applicant's attorney in bringing the

application and the respondent's attorney in not simply appeasing the applicant's attorney to the extent necessary by filing amended pages reflecting what is a common practice in this division – her entitlement to sign pleadings given her right of appearance. In addition, both attorneys raised procedural points against each other which have no merit. Accordingly, I am not of the view that this is a matter in which adverse costs are apposite or that the costs should be paid by the applicant. Rather each party should pay its own costs.

[24] I accordingly make an order in the following terms:

24.1 The application is dismissed.

24.2 Each party is to pay its own costs.

P V TERNENT

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

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 on 24 July 2023.

Appearances:

FOR APPLICANT: Mr M Mathebula
E-mail: musa@mbaincorporated.co.za

INSTRUCTED BY: Motsoeneng Bill Attorneys Inc.
E-mail: reception@mbaincorporated.co.za

FOR RESPONDENT: Advocate C Shongwe
E-mail: shongwecm@gmail.com

INSTRUCTED BY: Phaleng-Podile Attorneys
E-mail: admin@phalengattorneys.co.za _____

HEARD ON: 22 May 2023

DATE OF JUDGMENT: 24
July 2023