



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

CASE NO: 77227/2018

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

[7 DECEMBER 2022]

.....

SIGNATURE

In the matter between:

FIRST NATIONAL BANK t/a WESBANK

Plaintiff

and

J GOQO

Defendant

J U D G M E N T :

This Judgment was delivered electronically by being uploaded to the CaeLines platform. The date of the Judgment is deemed to be the date that the Judgment is uploaded on CaseLines, regardless of any other date appearing on this Judgment. In this particular application an Order was made, as appears from what is set out below, and the date of the Order is the date that the Order was delivered and uploaded to CaseLines.

NEL AJ

- [1] This is an opposed application for Summary Judgment, which has a lengthy, convoluted and extensive history. It is not necessary to set out all of the history, as the Summary Judgment Application is still not finalised, and will have to be considered afresh by another Court.
- [2] The Summary Judgment Application was initially launched on 11 January 2019, and the set down for hearing of the Application on 3 October 2022 was the sixth time that the Application has come before the Court.
- [3] The Application has been postponed on five prior occasions, but the reasons for such postponements are not relevant on this particular occasion.
- [4] The first *in limine* point raised by the Defendant's counsel was that the Plaintiff's failure to serve a Supplementary Affidavit that was uploaded to CaseLines, on the Defendant's attorneys of record, rendered the Application fatally defective.
- [5] I indicated that I was of the view that such failure did not render the entire Application defective, as such failure could be remedied by the Defendant being granted an opportunity to file an affidavit in response to the Supplementary Affidavit (and a postponement if necessary).
- [6] The Defendant however became aware of the existence of the Supplementary Affidavit, which had been uploaded to CaseLines, on 4 August 2022, being the day the Application was previously set down for hearing.

- [7] I enquired from the Defendant's counsel as to why the Defendant had not filed an affidavit in response to the Supplementary Affidavit after becoming aware of the Supplementary Affidavit on 4 August 2022, and he advised me that there was nothing in the Supplementary Affidavit "*to answer to*".
- [8] I enquired as to what prejudice the Defendant had then suffered that would render the non-service of the Supplementary Affidavit a "*fatal irregularity*", if the Defendant had been aware of the contents of the Supplementary Affidavit since 4 August 2022 and did not intend to respond thereto.
- [9] Defendant's counsel then submitted in response that if the Plaintiff was prepared to accept the record of the latest payments made by the Defendant, that the Defendant intended to rely on, which record had been uploaded to CaseLines without an affidavit, the Defendant would abandon the first *in limine* point. Plaintiff's counsel agreed to such proposal and I confirmed that there was agreement that the first *in limine* point had fallen away, and need no longer be considered.
- [10] Plaintiff's counsel then submitted that, based on the contents of the affidavits filed on behalf of the Plaintiff, including the Supplementary Affidavit, the Defendant's arrears as at 16 June 2022 was R175 745.92, and that the payment of R32 000.00 referred to in the records did not remedy the Defendant's arrears as Defendant contended.
- [11] Defendant's counsel then submitted that the Defendant would have to file an affidavit in response to the allegations in the Supplementary Affidavit in order to deal with such submissions.

- [12] I stated that I would grant a postponement of the Summary Judgment Application, despite the Defendant's change of approach as to the need for an answer to the Supplementary Affidavit, so as to enable the Defendant to file an affidavit in response to the contents of the Supplementary Affidavit, as requested by the Defendant's counsel.
- [13] Defendant's counsel submitted that the costs of the postponement should be payable by the Plaintiff, as a result of the Plaintiff's failure to serve the Supplementary Affidavit on the Defendant's attorneys, alternatively costs should be costs in the Application.
- [14] Plaintiff's counsel submitted that the Defendant's conduct in seeking a postponement was consistent with the manner in which the Defendant has sought to avoid the grant of summary judgment on previous occasions, and submitted that the only appropriate costs order would be that the Defendant should pay the costs of the postponement on an opposed basis, and on the attorney/client scale.
- [15] In determining an appropriate costs order, I had regard to the submissions of counsel, and the protracted history of the Summary Judgment Application.
- [16] I am of the view that the conduct of the Defendant, in electing not to respond to the Supplementary Affidavit, despite being aware of the existence and contents of the Supplementary Affidavit since 4 August 2022, and to rather raise as an *in limine* point that the lack of formal service of the Supplementary Affidavit renders the Summary Judgment Application fatally irregular, is opportunistic, particularly in circumstances where the Defendant had no intention of replying to such Supplementary Affidavit.

[17] I am also of the view that the request for a postponement, so as to enable the Defendant to file an affidavit in response to the Supplementary Affidavit, when the proverbial shoe began to pinch, is certainly dilatory.

[18] The conduct of the Defendant as set out above, certainly justifies the granting of a punitive costs order as against the Defendant.

[19] I accordingly made the following order:

[19.1] The Application for Summary Judgment is postponed *sine die*;

[19.2] The Defendant is to file its affidavit in response to the Plaintiff's Supplementary Affidavit within 15 days as from 6 October 2022;

[19.3] The Defendant is to pay the wasted costs occasioned by the postponement of the Summary Judgment Application, on the attorney and client scale, on an opposed basis.

G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Judgment: 7 December 2022

APPEARANCES

For the Plaintiff: I Oschman

For the Defendant: S G Seepamore