

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No. 3703/2019

In the matter between: -

SONWABO CIBI

First Applicant

PIWOKUHLE ZITSHU

Second Applicant

FIKELWA SETI

Third Applicant

NOXOLO MARU

Fourth Applicant

NOMBEKO MAZWI

Fifth Applicant

JOSHUA ZWELOBUSI JITA

Sixth Applicant

LOMEX MZANELE SISILANA

Seventh Applicant

NOMTHANDAZO NTOZAKHE

Eighth Applicant

THULISA SONJANI

Nineth Applicant

ANITA MODIKOE

Tenth Applicant

ANDILE MINI

Eleventh Applicant

NOSIPHIWO SOMDYALA

Twelfth Applicant

SIYABONGA STOMPI

Thirteenth Applicant

and

THE PUBLIC SERVICE COMMISSION

First Respondent

MEC: DEPARTMENT OF TRANSPORT

Second Respondent

PREMIER: EASTERN CAPE

Third Respondent

SPEAKER: EASTERN CAPE LEGISLATURE

Fourth Respondent

Coram: Bands AJ

Date heard: 21 July 2022

Delivered: 28 July 2022

JUDGMENT

BANDS AJ:

[1] This application served before me on the opposed motion court roll on Thursday, 21 July 2022, having been postponed to the said date, by agreement between the parties who were present in court on 24 February 2022.¹

[2] The application, in which the applicants, *inter alia*, seek to review and set aside a report of the first respondent, entitled “*PSC report on the investigation into allegations of irregular appointment of staff, consultants and contractors in the Department of Transport: Eastern Cape Province*”, dated November 2019, was issued during the course of December 2019.

[3] Following the filing of the first respondent’s answering affidavit on 29 September 2020, and the applicants’ reply thereto on, what appears to be,² 30 April 2021, the matter was enrolled for hearing by the first respondent on 24 February 2022.

[4] The Applicants’ erstwhile attorney of record filed a notice of withdrawal as attorneys of record on 30 June 2021,³ the relevance of which, I return to later.

[5] When the matter came before the court some eight months later, on 24 February 2022, the applicants remained unrepresented. The first respondent’s counsel, who was present in court on the said date, advised that the fourth; seventh; and eighth applicants appeared in person and sought a postponement of the matter for the purposes of obtaining legal representation.

¹ The fourth, seventh, and eighth applicants were present in person, whilst the first respondent was legally represented.

² Whilst the Notice of Filing, in respect of the first respondent’s answering affidavit, is dated 30 April 2021, it does not contain a receipt stamp from the offices of the first respondent’s attorney of record.

³ I make mention of the fact that the said notice is not compliant with the provisions of Uniform Rule 16(4)(a), read with Rule 7(a) of the Joint Rules of Practice for the High Courts of the Eastern Cape Province.

[6] The matter was accordingly postponed, by agreement between the parties, to 21 July 2022, with the applicants to pay the wasted costs occasioned by the postponement. I am further advised that Beshe J, who was seized with the matter, stressed, to the aforementioned applicants, the importance of obtaining legal representation to enable the matter to proceed on 21 July 2022.

[7] A notice of acting, on behalf of the third; fourth; seventh; eighth; and ninth applicants (whom I shall collectively refer to as "*the applicants*") was filed by the applicants' present attorney of record some five months later, on 21 July 2022, being on the date of hearing. Strikingly, the notice of acting was filed more than one year following the withdrawal of the applicants' erstwhile attorney of record.

[8] As a consequence of the late engagement of the applicants' attorney of record, a postponement of the matter was sought for the purposes of consulting with "*the Applicants in order to consult with a Counsel*". Whilst the first respondent reluctantly agreed to the belated request for a postponement, the parties were unable to agree on the scale of costs for which the applicants would be liable. The applicants contended that their liability in respect of the wasted costs occasioned by the postponement ought to be on a party-and-party scale. The first respondent, on the other hand, contended that this was an appropriate matter for the award of costs on an attorney-and-client scale.

[9] In support of the applicants' submissions, an affidavit deposed to by the applicants' attorney of record on the date of hearing, was handed up from the bar by the applicants' counsel. A copy of the affidavit was simultaneously provided to the first respondent's counsel, who had not previously had sight thereof.

[10] In argument, the first respondent's counsel contended that the attestation clause at the base of the affidavit, which referred to the deponent, as "*he*", in circumstances where the deponent was recorded as being an adult female, rendered the affidavit invalid. Accordingly, so the argument went, it was not possible to verify whether the affidavit had been attested to in the presence of the commissioner of oaths. In the event of a finding that the affidavit was invalid, no such affidavit served before the Court.

[11] Accordingly, the issues which fall to be determined by me pertain to the validity of the said affidavit; and the scale of costs for which the applicants are liable.

Validity of the affidavit

[12] Affidavits must satisfy the requirements set out in the Regulations Governing the Administering of an Oath or Affirmation⁴ (*“the Regulations”*) promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

[13] In terms of Regulation 2(1), read with 2(2), before a commissioner of oaths administers the oath to any person, he shall ask the deponent: (a) whether he knows and understands the contents of the declaration; (b) whether he has any objection to taking the prescribed oath; and (c) whether he considers the prescribed oath to be binding on his conscience. In the event of the deponent answering the aforesaid questions in the affirmative, the commissioner of oaths shall administer the oath.

[14] For the present purposes, the content of Regulation 3(1), which requires the deponent to sign the declaration in the presence of the commissioner of oaths, is apposite.

[15] In *Absa Bank v Botha NO*,⁵ Kathree-Setiloane J, in the context of summary judgment proceedings, had an occasion to consider the validity of an affidavit wherein the defendant’s principal ground of objection thereto was *“that the plaintiff’s purported verifying affidavit does not constitute an affidavit as the deponent to the affidavit, Ms Suney du Plessis, declares that she is a female in the affidavit, yet the commissioner of oaths certifies that she is a male. Ms Du Plessis specifically declared, in this regard, that she was ‘a major person in the employment of the Plaintiff as a manageress of the Plaintiff’, yet the commissioner of oaths certified that*

⁴ Promulgated in Government Gazette 3619, Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, Government Notice R1428 of 11 July 1980 and Government Notice R774 of 23 April 1983.

⁵ 2013 (5) SA 563.

*‘the Deponent acknowledged that he knows and understands the contents of this affidavit...’*⁶

[16] The confusion which arose in *Absa Bank v Botha NO* was compounded by the reference to the deponent as a manager in the certificate of balance upon which the plaintiff relied.

[17] Ultimately, the court, in the exercise of its discretion, found that the affidavit in question did not constitute an affidavit for the purposes of Rule 32(2) for want of compliance with the Regulations. In coming to such a finding, the court stressed that it should not be placed in a situation in which it was required to speculate as to the gender of the deponent and as to whether the affidavit had been sworn to and signed in the presence of a commissioner of oaths.

[18] *Absa Bank v Botha NO* is often cited by practitioners as authority for the proposition that affidavits are invalid simply if there is a disparity between the gender selected by the deponent and that selected by the commissioner of oaths. This is not so.

[19] It is settled law that the court retains a discretion to refuse an affidavit which does not comply with the Regulations, such Regulations being directory rather than peremptory. It remains a question of fact in each individual case as to whether or not there has been substantial compliance with the Regulations.

[20] In *Mndiyata and Others v Umgungundlovu CPA and Others*,⁷ a recent decision of the Mthatha High Court, the court, in considering errors in the commissioning of affidavits, stated as follows at paragraph [14]:

“Furthermore, the second respondent (who deposed to the answering affidavit on behalf of the respondents) stated at the beginning of the affidavit that he is an adult male. There is no evidence that another person other than the first respondent appeared before the Commissioner. The applicants

⁶ At paragraph [3].

⁷ Unreported judgment by Coltman AJ, (1606/20) [2021] ZAECHMC 6 (28 January 2021).

simply ask this court to infer that, as the affidavit refers to a “she” in the attestation clause, it could not have been the first respondent who had signed the affidavit. It will be noted that the word “she” forms part of the pre-typed document that must have been placed before the Commissioner. If the Commissioner had, for instance, personally written the word “she” in the attestation clause, it could have made for a stronger case for the applicants. It is, therefore, clear that this must have been an error on the part of the Commissioner.”

[21] Similarly, in the present instance, the attestation clause in question forms part of a pre-typed affidavit, which I accept was placed before the commissioner of oaths and did not emanate from him.

[22] In *Capriati v Bonnox (Pty) Ltd and Another*,⁸ the court was called upon to consider whether an affidavit, which made specific reference to the deponent being an adult female, was invalid in circumstances where the commissioner of oaths omitted to identify the gender of the deponent in the attestation clause. In considering the court’s discretion arising in such matters, the court stated, *inter alia* with reference to *Absa Bank v Botha NO*, as follows:

“[6] The decision was handed down in the context of a summary judgment application which, if granted by a court, brings finality to litigation as an extraordinary procedural step. It is important to emphasize, as the judge noted, that the court is vested with a discretion to refuse an affidavit which does not comply with the Regulations. The corollary, in my view, is that a court is vested with a discretion to condone noncompliance with the Regulations and to admit an affidavit.

[7] In Lohrman v Vaal Ontwikkeling 1979 (3) SA 391 (T), a full bench of this Division, dealt with, amongst others, the question of substantial compliance with the regulations governing attestation of affidavits in the context of an application for summary judgment. Nestadt J said at page 398E-H- 399A:

⁸ Unreported judgment of Petersen AJ, (101816/2016) (2018] ZAGPPHC 345 (10 May 2018).

"I should have mentioned that the commissioner is described as being a practising attorney...it seems to me that where an attorney (who is an officer of this Court) describes the statement as being a "beedigde verklaring", it can and must be accepted that it was sworn to on oath. To require that, in addition to these words, there should again in conjunction with "geteken" be added the word "beedig" would be to insist on an unnecessary duplication of allegations.

Even, however, if this approach be insufficiently formalistic, it nevertheless seems to me that the document in question is an affidavit. It is now settled (at least in the Transvaal) that the requirements as contained in regs 1,2, 3 and 4 are not peremptory but merely directory; the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (S v Msibi 1974 (4) SA 821 (T)). In Ladybrand Hotels v Stellenbosch Farmers' supra a similar conclusion was arrived at. In that case the admissibility of an affidavit was attacked on the basis that the certification did not state that the deponents' had signed it in the presence of the commissioner of oaths. It was held that the maxim omnia praesumuntur rite essa acta applied, that there was an onus on the person who disputes the validity of the affidavit to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken failed. In any event, it was held that if the affidavit was defective it should be condoned.

It is of course a question of fact in each case whether there has been substantial compliance or not."

[23] The court, at paragraph [8] went on further to state:

"In the present matter there is no evidence that the founding affidavit was not sworn to properly except for an allegation that the omission indicating the correct pronoun "she" should lead to an inference that the founding affidavit

was not properly commissioned. The founding affidavit was attested to by an attorney of this court. In the absence of evidence to the contrary, this court accepts that, the attorney who attested the affidavit of the applicant, who happens to be an advocate of this court, complied substantially with the regulations save for failing to make a deletion indicating the gender of the applicant.”

[24] I see no reason why the same rationale ought not to be applied in the present instance, where the deponent herself is an attorney of this court.

[25] The deponent to the affidavit in question is the applicants’ attorney of record, who describes herself as “*an adult female attorney*”. Absent any evidence to the contrary, and due regard being had to the above authorities, I accept that an attorney, when deposing to an affidavit, will do so cognisant of, and in compliance with, the requirements set out in the Regulations. It, of necessity, follows that the reference to the deponent as “he” was no more than an oversight on behalf of the commissioner of oaths, having been presented with the typed affidavit.

[26] On the facts of the present matter, and in the exercise of my discretion, I see no compelling reason to depart from the maxim *omnia praesumuntur rite essa acta*, and accordingly, the objection to the affidavit must fail.

Costs

[27] The first respondent complains that the applicants have been persistently dilatory in the conduct of the application, warranting an order of costs on a punitive scale.

[28] On the other hand, it was submitted from the bar, on behalf of the applicants, that: (1) they are lay persons; (2) they would undoubtedly have had difficulties in obtaining legal representation; and (3) in any event, the applicants had taken heed of the court’s advice to obtain legal representation, regardless of whether or not they were able to proceed with argument on the date allocated for same. With this in

mind, it was argued on behalf of the applicants, that a punitive order as to costs would not be appropriate.

[29] At this juncture, I am constrained to mention that the applicants elected not to tender an explanation, under oath, in respect of the aforesaid. The only explanation before me, is that of the applicants' attorney of record, which I deal with in detail later.

[30] Generally, a party whose conduct gives rise to the postponement of a matter must pay the wasted costs occasioned thereby.⁹

[31] In *Sublime Technologies (Pty) Ltd v Jonker and Another*,¹⁰ it was held at paragraph [3] as follows:

“With regard to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs...”

[32] Having said that, the award of costs is an issue within the discretion of the court. In considering the court's discretion, it was held in *Fripp v Gibbon & Co*¹¹ that:

“the law contemplates that [the Judge] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties.”

[33] In *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of SA*,¹² which was cited with approval by the

⁹ See *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3; *Abbott v Von Theleman* 1997 (2) SA 848 (C) at 854B; and *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) at 246C-E

¹⁰ 2010 (2) SA 522 (SCA).

¹¹ 1913 AD 354 at 363.

Constitutional Court in *Limpopo Legal Solutions v Vhembe District Municipality*,¹³ it was held, in the context of non-constitutional matters, that:

“[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.

[34] In *Nel v Davis SC N.O.*¹⁴ the court, in relation to attorney and client costs, held that:

“A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.”

[35] The learned authors, Cilliers and Loots, and Nel, of *Herbstein and Van Winsen: Civil Practice of the High Courts of South Africa*,¹⁵ set out, by way of example, that:

“Attorney-and-client costs may be awarded on the grounds of an abuse of the process of court; vexatious, unscrupulous, dilatory, or mendacious conduct on the part of the unsuccessful litigant;... reprehensible or blameworthy conduct; an attitude towards the court that is deplorable and highly contemptuous of the court; conduct that smacks of petulance, and that is vexatious and an abuse of the process of the court;... as a mark of the court’s disapproval of some conduct that should be frowned upon...”

¹² [2016] ZALAC 39, [2016] 37 ILJ 2815 (LAC).

¹³ [2017] ZACC 14; 2017 (9) BCLR 1216 (CC).

¹⁴ 2016 JDR 1339 (GP).

¹⁵ 5th Edition at p 973.

[36] Turning to the facts at hand, the only explanation before this court, is a narration of events as from 9 June 2022, as set out by the applicants' attorney of record. The relevant portions of the affidavit read as follows:

"3. On 9 June 2022 I was approach (sic) by the Applicants to represent them on the matter as their previous attorney withdrew. I took instructions and requested the Applicants to collect all the relevant documents relating to the matter so that I can peruse before a preparatory consultation.

4. On or about 4 July 2022 I received the documents from the Applicants but could not consult with them due to the fact that some of the Applicants opted to seek legal services elsewhere and there was a division amongst themselves.

5. On 6 July 2022 while reading the papers I realised that I do not have adequate time to prepare due to the fact that I needed to apply my mind properly on the papers and then consult with each and every one of the applicants that I am representing.

6. On 18 July 2022, I met with the Applicants save for the 4th Applicant who was not present and they formally instructed me in this matter, I then contacted the legal team of the 1st Respondent to seek a postponement by agreement. The clients were prepared to tender costs as the court procedure states that who seeks postponement (sic) bears the costs, however we could not reach such agreement.

7. On 21 July 2022 I filed and serve (sic) notice of acting. I also required the services of a Counsel, however I have not furnished him with the papers of this matter.

9. I seek a postponement in order to consult with all the Applicants in order to consult with a Counsel. The Respondent will not suffer any prejudice by the postponement, however the Applicant's will be prejudice (sic) and this

court ought to balance the suffering that will be caused if the Applicant's (sic) case is not heard."

[37] Given that the applicants' attorney of record consulted with the applicants¹⁶ on 18 July 2022, I fail to understand the need for a further consultation as contended for in paragraph 9 of the affidavit (nor is such need explained). This is particularly so in circumstances in which the proverbial die has been cast in that papers have already been exchanged; heads of argument have been filed, in accordance with the Rules of Court; and the matter is ripe for hearing.

[38] In essence, the essential basis upon which the postponement is sought, is founded upon the applicants' inability to have prepared for argument of the matter given the late engagement of their attorney of record.

[39] Counsel appearing on behalf of the applicants was unable to provide the court with an explanation as to what had occurred, between 30 June 2021, being the date on which the applicants' erstwhile attorney of record withdrew, and 9 June 2022, being the date on which the applicants approached their present legal representative.

[40] This is a period of almost one year, which is unaccounted for. In the absence of an explanation, the only inference that can be drawn is that the applicants did little, if anything, to obtain legal representation during this period.

[41] The lack of explanation is exacerbated by the fact that the applicants are silent on why legal representation was not obtained prior to the hearing of the matter on 24 February 2022, and why adequate steps were not taken to ensure that the matter could proceed on 21 July 2022, having personally agreed to the date some five months prior, and having been expressly warned to do so timeously, by Beshe J.

[42] The account of events is lacking in detail as to what transpired between 9 June 2022 and 4 July 2022, and more particularly, it offers no clarity as to the delay

¹⁶ Save for the fourth applicant.

in providing their attorney of record with the relevant documentation, which had been requested some three and a half weeks prior.

[43] Strikingly apparent from the affidavit is that as early as 6 July 2022, being three weeks prior to the hearing of the matter, the applicants' attorney had concluded that the matter would not be able to proceed on 21 July 2022. Notwithstanding such determination, an informal request for postponement was only forthcoming 3 court days prior to the hearing of the matter, and when same was refused, an affidavit in support of an application for postponement, absent a notice of application, was signed on the day of the hearing and handed up in court from the bar. The reasons for such delay are not sufficiently explained and are no more than an extension of the previous dilatory approach of the applicants to the litigation, which in the context of the present matter, deserves the court's censure.

[44] I do not intend reiterating the trite legal principles in respect of postponement applications, suffice to state that they are not for the mere asking; that an applicant is enjoined to fully explain the reason for his unpreparedness, in order to satisfy the court that his unreadiness is not a delaying tactic; and that such application ought to be brought as soon as the circumstances, which might justify such a postponement become known to the applicant.

[45] With respect, not only have the applicants merely paid lip-service to the aforesaid, but their impetus to pursue the application to completion is self-evident from the timeline of events and the applicants' continued inaction.

[46] Having considered all of the above, I am satisfied that the conduct on behalf of the applicants is such that warrants an order as to costs on a punitive scale. I see no reason as to why the first respondent ought to be out of pocket in respect of the postponement of the matter on 21 July 2022.

[47] I have already granted an order for postponement of the matter to 19 January 2023, and accordingly, the following order shall issue:

1. The applicants are jointly and severally ordered to pay the first respondent's costs occasioned by the postponement, on the scale as between attorney and client.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Third; Fourth; Seventh;

Eighth; and Ninth applicants: Adv Mzamo

Instructed by: Mgangatho Attorney

100 High Street, Makhanda

For the First Respondent: Adv Gaisa

Instructed by: Zilwa Attorneys

Office No. 3, 41 African Street, Makhanda