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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



1. REPORTABLE : ~~YES~~/NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
3. REVISED

25/11/2021

CASE NO.: 84107/2017

In the matter between:

FEZEKA NOUTHANDO DLWATHI

Applicant/Plaintiff

and

EDGAR BRUCE NELSON

First Respondent/First
Defendant

AIDA REAL ESTATE CENTURION

Second
Respondent/Second
Defendant

JUDGMENT

van der Westhuizen, J

- [1] During December 2017, a summons was issued on behalf of the present applicant/plaintiff against the respondents/defendants in an action for payment of monies. The action was commenced on behalf of the present applicant/defendant by her biological parents in view thereof that the present applicant/plaintiff was a minor at the time. The respondents/defendants defended that action.
- [2] Subsequent to the institution of the action, a flurry of interlocutory applications were launched on behalf of both the parties. Some of the interlocutory applications were decided, whilst others remained pending.
- [3] During the early part of 2020, the Deputy Judge President of this Division directed, that the matter, including the interlocutory applications, be case managed and appointed a case manager. Nothing apparently came of the case management so directed. Since the appointment of a case manager, a further flurry of interlocutory applications was launched. During October 2021 the respondents/defendants approached the Deputy Judge President of this Division for the appointment of a different case manager, seeing that the first case manager has been elevated to the Supreme Court of Appeal. I was appointed by the Deputy Judge President of this Division as the second case manager.
- [4] A case management meeting was set for 4 November 2021. All the parties were present and I directed that the pending interlocutory applications be argued on 19 November 2021 and further gave directions in respect of the filing of Heads of Argument by the parties on set dates. Further, in view thereof that the present applicant/plaintiff became of age on 30 October 2021, I directed that an application for substitution be prepared and filed by a certain date. It was indicated on

behalf of the respondents/defendants that they would not oppose the application for substitution.

[5] For ease of reference I shall refer to the parties as cited in the action. A long history of dispute between the parties arose soon after the main action was served. I do not intend to record that history as it has no bearing on the applications now before court, suffice to say that the filing of interlocutory applications were the order of the day. However, I am obliged to record that with the onset of the Covid-19 pandemic and the subsequent National Lockdown directed by the President, the parties came to an agreement to hold the exchange of pleadings over until the end of the National Lockdown.

[6] The pending interlocutory applications that were directed to be heard on 19 November 2021, were the following:

- (a) Plaintiff's first Rule 30 application;
- (b) First defendant's application for *inter alia* condonation of the late filing of an exception and for a stay of proceedings against the plaintiff;
- (c) Plaintiff's default judgment application;
- (d) Plaintiff's second Rule 30 application (in terms of the provisions of Rule 6(5)(b)(iii));
- (e) Plaintiff's Rule 15 application for substitution;
- (f) First defendant's exception to the plaintiff's particulars of claim.

[7] When the matter was called on 19 November 2021, I ruled on the unopposed Rule 15 application and ordered the substitution of the

present plaintiff for her parents, N.O.. I further ruled that for practical reasons all the applications were to be argued together. The parties did not object thereto. I record at this point that the plaintiff was represented by her father, an advocate, who appeared on brief from a firm of attorneys. It is not in dispute that all legal representatives of the plaintiff acted on a *pro bono* basis throughout. That fact was recorded on 8 October 2021 in a recent order of this court.

- [8] As will appear more fully below, the issues of condonation of the late filing of the exception and the stay of the proceedings are the real issues to be adjudicated upon. I shall deal with the applications in a sensible and practical manner.

Plaintiff's First Rule 30 Application:

- [9] A Rule 30 notice, in the main action, (the first R30 application) was served on 16 July 2020 on behalf of the plaintiff. The complaint identified in the said notice related to first defendant's notice of exception dated 6 July 2020. The latter notice was withdrawn by the first defendant on 28 September 2020, before the Rule 30 application was set down for adjudication. The notice of exception was premised upon the amended particulars of claim of the plaintiff that followed on a notice of intention to amend the plaintiff's particulars claim. The amendment was effected on 3 July 2020. Together therewith, the plaintiff served a notice of bar on the same day. Within the allotted time period to respond to the notice of bar, the first defendant filed its notice of exception on 6 July 2020.

- [10] The irregular step referred to in the Rule 30 notice related to an allegation that the first defendant was already *ipso facto* under bar and, thus, was prohibited to participate further in the legal process. I interpose to record that the serving of the notice of bar was in contravention of the agreement to hold proceedings over as referred to earlier. On 25 August 2020, the plaintiff caused a Rule 30 application to

be filed. The first defendant opposed that application alleging that the Rule 30 application was filed out of time. The notice of opposition was filed on 9 September 2020 within the time period stipulated in Rule 30 of the Uniform Rules of Court. As recorded earlier, the first defendant withdrew his notice of exception on 16 July 2020.

- [11] The provisions of Rule 30 are clear: A party intending to file an application in terms of the said rule is obliged, firstly to give notice of the alleged irregular step and to provide the opposing party with a 10 day period to remove the cause of complaint; The notice in terms of Rule 30 is to be given within a period of 10 days since the party giving the said notice to remove the cause of complaint became aware thereof within a period of 15 days after the 10 day period to remove the cause of complaint, and where the cause of complaint was not removed, the party giving the said notice is obliged to file an application in terms of Rule 30; that application can only be filed where the applicant has not him- or herself taken a further step in the process of moving forward.
- [12] In the present instance, the plaintiff only served the Rule 30 application on 25 August 2020, where the date for filing such application elapsed on 21 July 2020, i.e. more than a month out of time.
- [13] When the first defendant withdrew its notice of exception complained of in the Rule 30 notice on 16 July 2020, he simultaneously filed a new notice of exception. The exception following on latter is the subject of the application for condonation.
- [14] From the foregoing it is clear that by 16 July 2020 the cause of complaint has been removed, well within the 10 day period allowed by Rule 30 and the prescribed notice to remove the cause of complaint. Furthermore, the required application as provided for in Rule 30 was filed totally out of time. It follows that there is no merit in the first Rule 30 application and stands to be dismissed. At the hearing of this

matter, the plaintiff withdrew the Rule 30 application. However, no costs were tendered in that regard.

Plaintiff's Default Judgment application:

[15] On 16 September 2021, the plaintiff caused a Default Judgment application to be filed, together with a notice of set down for hearing on 4 October 2021. On 8 October 2021, this court struck that application from the roll and *inter alia* ordered that the matter may not be set down until there was compliance with the Directives issued by the Judge President of this Division as those have not been complied with. The plaintiff was ordered to pay the costs.

[16] The plaintiff's application for default judgment is premised upon the alleged fact that since the service of process upon the first defendant during February 2018 and to date, the first defendant has not filed a plea or an exception, and the time to do so has 'long since lapsed'.

[17] In the notice for default judgment the plaintiff asserts that the amount claimed in her particulars of claim stands to be granted. I interpose at this point to record that on a fair reading of the particulars of claim, the payment is premised upon a claim for general enrichment. It would thus require the plaintiff to lead evidence on the amount of alleged enrichment. No notice in that regard has been given and none was offered at the hearing of this matter.¹

[18] It was submitted on behalf of the first defendant that the application for default judgment was misguided. In this regard, the plaintiff was acutely aware that a new notice of exception to her particulars of claim was filed on 16 July 2020. Furthermore, it was submitted that the grounds for the exception were known to the plaintiff by at least 28 September 2020. On 5 August 2021 the first defendant filed the belated exception

¹ See the provisions of Rule 31(2) of the Uniform Rules of Court

in which the plaintiff was requested to condone the late filing thereof. It was further submitted that the first defendant had filed an application for condonation of the late filing of the exception on 9 September 2021, prior to the filing of the default application on 16 September 2021.

[19] In my view, the plaintiff is more than obtuse in respect of the various applications and the consequences thereof. Where there are pending proceedings that may have a direct bearing and effect on the further process, to stubbornly soldier on and apply for default judgment under the particular circumstances of this matter, is less than desirable. The plaintiff's complaint that the first defendant is dilatory, ignores her own approach to these proceedings, some of which are recorded earlier.

[20] It follows that the plaintiff at this stage is not entitled to a default judgment order being granted. It is premature. The application for default judgment stands to be refused with costs.

Plaintiff's Second Rule 30 Application:

[21] The plaintiff's second Rule 30 application brought on 29 September 2021 under the guise of a Rule 6(5)(b)(iii) application is equally fatal for what follows.

[22] The plaintiff filed opposing papers to the first defendant's application for condonation for the late filing of the exception and for the stay of proceedings. The plaintiff launched the application in terms of the provisions of Rule 6(5)(b)(iii) of the Uniform Rules of Court. The premise for the latter application related to the alleged defective and fatal form of the application for condonation of late filing of the exception and for the stay of proceedings. The plaintiff avers that the first defendant was obliged to utilise the notice and form provided for in terms of the provisions of Rule 6(5)(b)(iii), i.e. the 'long form'. What the first defendant, so it is submitted, did, was not to provide a period within which the plaintiff was to oppose the application. Further, the first

defendant did not provide a date for the hearing of that application, which was a date that was to be no less than 10 days from the date upon which the notice of opposition was to have been provided, but no notice of opposition given.

- [23] The further submission on behalf of the plaintiff was that the first defendant's non-compliance with the provisions of Rule 6(5)(b)(iii) resulted in an irregular step and an abuse of process as contemplated in Rule 30. However, the plaintiff herself failed to comply with the provisions of Rule 30. In that regard, no notice in terms of the provisions of Rule 30 to remove the cause of complaint was given.
- [24] Furthermore, the plaintiff herself took a further step in that she filed opposing papers in the first defendant's application for condonation of the late filing of the exception and for a stay of proceedings. It is trite that a party who has taken a further step in the face of knowledge of an irregularity, may not utilise the provisions of Rule 30 or Rule 30A.²
- [25] It is trite that a further step is one that advances the proceedings one step nearer to completion.³ In my view, the filing of an opposing affidavit to an application for condonation of the late filing of an exception and for a stay of proceedings, is a step that advances the proceedings nearer to completion.
- [26] An application for condonation of the late filing of an exception and for stay of proceedings is an interlocutory application in the main action. In that regard, the provisions of Rule 6(11) apply. That Rule provides as follows:

“Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may

² Rule 30(2)(a)

³ See for example *Markets Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984(1) SA (WLD)

require and set down at a time assigned by the registrar or as directed by a judge.”

- [27] The afore-quoted passage clearly distinguishes between a notice supported by affidavit and a notice of motion supported by affidavit.⁴
- [28] It follows that there is no merit in the plaintiff's second Rule 30 application and it stands to be dismissed with costs.

The First Defendant's Application for Condonation re the Exception:

- [29] On 9 September 2021 the first defendant filed an interlocutory application seeking *inter alia*: the uplifting the bar (insofar as it is deemed necessary); condonation of the late filing of the exception; and a stay of the proceedings in the main action.
- [30] The issue of the barring of the first respondent was the primary issue taken and relied upon by the plaintiff in her first Rule 30 application. As recorded earlier, that application was withdrawn at the hearing of this matter. Furthermore, insofar as the bar was relied upon in the application for default judgment, that application too stands to be dismissed. It was further recorded that the filing of the bar was in contravention of the agreement between the parties relating to the holding over of the exchange of papers during the National Lockdown. In any event, the first respondent filed, within the stipulated period in the notice of bar, a notice of exception. That, in my view, disposed of the notice of bar. In so far as there may be a residual effect of the said notice of bar, I rule that the bar be uplifted, in particular in view of the various actions taken by the plaintiff after the filing of the first defendant's notice of exception and contrary to the notice of bar.

⁴ *Yorkshire Insurance Co. Ltd. v Reuben* 1967(2) SA 263 (ECD) at p 265C-266B

- [31] As recorded earlier, the first defendant in his notice of exception requested the plaintiff to condone the late filing of the exception. Nevertheless the first defendant formally seeks condonation of the late filing of the exception.
- [32] Rule 27 of the Uniform Rules of Court provides for the abridgement or extension of time periods stipulated in the Rules of Court. In the absence of an agreement in that regard, a party may approach the court on notice and on good cause shown, for an extension or abridgement of the stipulated time periods. The said rule further provides that such extension or abridgement of a stipulated time period may be made after the expiry of the relevant time period.
- [33] It is trite that an applicant for extension or abridgement must show good cause. It is trite that the court is afforded a wide discretion in that regard.⁵ Such discretion must be exercised with regard to the merits as a whole.⁶ Where a reckless and intentional disregard of the rules are discernible, the application will not be granted.⁷
- [34] In the present instance, the first respondent dealt comprehensively with the reasons for the delay in filing the exception in his affidavit in support of this application to condone the late filing. I do not intend repeating the various reasons advanced by the first defendant, suffice to record that many of the plaintiff's actions, some of which have been dealt with earlier, kept the first defendant occupied and due to an unfortunate and unintentional slip in the follow-up of the notice of exception, the filing of the exception fell through the cracks. A full explanation for the delay was provided.
- [35] Furthermore, the plaintiff has been acutely aware of the defects in her particulars of claim from the onset of the litigation between the parties.

⁵⁵ *Smith NO v Brummer NO* 1954(3) SA 352 (O)

⁶ *Gumede v Road Accident Fund* 2007 (6) SA 304 (C)

⁷ *Smith NO v Brummer NO*, *supra*

The plaintiff made numerous attempts to correct the defects by various amendments to her particulars of claim. The plaintiff was made acutely aware of the continuing defects contained in the amended particulars of claim at least when the new notice of exception was filed on 28 September 2020.

[36] It is further trite that in an application such as the present, a court is obliged to consider the merits of the matter, as well as the prejudice that may befall either of the parties. In the present matter, the first defendant clearly stands to be severely prejudiced should condonation for the late filing of the exception not be granted. On the other hand, the prejudice that the plaintiff may suffer in that regard is offset by the fact that she would still have an opportunity to argue and deal with the exception.

[37] The issue of prejudice is closely linked to the merits of the exception. A cursory look at the plaintiff's present amended particulars of claim evidences many alleged deficiencies that could severely affect the first respondent in defending the action. In my view, and without considering the merits of the exception, there is more than just a triable issue raised in the exception.

[38] In my view, it follows that the first defendant is to be afforded an opportunity to argue the exception. By so allowing the first defendant to argue the exception, the issues of dispute between the parties may be clarified.

[39] It follows that condonation for the late filing of the exception stands to be granted.

First Defendant's Application for a Stay of Proceedings:

[40] The first defendant premised the application for a stay of proceedings on the plaintiff's non-payment of costs that were granted in previous

interlocutory applications between the parties. Costs orders were granted against the plaintiff in three instances by this court: on 22 May 2019 a cost order was granted against the plaintiff in respect of the upholding of an exception to plaintiff's particulars of claim; on 21 October 2019 a cost order was granted against the plaintiff in respect of wasted costs relating to the withdrawal of a proposed amendment to her particulars of claim; on 8 October 2021 a costs order was granted against the plaintiff in respect of the striking off of a matter due to non-compliance with practice directives.

[41] A further costs order was granted against the parents of the plaintiff *de bonis propriis*, whilst acting on her behalf due to the fact that she was a minor at the time, in respect of an abortive application for summary judgment. The said costs order being one *de bonis propriis* against the parents, the first defendant cannot rely thereupon for the purposes of seeking a stay of proceedings.

[42] However, on three occasions since the inception of the action, costs orders were awarded against the plaintiff, all remained unpaid. This is common cause between the parties. On behalf of the plaintiff it was submitted that due to the fact that the first defendant allegedly unlawfully withholds funds that are due to the plaintiff, the plaintiff is not in a position to honour the unpaid costs orders. There is no merit in that submission for what follows.

[43] It is trite that a court has an inherent power to order a stay of proceedings.⁸ In various judgments it was held that a stay of proceedings may be granted in respect of unpaid costs orders.⁹ The underlying principle laid down in *Mokone, supra*, is dictated by the grounds of interests of justice.¹⁰

⁸ *West Assurance Co. v Caldwell's Trustee* 1918 AD 262 at 271; *Mokone v Tassos Properties CC et al* [2017] ZACC 25 at [66]-[68]

⁹ *Strydom v Griffen Engineering Co.* 1927 AD 552 at 553

¹⁰ At [67]

[44] A glance over the history of the litigation that ensued between the parties, commencing with the service of an unsigned and undated combined summons and non-compliance with the rules for service of process, reveals an approach on the part of the plaintiff of obtuseness. From the onset of the litigation, a plethora of interlocutory applications followed that either sought the initial relief claimed in the action, or sought to regulate the process. As recorded earlier, in that process a number of costs orders were granted against the plaintiff in matters that clearly indicated a stubborn and misguided approach to the legal process on the part of the plaintiff that borders on a vexatious attitude. This can be gleaned from what is recorded earlier in this judgment. The only inference to be drawn from the litany of interlocutory applications by the plaintiff is an endeavour to obtain the relief sought in the main action by any means irrespective of the applicable legal principles and legal process to be followed.

[45] An inability to pay a costs order is no excuse.¹¹ The mere fact that the legal representatives act on a *pro bono* basis is no licence to litigate regardless. Such an approach resulted in an immense prejudice upon the first defendant.

[46] I am satisfied that, from all the foregoing, it would be in the interests of justice that a stay of proceedings be granted until the plaintiff has honoured all the costs orders already granted and that stand to be granted in the present matters, as indicated earlier.

The First Defendant's Exception:

[47] As recorded earlier, the late filing of the first defendant's exception is condoned. The exception thus can be adjudicated upon. In view of the fact that judgment was reserved on the application for leave to

¹¹ *Strydom, supra* at 553

condone the late filing of the exception, I did not entertain argument on the exception. To do so, would have prejudiced both parties.

[48] In view thereof that an order stands to be granted staying the proceedings until the payment of all the costs orders, it would not be sensible to hear the exception whilst the stay of the proceedings remains in place. In my view, the first defendant could enrol the exception once the stay of proceedings has been uplifted.

[49] There remains the issue of costs and in particular the scale upon which it should be awarded. On behalf of the first respondent it was submitted that this court should award costs on a punitive scale having regard to the approach taken by the plaintiff in the matters being adjudicated upon by this court. I am not persuaded that it would be appropriate do so.

I grant the following order:

1. The application for substitution is granted and no order as to costs is made;
2. The plaintiff's withdrawal of the first Rule 30 application, filed on 16 July 2020, is noted.
3. The plaintiff is ordered to pay the cost of the abortive Rule 30 application filed on 16 July 2020;
4. The plaintiff's application for default judgment filed on 16 September 2021 is dismissed;
5. The plaintiff is to pay the costs of the application for default judgment;

6. The plaintiff's application in terms of Rule 6(5)(b)(iii), the second Rule 30 application, filed on 29 September 2021 is dismissed;
7. The plaintiff is to pay the costs of the application in terms of Rule 6(5)(b)(iii), the second Rule 30 application;
8. The first defendant's application to condone the late filing of the exception filed on 5 August 2021 is granted and the exception stands as if filed within the prescribed periods. No order as to costs is made;
9. The first defendant's application to stay the proceedings is granted with costs;
10. The proceedings under case number 84107/2017 be and is hereby stayed pending the full payment of the costs orders granted on: 22 May 2019; 21 October 2019; 8 October 2021; as well as the aforementioned costs orders referred to in 3, 5, 6, 7 and 9 above;
11. In the event that the parties are unable to agree upon the various amounts of the costs orders referred to in 10 above, the said costs shall be taxed;
12. Payment of the aforementioned costs shall be made into the first defendant's attorneys' trust account, details of which are:

Account holder: Snyman De Jager Inc.
Bank: First National Bank
Account Number: [...]
Branch: 25044
Reference: M21922(menitza@pta.sdj.co.za)

13. The first defendant's exception is postponed *sine die*;

14. Upon full payment of all the aforementioned costs orders, the parties may approach the appointed case manager for further directives to be issued with regard to the manner in which to proceed with Case Number 84107/2017.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of Hearing: 19 November 2021

On behalf of Plaintiff: S Dlwathi
Instructed by: Denga Attorneys

On behalf of Respondent: Ms N M Krige
Instructed by: Snyman De Jager Inc.

Judgment Delivered: 25 November 2021