REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2016/07384

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

29 March 2018

MODIBA J

In the matter between:

OFFICE OF THE PREMIER OF THE NORTH WEST PROVINCE First Applicant

THE DIRECTOR GENERAL: OFFICE OF THE PREMIER Second Applicant

and

LIVIFUSION (PTY) LTD Respondent

J U D G M E N T

MODIBA, J:

[1] This judgment follows an extended hearing in this matter on 28 February 2018, pursuant to a judgment handed down on 13 November 2017 when I gave the parties the following directives:

"*1.* *The respondent shall within 5 days of this order, address a letter to the applicants pointing out in what respect the response to their notice in terms of rule 30 and 30A remains defective.*

2. *The applicants shall file a notice in terms of Rule 6(5) (d) (iii) within 10 days of the respondent's compliance with paragraph 1 or within 10 days of expiry of the period referred to in the same paragraph, whichever occurs first.*

3. *The applicants' attorneys of record shall file an affidavit and if deemed necessary heads of argument within 10 days of this order, setting out reasons why they should not be ordered to pay the respondent's wasted costs on a punitive scale de bonis propriis.*

4. *Should it deem it necessary, the respondent shall, within 10 days of receipt of the documents referred to in paragraph 3 of this order or within 10 days of expiry of the period referred to in the same paragraph whichever comes first, file an answering affidavit and heads of argument responding to the applicants' attorneys averments and submissions on costs.*

5. *The documents referred to in paragraph 3 and 4 of this order shall be directly filed with my registrar in chambers 503 after being served on the other party.*"

[2] The parties have complied with the above directives.

[3] This is an application to set aside, alternatively strike out the applicants' notice of motion and founding affidavit in terms of Rule 30 and Rule 30A of the Uniform Rules of Court ("this application").

[4] In the main application, the applicants seek to review a Memorandum of Agreement ("the MOU") concluded in December 2014 pursuant to which a tender was awarded to the first respondent for the design, implementation and maintenance of the Provincial Enterprise Programme Management Office of the first applicant ("the review application"). I refer to the parties by their nomenclature in the review application.

[5] The issue for consideration is whether the respondent has made out a case for the setting aside, alternatively striking out of the application in terms of Rule 30 and Rule 30A. The respondent contends that it has. It seeks an

order as prayed for in the notice of motion. The applicants contend otherwise. They seek a dismissal of the application with costs.

[6] As mentioned in the judgment handed down on 13 November 2017, in an amended notice of motion filed by the applicants after the respondent filed a notice to remove the cause of complaint, the applicant did not attend to all the causes of complaints set out therein. The remaining causes of complaint relied on by the respondent for the relief it seeks in this application are as follows:

6.1 Failure to comply with several provisions in terms of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA");

6.2 Non-joinder of Professor Tebogo Job Mokgoro ("Professor Mokgoro");

6.3 The applicants' non-compliance with Uniform Rule of Court 53 and Rule 18(4);

6.4 Failure to apply for condonation for the late filing of a notice in terms of Uniform Rule 6(5) (d) (iii).

[7] The respondent does not rely on Rule 30 and 30A in the alternative. Rule 30 provides for the setting aside of a cause in which an irregular step has been taken. Rule 30A provides for the setting aside of a cause in which a party has failed to comply with the court rules after being afforded an opportunity to remedy the non-compliance complained of. In the review application, the applicants seek to review and set aside the MOU. The basis on which the respondent alleges that the review application constitutes an

irregular step is unclear. Bringing a review application does not constitute an irregular step in the circumstances of this case. To the extent that the respondent complains about the applicants' non-compliance with various provisions of PAJA, this application may have fallen within the purview of Rule 30. However, for reasons dealt with below, the respondent did not persist with its PAJA-based complaints. The respondent also relies on various instances of non-compliance with the court rules. To that extent, this application is worthy of consideration in terms of Rule 30A.

[8] The crux of the applicants' opposition is that the Rule 30 and Rule 30A procedure is not appropriate for raising complaints that go to the substance of an application. The applicants contend that these rules may only be used to address complaints of a procedural nature. They rely in this regard on several cases cited in Erasmus Superior Court Practice at B1-191 as well as *Cochrane v City of Johannesburg*[1]. They contend that the respondent's complaints go to the substance of its opposition. Therefore, it ought to set them out as points *in limine* in an answering affidavit. The principle on which the applicants rely is trite. As I find in this judgment, with the exception of one ground of complaint, I disagree with the applicants' contention that the respondent's grounds of complaints are substantial in nature. In respect of the latter grounds, I find that Rule 30A is the appropriate procedure in these circumstances.

[1] 2011 (1) SA 553 GSJ at 202E.

[9] Be that as it may I do not find merit in any of causes of complaint relied on by the respondent in this application. The Constitutional Court judgment in *Gijima Holdings (Pty) Limited*[2] has tremendously affected the merits of this application. During argument on 30 October 2017, when he argued, counsel for the respondent placed heavy reliance on the respondent's complaints based on PAJA. I deal with this issue more fully below. With those grounds of complaints not persisted with, I find that the applicants' amended notice of motion sufficiently addressed the respondent's meritorious causes of complaints. These relate to the misjoinder of the second and third respondents, application for condonation for the late filing of the review application and the inappropriate call on the respondent to file the record of proceedings in terms on Rule 53 (1).

[10] I now turn to deal with each cause of complaint relied on by the respondent.

NON-COMPLIANCE WITH PAJA

[11] The respondent raised a number of complaints in relation to the applicants' non-compliance with various provisions of PAJA. Their counsel prudently did not persist with these because on the authority in *Gijima*, PAJA is not at the disposal of an administrative body seeking to review its own decision because it is not the bearer of the right to administrative action in terms of section 33 of the Constitution, but the bearer of an obligation to fulfil

[2] 2017 ZACC 40.

that right. Therefore it may not benefit from the provisions of a legislation promulgated to amplify the implementation of a right it does not bear. As mentioned above, the respondent abandoned its PAJA-based causes of complaint.

NON-JOINDER OF PROF MOKGORO

[12] The respondent's complaints in respect of the non-joinder of Professor Mokgoro are preposterous. Firstly, it complains that the notice of motion fails to mention the official who made the decision the applicants seek to review. Then it takes issue with the non-joinder of Professor Mokgoro contending that he is a necessary party to these proceedings by virtue of the provisions of Rule 53 (1) and ought to have been joined. The basis for this complaint is that in terms of Rule 53(1), a notice of motion instituting review proceedings ought to be directed to the officer "*performing a judicial, quasi-judicial or administrative action*."

[13] There is no merit to the respondent's non-joinder complaint. Although the notice of motion fails to mention the officer whose decision the applicants seek to review, based on the averments in the founding affidavit, and the grounds on which the respondent rely for the relief they seek in this application as set out in the supporting affidavit deposed to by the respondent's attorney of record, it is common cause that Professor Mokgoro was the incumbent Director General in the Office of the Premier: North West Province when the decision sought to be reviewed was made. He has since vacated that office. Although he or she is not specifically named, the

incumbent Director General in Office of the Premier: North West Province is cited as the second applicant in this application. Professor Mokgoro acted in an official capacity when he made the decision sought to be reviewed. He did not act in a personal capacity. The current incumbent has stepped in his shoes and has accordingly been cited. Therefore this cause of complaint stands to be rejected.

NON-COMPLIANCE WITH RULE 53 AND RULE 18(4)

[14] The respondent bemoans the following instances of non-compliance with Rule 53 and Rule 18(4):

14.1 Failure to deliver the notice of motion to Prof Mokgoro as envisaged by Rule 53(1), calling on him to comply with the prescripts of that Rule;

14.2 The nature of the function performed by the officer whose decision is being reviewed is not specified;

14.3 The inappropriateness of directing a request to the respondents for a record of the proceedings. At that point, the respondents included the second and third respondents whose citation was removed in the amended notice of motion;

14.4 The review application fails to set out a recognizable ground of review such as fraud, duress, invalidity or otherwise in support of the declaratory order sought by the applicants and therefore, fails to set out a cause of action as required in terms of Rule 18 (4).

[15] In terms of Rule 53(1), the party seeking to review the decision of an official or body referred to this in this rule institutes such proceedings by having a notice of motion, supported by affidavit served on the party whose decision is being reviewed, calling on him or her to show cause why the decision should not be set aside and calling on him to file with the Registrar of this court a record of the proceedings in respect of the decision being reviewed. The respondent contends that this rule requires service of the notice of motion on Professor Mokgoro, being the person who made the decision the applicants' seek reviewed.

[16] The interpretation of Rule 53 (1) that the applicants are contending for is not supported by the language used in this rule, the context of the rule and its purpose.[3] This rule regulates the review of decisions and proceedings of a judicial, quasi-judicial and administrative nature made by officials acting in the said capacities. It does not regulate decisions made by officials acting in their personal capacity. It is not the applicants' case that Professor Mokgoro was acting in a personal capacity when he decided to conclude the MOU. It is not a requirement in terms of Rule 53 (1) that the notice of motion is addressed to him personally to comply with the provisions of Rule 53 (1). There is therefore no merit in this cause of complaint. It too stands to be rejected.

[3] The trite approach for the interpretation of legislation is the language of the provision itself; read in context and having regard to the purpose of the provision and the background to the preparation and production of the document (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.)

[17] The applicants also complain that the notice of motion neglects to specify whether the decision the applicants seek reviewed is judicial, quasi-judicial or administrative in nature. Rule 53 contains no requirement that the nature of the decision sought to be reviewed be specified. Rule 53 (2) requires that the notice of motion set out the decision or proceedings sought to be reviewed, supported by an affidavit setting out the grounds, facts and circumstances upon which applicant relies to have the decision or proceedings reviewed. It appears from both the amended notice of motion and the founding affidavit that the decision the applicants seek to review is the decision to conclude the MOU. The grounds on which the applicants rely for this relief are set out in the founding affidavit. Therefore this cause of complaint also stands to be rejected.

[18] It was inappropriate for the applicants to have called upon the respondent to furnish the Registrar with a record of the proceedings in respect of the MOU and to set out the 'reasons that motivated the decision to conclude the MOU'. The decision sought to be reviewed is one made by the first applicant's Director General. Therefore the applicants are bearers of the record envisaged in Rule 53(1) (b). The reasons for the decision are also at their disposal. The applicants addressed this ground of complaint in their amended notice of motion dated 16 September 2016, when they deleted reference to the respondents in the relevant paragraph of the notice of motion and replaced it with 'applicants', effectively and preposterously directing the directive envisaged in Rule 53 (1) (b) to themselves.

[19] I also find no merit in the respondent's complaint that the applicants have failed to set out the grounds of review. The applicants allege that the tender awarded to the respondent is invalid because it was awarded without tender procedures being followed. The respondent ought to answer to this allegation by filing an answering affidavit. This cause of complaint also stands to be rejected.

FAILURE TO APPLY FOR CONDONATION FOR THE LATE FILING OF THE NOTICE IN TERMS OF RULE 6(5) (D) (III)

[20] The respondent's complaint in this regard is misplaced and for that reason, stands to be rejected. It is common cause that when this application served before me on 30 October 2017, the applicants had not complied with Rule 6(5) (d) (iii); hence the directive set out in paragraph 2 of the judgment that I handed down on 13 November 2017. The reason I gave this directive as set out in that judgment is two-fold:

20.1 I was dissatisfied that the respondent failed to alert the applicants in writing in what respects the applicant's amended notice of motion failed to adequately address its complaints set out in the notice to remove the cause of complaint that preceded this application. I found it inappropriate that the respondent only did so in their heads of argument. It is for that reason that I directed the respondent in terms of paragraph 1 of the order to remedy this anomaly.

20.2 I found that the interests of justice required a proper ventilation of the issues arising in this application.

[21] Inappropriately the applicants' attorneys caused the said notice to be delivered a day after I reserved my judgment without any invitation to do so. This is what led to the respondent to complain in its supplementary heads of argument that the applicants failed to apply for condonation for the late filing of the said notice. After I issued the directive set out in paragraph 2 of my order, the applicants no longer needed to apply for condonation for the late filing of the notice in terms of Rule 6(5) (d) (iii). This of course does not condone the underhanded manner in which the applicants' attorneys of record placed the notice before me. To avoid prejudice on the part of the respondent, I did not consider the said notice at that stage. I only considered it when I was preparing for the extended hearing.

[22] In paragraph 16 of my judgment, handed down on 13 November 2018, I expressed my displeasure with the applicants' attorney's flagrant disregard for court rules. It is for that reason that I set the basis for saddling them with a cost punitive order, the only issue remaining being whether the applicants or their attorney of record should be liable for such costs *de bonis propriis*. It is for that reason that I directed the applicants' attorney of record to file an affidavit setting out reasons why I should not order him to pay the respondent's wasted *costs de bonis propriis.* I shall return to this affidavit when I deal with the question whether the applicants' attorneys of record should be ordered to pay costs *de bonis propriis*.

[23] The only remaining ground of complaint is condonation for the late filing of the review application. Rule 53 does not set a specific time frame for the filing of a review application. The applicable requirement is that such an application ought to be filed within a reasonable time.[4] The applicants seek condonation for the late filing of the review application. The appropriate response to this application ought to be set out in the answering affidavit. Rule 30A is not the appropriate procedure for opposing a condonation application.

[24] In the premises, I find that the respondent has failed to make out a case for the relief sought. Therefore this application stands to be dismissed.

[25] I now return to the affidavit filed by the applicants' attorney of record in respect of costs *de bonis propriis*. In this affidavit filed on 28 November 2017, the applicants' attorney of record insists that in the circumstances of this case, there is no duty on the applicant to file the said notice, yet he went on to file it in an underhanded manner before being invited to do so by the court. This conduct was improperly aimed at unduly influencing the court to the prejudice of the respondent who had no opportunity to address me in respect of the said notice. The tone of his affidavit is disrespectful. To add salt to injury, the applicant's attorney was not in court during the extended hearing yet he was aware that an issue of costs which affects him personally would be considered.

[4] See *Chairperson, STC v JFE Sapela Electronics* 2008 (2) SA 638.

[26] Further, his contention that Rule 6(5) (d) (iii) does not apply to applications brought in terms of Rule 6(11)[5] is meritless. Rule 6(11) serves to benefit an applicant who seeks summary relief in interlocutory applications. It does not prohibit the filing of supporting affidavits. It confines the need to file additional papers only where the circumstances of the case require the filing of such papers. In the same way Rule 6(11) does not absolve the opposing party from filing an answering affidavit where the case so requires, it does not absolve a respondent who wishes to oppose an application on a point of law from complying with Rule 6(5) (d) (iii). To absolve the opposing party from complying with Rule 6(5) (d) (iii) would promote litigation by ambush as conducted by the applicants' attorneys in these proceedings, worse so that the applicants also failed to file a practice note and heads of argument, despite my directive to that effect. I found these documents in the court file when I opened it in court on 30 October 2017. The circumstances under which they were placed in the court file are mysterious. They were not there when I studied the papers. They had also not been served on the respondent.

[27] The applicant's attorney's reliance on *Cochrane* is also misplaced. There the court found that an application in terms of Rule 30 (1) need not be supported by affidavit. This dictum is consistent with the wording in Rule 6 (11). In terms of this rule, it is the circumstances of a case that dictates the need for supporting affidavits. In *Cochrane*, the obviated need for a supporting affidavit was based on the fact that the grounds on which an applicant sought

[5] Rule 6 (11) Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.

relief in term of Rule 30 (1) were set out in a notice served in terms of Rule 30(2) specifying the irregularities complained of. Similarly in case, because a notice to remove the cause of complaint specifying grounds of complaint had been filed, it was not necessary for the respondent to file a supporting affidavit. This *dictum* does not extend to a party seeking to oppose an interlocutory application.

[28] In any event, the applicants' attorney's contention that his reliance on *Cochrane* was reasonable does not justify the improper manner in which he placed this notice before the court as well as other instances of impropriety in these proceedings as alluded to in this judgment.

[29] The flagrant non-compliance with court rules and disrespect towards the court displayed by the applicants' attorney of record warrant a departure from the general rule that costs follow the course. An order that he pays the costs of opposition up to the date of filing of his affidavit on 28 November 2017 is an appropriate censure to signify the court's displeasure with his improper conduct. Substantially the said costs are wasted costs, occasioned by the improper manner in which he has conducted the applicants' opposition as well as the improper manner in which he conducted himself as an attorney in this application.

[30] I therefore make the following order:

1. The application is dismissed with costs, excluding the costs of opposition up to 28 November 2017.

2. The applicants' attorney of record shall pay the respondent's costs of opposition up to 28 November 2017 *de bonis propriis* on the attorney and client scale including the costs of two counsel.
3. The respondent shall file its answering affidavit within 15 days of this order.

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MADAM JUSTICE L. T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the applicant:	Adv Dali Mpofu & Adv Sieberhagen
Instructed by:	Kgomo Attorneys INC
Counsel for the defendant:	Adv Ngcukaitobi & Adv Tulk
Defendant's attorneys:	Edelstein Farber Grobler Inc
Date of hearing:	29 February 2018
Date of judgment:	29 March 2018