

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: 14/2/2024	
14/2/2024	[REDACTED]
DATE	SIGNATURE

CASE NO: 70992/2018

In the matter between:

ALETTA JOHANNA BARNARD

Applicant/Plaintiff

and

ESTELLE GOUWS

Respondent/Defendant

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

(The application for Leave to Appeal was heard in open court but the Judgment was delivered by uploading it onto the electronic file of the matter on CaseLines and delivering it via Email to the representatives of the parties. The date of the uploading the Judgment onto CaseLines is deemed to be the date of the Judgment)

BEFORE: HOLLAND-MUTER J:

[1] An application for leave to appeal was received from the plaintiff (now applicant) on 13 December 2023. The reserved judgment was uploaded onto the electronic file of the matter onto CaseLines on 11 December 2023. I will refer to the parties as they were in trial.

[2] The matter was heard in open court on 17 August 2023 and continued as part heard on 13 & 14 September 2023. Judgment was reserved on 14 September 2023 with the confirmation by both counsel that judgment could be delivered after both filed their respective heads of arguments on CaseLines on the agreed dates therefore. Mr Lamey was to file his heads of arguments on 14 October 2023 and Mr Eia his heads of arguments on 28 October 2023.

[3] Both counsel confirmed in court that judgment could be delivered as on paper without their physical appearances to argue on their respective heads of arguments. No mention was made at any stage then of any envisaged application. The defendant's attorney objected to counsel on behalf of the plaintiff

[4] The plaintiff filed a Rule 27(3) application ("condonation application") on 10 October 2023, the step regarded as irregular by the defendant resulting in a Rule 30 application on behalf of the defendant. The defendant viewed the conduct on behalf of the plaintiff as a procedural abuse, primarily because the plaintiff knew from the beginning that the defendant objected to the irregular service of the summons on 28 September 2018. The defendant's attorney voiced his disapproval in a letter dd 12 October 2023 to the manner in which plaintiff's counsel unilaterally approached the court via Email.

[5] The defendant argued that the plaintiff's application at this late stage of the proceedings, amounted to frivolous and vexatious litigation. It is trite that any application for condonation with regard to non-compliance with the Rules of Court, should be applied for at the earliest opportunity without delay. See **Golden International Navigation SA v Zeba Maritime Co Ltd 2008 (3) SA 10 (CPD)** at par [9].

[6] I requested my registrar to inform the parties to finalise the papers and that a suitable time will be arranged to hear the respective applications, and each to file one combined heads of argument.

[7] After perusing the two applications and founding affidavit to the Rule 27(3) application, I was convinced that the application was an abuse of process. Sight should not be lost of the fact that the chosen process was a trial where the Rules of Court are applicable to the trial in general and for other aspects as in this Rule 27(3) application. There is no scope in my view for additional proceedings where the applicant had the advantage of oral evidence during trial to "cure" the reality faced after hearing the evidence of the Sheriff, Koen.

[8] The trial was the forum where the complaint by the defendant in the special plea regarding the non-service be adjudicated. There is no justification for the plaintiff to attempt to "cure/condone" this evidence by way of another application after trial. I then decided not to hear any further arguments on the issues already addressed during the trial evidence. It would serve no purpose to allow the Rule 27(3) application as a last attempt to remedy what was already heard.

[9] The plaintiff's counsel had the opportunity of cross-examination of all the defence witnesses but failed to unsettle the witnesses. The evidence of Koen harmed the case of the plaintiff on this issue and was water under the bridge.

Any attempt to have a proverbial second bite at the cherry should be discouraged.

[10] I could find no authority converting non-service in terms of Rule 4 (1)(a)(iv) into proper service by way of a condonation application. Mr Eia's argument that the court should not follow strict compliance with the words of the Rules is stillborn. Any further address to court would not assist to condone the harm caused during evidence.

[11] The delay in bringing the application after trial is extreme and it makes no difference in the evidence already adduced. No good cause for the delay was shown.

[12] The applicant has not met the stringent requirement for the granting of leave to appeal and failed to show any facts or law that a court of appeal could reasonably arrive at a conclusion different to that of this court.

[13] In deriving at the judgment in the trial court, I considered the delay caused by the abuse of process and irregularity of the attempt sought by way of the application in arriving at the order for costs on an attorney and client scale. The defendant should not be burdened with costs where the process followed amounts to an irregularity as such.

[14] I make the following order: The application for leave to appeal is dismissed with costs.



HOLLAND-MUTER J

Judge of the Pretoria High Court

14 February 2024

Leave to appeal heard on 9 February 2024

Judgment handed down on 14 February 2024

On behalf of the Plaintiff/Applicant:

ADV P EIA

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On behalf of Defendant/Respondent:

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