

**IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE No. 28166/2007



DELETE WHICHEVER IS NOT APPLICABLE

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

REPORTABLE

In the matter between:

ORION REAL ESTATE LIMITED

Plaintiff

and

COBRA WATERTECH (PTY) LIMITED

Defendant

and

GROUP FIVE BUILDING (PTY) LIMITED

First Third Party

EPE CATER AND ASSOCIATES

Second Third Party

JUSTUS VAN DER HOVEN CC

Third Third Party

INTERNATIONAL PLUMBERS (PTY) LIMITED

Fourth Third Party

In re :-

ORION REAL ESTATE LIMITED

Applicant

and

COBRA WATERTECH (PTY) LIMITED

First Respondent

GROUP FIVE BUILDING (PTY) LIMITED

Second Respondent

EPE CATER AND ASSOCIATES

Third Respondent

JUSTUS VAN DER HOVEN CC

Fourth Respondent

INTERNATIONAL PLUMBERS (PTY) LIMITED

Fifth Respondent

JUDGMENT

WILLIS J:

[1] The applicant seeks what is, in effect, a retrospective order. The order sought in the applicant's Notice of Motion reads as follows:

"Granting the Applicant leave to have served third party notices on the Second to Fifth Respondents as follows:

1. Second Respondent: 8 July 2008
2. Third Respondent: 20 August 2008
3. Fourth Respondent: 16 October 2008
4. Fifth Respondent: 25 July 2008."

The reason for the casting of the order in the somewhat unusual form of leave being granted to the applicant "to have served" the third party notices is that the applicant faces certain difficulties with prescription if the order does not have a retrospective operation. In bringing the application, the applicant purports to rely on Rule 13 (3) (b), alternatively Rule 27 of the Uniform Rules of Court. The application has been opposed by the second, third and fifth respondents who have filed answering affidavits. Although the fourth respondent has filed a notice of intention to oppose, it has filed no answering affidavit. The fourth respondent filed exceptions to the applicant's third party notice, but did nothing further. The first respondent, who is the defendant in the action between itself and the present applicant, has adopted a position of indifference in these third party proceedings.

[2] During November 2007 the applicant commenced action against the first respondent, Cobra Watertech (Pty) Limited ("Cobra"), for a claim of some R3,7 million being the alleged damages which have arisen from a water leak which occurred at the applicant's business premises on 23rd November, 2006. In its summons, the applicant, as plaintiff, alleges that the water leak was caused by a complete radial separation fracture of the bonnet housing of a gate valve manufactured by Cobra. Accordingly, so the plaintiff alleges, Cobra was negligent. Cobra, as defendant, delivered

its plea on 23rd January, 2008. Cobra denied liability on the basis that although it manufactured the particular gate valves in question, these were sprinkler valves designed, manufactured and intended to be used for purposes other than plumbing in the water supply pipeline to any building; only gate valves approved by the South African Bureau of Standards (SABS) may lawfully be used in water supply pipelines to a building; the valves in question were not SABS approved; Cobra does, however, manufacture SABS approved valves which can be used for water supply pipelines to a building; whoever may be at fault *in casu*, it was accordingly not Cobra. Pleadings closed on 13th February, 2008. After the pleadings had closed between the applicant and Cobra, the applicant delivered a third notice to the second respondent on 8th July, 2008, to the fifth respondent on 25th July, 2008 and to the third respondent on 20th August, 2008. These notices were therefore, in each instance, served several months after the close of pleadings.

- [3] The subsequent chronology of events in this case is significant. On 5th September, 2008, the second respondent's attorney had a telephone conversation with Cobra's attorney. Cobra's attorney informed the second respondent's attorney that the pleadings between the applicant and Cobra in the matter had closed. On 14th October, 2008 the applicant delivered a notice of bar to the second, third and fifth respondents. On that day the second respondent's attorneys informed the applicant's attorneys in a telephone conversation that the notice of bar was irregular because the third party notice was delivered after pleadings had closed. This was followed up with a letter from the second respondent's attorneys to the applicant's attorneys the very next day recording this advice and protesting that the notice of bar was accordingly of no effect. On the day before, the third and fifth respondents' attorneys had sent a similar letter to the applicant's attorneys. In that letter the third and fifth respondents' attorneys pertinently advised that the notices of bar were irregular owing to the applicant's failure to obtain the leave of the court prior to serving the notices. On 17th October, 2008 it was agreed in a telephone conversation between the attorneys acting for the applicant and the second respondent that the applicant's proceedings against the second respondent would be held in abeyance. On 11th November, 2008 the applicant's attorneys sent a telefax to the second respondent's attorneys recording that the applicant held the view that it could apply for a condonation for delivering the third party notice after the close of pleadings or it could issue a separate summons against the second to fifth respondents and then consolidate the actions. The applicant's attorneys requested that second respondent agree to condonation being granted accordingly.
- [4] On 15th December, 2008, the second respondent's attorneys sent a letter to the applicant's attorneys requesting that they provide reasons for the

service of the third party notice after the close of pleadings in order that instructions could be taken from client in the matter. During the whole of 2009, the applicant took no further steps in the matter. On 15th January, 2010 the second respondent's attorneys received a letter from the applicant's new attorneys of record recording that they would shortly be substituting themselves and that they had been instructed to apply for condonation for the delivery of the third party notice after the close of pleadings. On 18th January, 2010 the second respondent's attorneys sent a letter to the applicant's new attorneys recording that an application to obtain leave to deliver the third party notice on the second respondent after the close of pleadings would serve little effect because the applicant's claim against the second respondent had prescribed. The present application before this court was served on the second, third and fifth respondents on 16th September, 2010.

- [5] The only explanation for the failure to serve the third party notices before the close of pleadings is laconically stated as being that, after the receipt of the plea, the applicant realized that third parties might possibly be liable for the applicant's damages. It is not clear whether an attempt was made by the applicant to place the blame on Mr McCarthy of McCarthy Cruywagen, the applicant's attorney in this matter until November 2009. The applicant, in its founding affidavit, refers to delay "occasioned by McCarthy in the preparation and finalising of the third party notices" but elsewhere, somewhat cryptically and elliptically, attributes the lapse of time between the close of pleadings and the service of the third party notices to time-consuming analyses of various agreements and expositions of the involvement of the respondents, none of which have been annexed in this application. Moreover, the lapse of time between the service of the third party notices and the service of this application is left without any explanation whatsoever.

[6] Rules 13(3)(a) and (b) of the Uniform Rules of Court read as follows:

“13 *Third Party Procedure*

. . .

(3) (a) *The third party notice, accompanied by a copy of all pleadings filed in the action up to the date of service of the notice, shall be served on the third party and a copy of the third party notice, without a copy of the pleadings filed in the action up to the date of service of the notice, shall be filed with the registrar and served on all other parties before the close of pleadings in the action in connection with which it was issued.*

(b) *After the close of pleadings, such notice may be served only with the leave of the court.”*

Rule 13(3)(b) is peremptory in its terms, constituting a bar to a party delivering a third party notice after the close of pleadings, without obtaining the leave of the court. I agree with counsel for the respondents that this entails that a party wishing to deliver a third party notice must obtain the leave of the court prior to the delivery of the third party notice: a party cannot, in terms of this Rule, seek retrospective condonation for an irregularly served third party notice – i.e. such a notice served after the close of pleadings but without the antecedent leave of the court. In other words, the service may take place after the close of pleadings only with the leave of the court; the service cannot take place after the close of pleadings without the leave of court, which leave is only to be obtained later. It seems to me to be plain enough that the leave of the court is a “condition precedent” for service and not an *imprimatur* that may be granted *ex post facto* an otherwise irregular step.

- [7] Moreover, a request by a party wishing to deliver a third party notice after the close of pleadings is in the nature of a request by that party for an indulgence. I am in respectful agreement with Lombard J when he said in *Padongelukkefonds v Van den Berg* that, in terms of this rule, a court is given a wide discretion to grant an application for the delivery of a third party notice after the close of pleadings.¹ In *Wapnick v Durban City Garage* Booyesen J concluded that a party applying to deliver a third party notice after the close of pleadings must furnish an acceptable explanation for its failure to deliver the third party notice before the close of pleadings and must also make out a *prima facie* case on the merits against the third party.² Booyesen J said that he accepted that it may not always be a *sine qua non* to the success of every application in terms of Rule 13 (3) that the applicant should make out a *prima facie* case on the merits.³ For reasons which should soon become apparent, it is unnecessary in this particular case to determine whether the applicant should have made out a *prima facie* case against the second, third and fifth respondents and, if so, whether it has done so.
- [8] The applicant has submitted that there is no reason, in principle, why Rule 27 of the Uniform Rules of Court should not be applicable, particularly having regard to Rule 27(3) which states as follows:

“(3) *The court may, on good cause shown, condone any non-compliance with these Rules.*”

I fully accept, as counsel for the applicant invited me to do, that, as was said in *Mynhardt v Mynhardt*, in addition to the provisions of Rule 27 (3), the court has, in any event, inherent jurisdiction derived from common

¹ 1999 (2) SA 876 (O) at 886B.

² 1984 (2) SA 414 (D &CLD) at 424B-C.

³ *Ibid.*

law to condone non-compliance with its rules.⁴ In summary, I accept that the court has a wide discretion in a matter such as this – a discretion that must nevertheless be exercised judicially. In other words, ultimately the niceties of interpretation of Rule 13(3) (b) and Rule 27(3) do not really matter in an application such as this. What matters is whether, in all the circumstances, justice will be better served by condoning a non-compliance with the court’s ordinary rules or by granting an indulgence.

[9] In *Ford v Groenewald* Nestadt J (as he then was) held that the principles in the well-known case of *Breitenbach v Fiat (Edms.) Bpk*,⁵ were applicable in the case of a party seeking the removal of a legal bar: that party should not state its case in a manner that is bald, vague or laconic.⁶ In *Standard General Insurance Company Limited v Eversafe (Pty) Limited* the court held that in an application for condonation in terms of Rule 27, where the delay has been particularly long, the defaulting party must satisfy a court that the relief sought should be granted and that this applied particularly where the defaulting party is the *dominus litis*.⁷ In the *Eversafe* case, the court also held that in an application under Rule 27, it is insufficient for an applicant to show that condonation of the default will not result in prejudice to the other party – the question of prejudice arises only if an applicant is able to show good cause.⁸

[12] The best that can be gleaned from the applicant’s delays in failing (a) to serve the third party notices before the close of pleadings and (b) to apply for the leave of the court to do so in reasonably good time, is that the applicant was like a mouse mesmerized by a cobra. Be that as it may,

⁴ 1986 (1) SA 456 (T) at 463H

⁵ 1976 (2) SA 226 (t) at 228-9

⁶ *Ford v Groenewald* 1977 (4) SA 224 (T) at 225E-226H.

⁷ 2000 (3) SA 87 (W) at 93G.

⁸ 95E-F.

the explanations given by the applicant for its various delays are bald, vague and laconic. In particular, as has already been mentioned, the delay for the lapse of time from the service of the third party notices during July and August 2008 and the service of this application on 16 September 2010 is entirely unexplained. This long delay cries out for an adequate explanation. There are limits to which a court can indulge a “wee, sleeket, cow’rin’, tim’rous beastie”.⁹

[13] Against this background, the proper exercise of a judicial discretion requires that the application be dismissed on the basis of the inadequacy of the applicant’s explanation for the delays relevant to this matter. Accordingly, it is unnecessary to consider the point raised by the respondents as to whether granting the application would fall foul of the Prescription Act, No. 68 of 1969 inasmuch as the court would, by granting the application, allow the applicant to prosecute a prescribed claim.

[14] The following is the order of the court:

The application is dismissed with costs.

DATED AT JOHANNESBURG THIS 14th DAY OF MARCH, 2011

N.P.WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicant: *L. Hollander*

⁹ From Robbie Burns’ (1759-1796) famous poem, “Ode to a Mouse”.

No Appearance for the First Respondent

Counsel for Second Respondent: *I.P. Green*

Counsel for Third and Fifth Respondents: *H. Martin*

No Appearance for the Fourth Respondent

Attorneys for Applicant: Nita Van Zyl Incorporated

Attorneys for Second Respondent: Webber Wentzel

Attorneys for Third and Fifth Respondents: Wertheim Becker Incorporated

Date of hearing: 8th March, 2011

Date of judgment: 14th March, 2011