

## REPUBLIC OF SOUTH AFRICA



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

|             |                                  |
|-------------|----------------------------------|
| (1)         | REPORTABLE: Yes                  |
| (2)         | OF INTEREST TO OTHER JUDGES: Yes |
| 18 MAY 2020 | <i>B Vally</i>                   |
| DATE        | SIGNATURE                        |

CASE NO: 2000/27885

In the application of:

**National Director of Public Prosecutions****Applicant**

and

**Andrew Lionel Phillips and Others****First to twentieth respondents**

In the counter-application of:

**Andrew Lionel Phillips and Others****First to Twentieth applicants**

and

**National Director of Public Prosecutions  
and Others****First to Sixth Respondents**


---

**JUDGMENT**

---

Vally JIntroduction

[1] This is an application brought in terms of Rule 30 of the Uniform Rules of Court (the rules). Rule 30 allows for a party to apply to court to set aside a

**pdfMachine****Is a pdf writer that produces quality PDF files with ease!**

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, if you can print from a windows application you can use pdfMachine.

Get yours now!

step taken by its opponent, the other party, on the grounds that the step is irregular. It is designed to attend to a procedural step taken by the other party which is not in accordance with the rules, or which in one form or another is defective. It is an interlocutory application that is designed to remove what has become a procedural “*hindrance to the future conducting of the litigation*”<sup>1</sup> and no more. It is not aimed at terminating the litigation, nor is it designed to effectively sterilise or neuter a party’s case altogether. Logically, therefore, it affords the court a wide discretion when attending to a complaint against a step taken by a party. The court may set the step aside “*in whole or in part*” for its irregularity and grant the defaulting party “*leave to amend*”, or it may “*make any such order as to it seems meet*.”<sup>2</sup>

[2] In this matter the applicant, the National Director of Public Prosecutions (NDPP), brought an application to rescind a restraint order obtained from this Court by itself. Mr Andrew Lionel Phillips and some of the companies (the Phillips parties) associated with him are the subjects of the restraint order. The restraint order effectively took away the control of certain properties, which was clearly prejudicial to them. They delivered (filed and served) an answering affidavit to the rescission application, and at the same time brought a counter-application to the rescission application (the counter-application). The counter-application also seeks to rescind the restraint order, but goes much further in that it seeks to hold the NDPP accountable for certain losses and costs incurred while the restraint order remains operational. Broadly put, they seek

---

<sup>1</sup> *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O)* at 333G

<sup>2</sup> Rule 30(3)

an order that goes beyond a mere rescission of the restraint order. It is their contention that a mere rescission of the restraint order would not be sufficient to restore the *status quo ante* and would saddle them with costs which they maintain should not be for their account, but rather for the account of the NDPP since the NDPP had sought and obtained the restraint order. The NDPP has filed an answering affidavit to the counter-application as well as a replying affidavit in the rescission application. Both these affidavits form the subject of this rule 30 application.

#### Historical facts

[3] The NDPP obtained the restraint order on 22 December 2000. It was sought in terms of section 26 of the Prevention of Organised Crime Act, 121 OF 1998 (POCA). As a result, a curator was appointed to take control of the properties identified in the restraint order. The restraint order was confirmed on 31 July 2001 by this Court, per Heher J (as he then was).<sup>3</sup> On 10 June 2011 this Court granted a permanent stay of prosecution against Mr Phillips. This order was upheld by the Supreme Court of Appeal (SCA) on 28 September 2012. The NDPP launched an application to rescind the restraint order on 10 April 2014. After exchanging various communications, both verbal and written, the Phillips parties eventually delivered their answering affidavit to the rescission application, and simultaneously brought the counter-application on 25 November 2015. The NDPP delivered a notice of intention to oppose the counter-application. It did nothing more. It did not deliver the replying affidavit to the rescission application, nor the answering affidavit to the counter-

---

<sup>3</sup> *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W)

application. The counter-application seeks relief against both the curator and the NDPP. The curator delivered an application to set aside the counter-application on the grounds that he had no interest in the matter and therefore should not have been joined to it. The curator's application was settled between himself and the Phillips parties. The curator agreed that he would remain a party to the application and accordingly deliver an answering affidavit. He delivered his answering affidavit on 28 March 2017. The Phillips parties only replied thereto on 1 June 2018. The curator only opposes that part of the relief sought which affects him. He remains agnostic with regard to the dispute between the Phillips parties and the NDPP. In the meantime the NDPP's replying affidavit in the rescission application and its answering affidavit in the counter-application remained outstanding.

[4] It is clear from this trajectory of the matter that throughout this lengthy and tortuous litigation the parties seem to have had little regard for the time periods prescribed in the rules concerning the delivery of affidavits. It appears they engaged in various communications rather than deliver their respective affidavits as per the rules.

[5] Not having received NDPP's replying affidavit (in the rescission application) and answering affidavit (in the counter-application), the Phillips parties decided to set the two applications on the unopposed motion court roll of 10 June 2019. On 6 June 2019 the NDPP filed an application for the postponement of the matter on the grounds that the counter-application remained opposed, despite its failure to file its answering affidavit in that

application. It is not clear on the papers before me if the application for postponement was opposed by the Phillips parties and, if so, if they filed an answering affidavit thereto. However, the matter was called before Opperman J, who was presented with a draft order agreed to by both the NDPP and the Phillips parties with a request to make it an order of court. Opperman J acceded to the request. The order compels the NDPP to pay the costs occasioned by the postponement of the application, and compels it to file its two affidavits on or before 9 August 2019, together with an application for condonation for the late filing of the said affidavits.

[6] On 8 August 2019 the NDPP delivered the two affidavits without an accompanying application for condonation for their late filing. It therefore failed to comply fully with the order issued by Opperman J. On 21 August 2019 the Phillips parties issued a notice to remove the cause of complaint in terms of rule 30(2)(b). The notice alerted the NDPP to the fact that it had overlooked its duty to deliver an application for condonation together with its answering affidavit. The notice further called upon the NDPP to remedy its deficient compliance with the order of Opperman J by delivering the necessary application for condonation within 10 days. The 10 days expired on 4 September 2019. On this day the NDPP delivered its application for condonation. It therefore complied with the notice. But this did not console the Phillips parties. Nor did it deter them from bringing this application.

[7] It is imperative to mention that both the Phillips parties and the NDPP are adamant that this Court is not seized with the condonation application. Its

remit is limited to the setting aside of the two affidavits and no more. The condonation application, both parties insist, is one that will be adjudicated at a later stage.

The Phillips parties' case and an evaluation thereof

[8] The Phillips parties seek to have the replying affidavit in the rescission application, as well as the answering affidavit in the counter-application, set aside as being irregular. They say that the irregularity lies in the fact that the said affidavits were delivered without the accompanying condonation application as required by the order of Opperman J. Their complaint is that:

- a. The failure of the NDPP to file the condonation application despite being ordered to do so by this Court is an irregular step that warrants this Court's censure; and,
- b. They are irreparably prejudiced by the fact that these affidavits were not accompanied by the condonation application which were delivered three years out of time.

[9] While it is correct that the NDPP failed to deliver the condonation application as ordered, once the rule 30 notice was delivered the NDPP rectified the irregularity within the time period set out in the notice. Having rectified the irregularity the step taken can no longer be regarded as irregular. On this basis alone, the application ought to be dismissed. The provisions of

sub-rules 30(2)(b) and (c) are instructive as well as dispositive of the dispute before this Court. They provide:

“(2) An application [to set aside the irregular step] shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

(a) ...

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).”

[10] The purpose of subrule 30(2)(b) is to (a) allow the defaulting party to remove the cause of the complaint, and (b) if that party removes the cause of the complaint, there can, it seems to me, no longer be any complaint. This is precisely what occurred in this case. The Phillips parties complied with subrule 30(2)(b) by issuing the necessary notice and the NDPP accepted the validity of the complaint and addressed it fully and finally. There was no longer a cause to complain. Subrule 30(2)(c) is only applicable when the defaulting party fails to remove the cause of the complaint. The Phillips parties brought this application in terms of subrule 30(2)(c). But subrule 30(2)(c) ceased to have application as soon as subrule 30(2)(b) was taken advantage of by the NDPP. This in my view is the only sensible interpretation of the two subrules. They exist coextensively and must be applied in a manner consistent with such coextensivity, failing which subrule 30(2)(b) would be rendered nugatory.

[11] That should be the end of the matter. However, for the sake of completeness I address the issue of the prejudice the Phillips parties allege they will be forced to endure if the two affidavits are not set aside. The prejudice

they claim to suffer is that, if it were to be found that they should bear the costs of returning the restrained properties to their original status, such costs have unduly increased as a result of the delay in the finalisation of the two application. This delay was caused the NDPP delivering the two affidavits three years after they were due. The increase in the costs are a result of the inflationary forces that were present in the South African economy during the time of the three year delay. At the same time there has been the costs of holding the properties. These costs have to be borne daily.

[12] There is no merit to this claim. The Phillips parties are not able to gainsay that the court dealing with the question of who is to bear the costs of restoring the properties to the original status can apportion the liability for all the costs incurred by taking note of the impact of the delay in the finalisation of the matter on these costs, and by identifying the party(ies) liable for the delays. There have been so many delays in this matter, and some of them may well lie solely at the feet of the Phillips parties, others solely at the feet of the NDPP and others still at both their feet. There is simply no warrant to the Phillips parties' claim that they stand to suffer irreparable harm should the two affidavits not be set aside at this stage. Whatever harm they stand to suffer may well be addressed by the court hearing the two applications.

[13] There is another disturbing aspect to this case. It is that the issue here is not really about the admission of the two affidavits. The admission of those two affidavits is an issue integral to the condonation application. It is impossible to set aside the two affidavits without effectively extinguishing the condonation

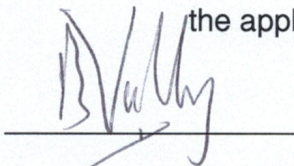
application altogether. Once the two affidavits are set aside the condonation application loses all value, meaning or purpose. Differently articulated, as soon as they are set aside there is nothing left to condone. The Phillips parties are simply wrong to contend that this Court should strike them out and leave the condonation application for adjudication later, albeit in the same Court.

[14] In conclusion, the application stands to be dismissed. Both parties sought their costs should they prevail. I agree with them, costs should follow the result.

#### Order

[15] The following order is made.

- a. The application brought in terms of Rule 30 is dismissed.
- b. The applicants in the Rule 30 application are to pay the costs of the application.



Vally J

|                    |                                        |
|--------------------|----------------------------------------|
| Dates of hearing:  | 20 April 2020                          |
| Date of judgment:  | 18 May 2020                            |
| For the Applicant: | M Chaskalson SC with NPG Redman SC     |
| Instructed by:     | Shannon Little Attorneys               |
| For Lucky Acres:   | Paul Strathern SC with William Coetzer |
| Instructed by:     | State Attorney                         |

**pdfMachine**

**Is a pdf writer that produces quality PDF files with ease!**

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, if you can print from a windows application you can use pdfMachine.

Get yours now!

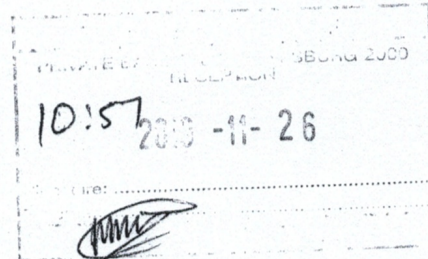
*Shannon Little*

**SHANNON LITTLE ATTORNEYS**

Attorneys for 1<sup>st</sup> to 15<sup>th</sup> Respondents  
 Infinity Office Park  
 Suite 2, Block G, Ground Floor,  
 2 Robin Close, corner Michelle  
 & Hennie Alberts Street  
 Meyersdal  
 P.O. Box 1693, Saxonwold, 2132  
 Tel : (011) 867-9200  
 Fax : 086 5400 100  
 E-mail : nigel@shannonlaw.co.za  
 Ref : Mr N Little/P255

TO: THE REGISTRAR OF THE ABOVE  
 HONOURABLE COURT  
**JOHANNESBURG**

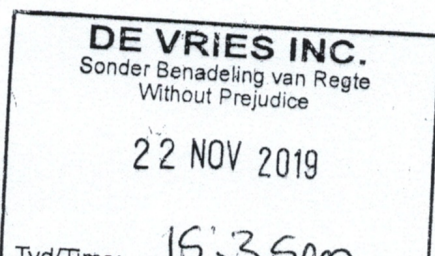
AND TO: **THE STATE ATTORNEY**  
 Applicant's Attorneys  
 10<sup>th</sup> Floor, North State Building  
 99 Albertina Sisulu Street  
 Johannesburg  
 Tel: (011) 220-4031 / 072 4449 055  
 Ref: Mr J Tagane/7576/00/P14  
 e-mail: [JTagane@justice.gov.za](mailto:JTagane@justice.gov.za)  
[JTagane@npa.gov.za](mailto:JTagane@npa.gov.za)



Received a copy hereof on this  
 the day of \_\_\_\_\_ 2019.

AND TO : **DE VRIES INCORPORATED**  
 De Vries House  
 93 Protea Road  
 Chislehurst  
 Sandton  
 Tel: (011) 775-6000  
 Fax: (011) 775-6100  
 e-mail: [abonnet@devries.co.za](mailto:abonnet@devries.co.za)  
 Ref: Mr A Bonnet/VAN309/0001

Received a copy hereof on this  
 the day of 22 Nov 2019.



pdfMachine

**Is a pdf writer that produces quality PDF files with ease!**

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, if you can print from a windows application you can use pdfMachine.

Get yours now!