



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2020/18844

(1)	REPORTABLE: ☒ NO.
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES.
(3)	REVISED.
<u>26/01/2024</u> DATE SIGNATURE	

In the matter between:

ROMEO & JEAN COUTURE (PTY) LTD

First Applicant

T/A ROMEO & JEAN BOUTIQUE

MOLAI, NONKONZO

Second Applicant

MOLAI, TSHEPO

Third Applicant

And

**BUSINESS VENTURE INVESTMENTS NO. 1360
(PTY) LTD**

Respondent

In re:

**BUSINESS VENTURE INVESTMENTS NO. 1360
(PTY) LTD**

Plaintiff

And

**ROMEO & JEAN COUTURE (PTY) LTD
T/A ROMEO & JEAN BOUTIQUE**

First Defendant

MOLAI, NONKONZO

Second Defendant

MOLAI, TSHEPO

Third Defendant

JUDGMENT

MBONGWE, J.

INTRODUCTION

- [1] This is an application for the rescission of orders granted on 6 September 2022 in favour of the respondent in its interlocutory application for leave amend its particulars of claim in terms of the provisions of rule 28(4), in circumstances where the application was brought well out of time in terms of rule 28(2), yet the plaintiff had not only failed to seek an order condoning the late bringing of the application to amend in compliance with rule 27(3) but had also, in the exchange of process, persistently disregarded other provisions of the rules in relation to notices served on it challenging the amendment of the particulars of claim, being, an exception (Rule 23(1)), objection (Rule 28(3)), and irregularity (Rule 30A(1)).

[2] The defendants had filed their opposing answering affidavit and heads of argument, but were absent from court on the date of the hearing opposed motion application. The hearing of the plaintiff's application took place a day after the date of hearing as per the notice of set down. Furthermore, the secretary to the judge who presided over the matter had made a note that the defendants had not filed their heads of argument, implying that the defendants had not complied with the judge's directive. On perusal of the court documents, the defendants' heads of argument had in fact been filed when the plaintiff's application was heard on 6 September 2022.

[3] In its application the plaintiff had sought mainly the following orders:

1. *That the plaintiff be granted leave to amend its particulars of claim dated 11 March (sic) 2020 in accordance with the notice in terms of rule 28(1) attached to the founding affidavit marked as annexure "A".*
2. *That the first to third defendants' rule 28(3) notice of objection attached to the founding affidavit marked as annexure "B" be set aside.*
3. *That the first to third defendants be ordered to pay the costs of the application, jointly and severally, only in the event of opposition thereto."*

BACKGROUND FACTS

[4] The plaintiff instituted a claim for damages on 13 March 2020 against the defendants founded on the breach of a lease agreement between the plaintiff

and the first defendant. The Second and Third Defendants were cited in their capacities as sureties and co-principal debtors with the first defendant.

[5] The plaintiff initially sought to pursue its claim on the basis that, by its evacuation of the leased premises prior to lapse of the period of the lease, the first defendant had repudiated the lease agreement, which repudiation the plaintiff accepted and, consequently, sought payment of damages. The plaintiff had subsequently doubled and sought, in a notice of amendment, to enforce the lease agreement and claim damages on the basis of the first defendant's unilateral premature termination of the lease. The implications of the plaintiff's switch, coupled with the contentious date of commencement of the lease agreement, forms an integral part of the issues for future determination of the merit in this case, but has also been raised by the defendants as one of the grounds for opposition to the plaintiff's amendment of the particulars of claim.

[6] For an appreciation of the implications referred to it is necessary to state that the relevant lease agreement was signed by the second defendant on behalf of the first defendant on 13 February 2017 and the plaintiff only signed some seven months later, on 15 September 2017. As a result of a lack of clarity in both the plaintiff's original and the then sought amendments of the particulars of claim, the defendants opposed the amendment of the plaintiff's amendment raising the question whether the plaintiff was entitled to claim damages in respect of the period prior to it signing the lease agreement.

[7] Subsequent to the service of the summon on them, the defendants filed a notice of exception in terms of rule 23(1) on 17 June 2020 seeking that the plaintiff removes from its particulars of claim several causes of complaint that allegedly rendered the particulars of claim vague and embarrassing and not disclosing a cause of action. The exceptions raised are, *inter alia*, that:

7.1 there was no lease agreement between the plaintiff and the first defendant prior to 15 September 2017 and, therefore, no contractual claim could have arisen prior to the plaintiff signing the lease agreement on that date;

7.2 the third defendant was neither a signatory to the lease agreement nor to the Deed of Suretyship relied upon by the plaintiff and, therefore, the third defendant should not to have been cited as a party in these proceedings;

7.3 the Deed of Suretyship relied upon by the plaintiff was signed by the second defendant on 13 February 2017, prior to the conclusion of the lease agreement – there is no averment in the particulars of claim demonstrating the connectivity between the Deed of Suretyship and the premises to which the lease agreement relates.

[8] In response and without specifically addressing the issues raised in the defendants' rule 23(1) notice, the plaintiff filed a notice of intention to amend its particulars of claim in terms of rule 28(1) on 20 August 2020 and to which it annexed what effectively constituted a substitution or replacement of the entire initial particulars of its claim.

- [9] On the 4 September 2020 the defendants filed a notice of objection in terms of rule 28(3) some five pages whereof contain a list of the defendants' grounds of objection to the plaintiff's proposed amendments and calling upon the plaintiff to comply with the provisions of rules. Rule 28(3) provides thus:

"(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded."

- [10] Notwithstanding the defendants' notice of objection aforementioned, the plaintiff's attorneys filed the purportedly amended particulars of claim on 23 September 2023. This resulted in the defendants filing their notice in terms of rule 30A (1) on 8 October 2020 raising as an irregularity the plaintiff's filing of the purported amended particulars of claim.

- [11] The plaintiff was procedurally required in the circumstances to file an application for leave to amend its particulars of claim in terms of rule 28(4) and a further application, as required in rule 27(3), for the condonation of the late filing of the rule 28(4) application which, in terms of rule 28(2), ought to have been file within **ten (10)** days from the date of receipt of the defendants' notice of objection (rule 28(3), being from on 3 September 2020. Rules 27(3) and 28(2) were simply disregarded.

APPLICABLE LEGAL PRINCIPLES

CONDONATION

- [12] Compliance with time limits indicated in the rules of the court or a court directive is mandatory. Any delay places an obligation on the party concerned to seek the indulgence of the court as soon as it becomes aware of the necessity to do so in an application for condonation setting out the reasons for the delay.¹
- [13] For an application for condonation to succeed, the applicant for condonation must of necessity provide a detailed explanation of the cause of the delay, for the entire period thereof. In the case of a delayed application for leave to appeal or the rescission of an order / judgment, *inter alia*, the prospect of the success of the appeal, claim or defence on the merits is an important consideration. The legal requirements for a successful application for condonation were aptly summarised by Froneman J in the matter of *Foster v Stewart Scott Inc.*² in the following terms:

"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the fact. Relevant considerations may include the degree of non-compliance with rules, the explanation thereof, the prospect of success on appeal, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other.....". A slight delay and a good explanation for the delay may help to compensate for prospect of success which are not strong.

¹ *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B-D.

² *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC) at para 369

Conversely, very good prospect of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-399A."

[14] Holmes JA³ state the applicable principle thus:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the fact and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion..."

[15] Other considerations include the significance of the matter and, most importantly, the interests of justice.

[16] Expressing dismay with the legal practitioners' disregard of the rules in relation to the time frames set therein for the execution of specific actions in terms of the rules, the Constitutional Court, per Bosielo AJ⁴: the Constitutional Court said the following:

"21. The failure by parties to comply with the rules of court / directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court."

³ *Meiane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at C-F

⁴ *Grootboom v National Prosecution Authority & Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

The court continued in paras 23 and 34 to say the following;

"23. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules of court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

"34. One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message must be sent to the litigants that the rules and directions cannot be disregarded with impunity."⁵

- [17] Coming back to the present matter, in an effort to exculpate themselves from the situation they had placed themselves in, the plaintiff's attorneys disingenuously attempted to circumvent the provisions of rule 27(3), which required that condonation be sought, and to also escape the effect of the defendants' rule 30A(1) notice, sent an email to the defendants' attorneys on 14 October 2020 wherein they state that they had not been aware of the defendants' rule 28(3) notice when filing the rules 28(5) and 28(9) notices with the (purported) amended particulars of claim, but, astonishingly went further to state that:

⁵ Grootboom supra.

3. *We have no intention of opposing the rule 30 notice, however, we suggest a practical approach to the matter on the basis that you withdraw the rule 30 notice and that we set the amendment down on the opposed motion roll to be argued in due course.*
4. *For the above suggestion to happen, we would require your agreement that you withdraw the rule 30 notice, and we withdraw the rule 28(5) and 28(9) notices leaving the status of the documents filed as rule 28(1) notice dated 11 August 2020 together with your notice of objection dated 3 September 2020. If you agree to the aforesaid, we can then obtain a date upon which the proposed amendment may be argued. This, in our view, is the most practical way to resolve the current situation.*
5. *If you do not agree to our practical suggestion and solution, we would have no alternative but to withdraw both the rule 28(1) notice and the rule 28(5) and 28(9) notices and start afresh by delivering a new notice in terms of rule 28(1).*
6. *We presume that you will see the practicality in our suggestion and accordingly await to hear from you as soon as possible. It goes without saying that, pending your response, we shall not take any further steps and we similarly expect you not to take any further steps regarding the rule 30 notice."*

[18] With the defendants' attorneys not yielding to the plaintiff's attorneys' improper proposal, the plaintiff's attorneys on 6 January 2021, that is, approximately three months after receipt of the defendants' rule 28(3) notice, filed an application in terms of rule 28(4) seeking the following orders:

- "1. That the plaintiff be granted leave to amend its particulars of claim dated 11 March 2020 in accordance with the notice in terms of rule 28(1) attached to the founding affidavit marked as annexure "A";*
- 2. That the first to third defendants' rule 28(3) notice of objection attached to the founding affidavit marked as annexure "B" be set aside;*
- 3. That the first to third defendants be ordered to pay the costs of the application, jointly and severally, only in the event of opposition thereto."*

ISSUE FOR DETERMINATION

- [19] At the heart of this application for rescission is a determination whether the orders sought to be rescinded ought to have been granted in the first place in light of the absence of an application for an order condoning the late filing of the plaintiff's rule 28(4) application – a transgression of rule 27(3) occasioned by an earlier disregard of rule 28(2) and other rules by the plaintiff's attorneys.

ANALYSIS

- [20] The plaintiff's attorneys' persistent disregard of the defendants' notices filed in terms of the rules and their audacity to even suggest, in the email, a self-serving deviant course aimed at facilitating the circumvention of the operation of rule 27(3) constituted, in my view, the worst form of disregard for the rules of the court and, with the further total failure to seek condonation of the late filing of the rule 28(4) application, the plaintiff's rule 28(4) application ought not to have been granted. In fact, there was no proper application before the court.

[21] The legal position is that, absent a condonation application where one is required in terms of the rules as was the case before the court on 6 September 2022, there was no proper application before the court for the amendment of the plaintiff's particulars of claim and leave to amend ought to have not been granted, notwithstanding the absence of counsel for the defendants in court or any opposition. The plaintiff's defective application stood to be dismissed by the mere operation of the law/ legal principles. In *Nedcor Investment Bank Ltd v Visser NO and Another*⁶ the court stated, in relation to an application for condonation that:

"The requirements are first that the plaintiff should at least tender an explanation for its default to enable the court to understand how it occurred (Suilber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353. Secondly, it is for the plaintiff to satisfy the court that its explanation is bona fide and not patently unfounded." (own emphasis)

[22] The above procedure could not have been followed in the present matter on 6 September 2022 as the plaintiff had not brought an application for condonation in terms of rule 27(3) for the default to timeously launch its rule 28(4) application. With the proposal contained in the plaintiff's attorneys' email referred to in para [17], no reasonable explanation, let alone a bona fide one, could have been proffered for the delayed rule 28(4) application.

[23] I could not agree more with the submission by counsel for the defendants that, but for the erroneous note by the judge's secretary that the defendants' heads of argument had not been filed - an implied defendants' disregard of the

⁶ *Nedcor Investment Bank Ltd v Visser N.O. and Another* [2022] JOL 9536 (T)

directives, the presiding judge would have had regard to the defendants' heads of argument that had been uploaded onto Caselines, section 028 -1 to 028 – 12 on 26 July 2022, and become aware, *inter alia*, of the absence of the mandatory condonation application for the plaintiff's belated rule 28(4) application as well as its attorneys persistent disregard of rules pertaining to the defendants' notices of exception, objection and irregularity served on them in terms of rules 23(1), 28(3), 30A(1), respectively, and generally rules 28(2), 27(1) and 27(3).

[24] The plaintiff had opportunistically taken advantage of two aspects to obtain the orders sought to be rescinded; firstly, the erroneous note by Potterill J's secretary that the defendants' heads of argument had not been filed and, secondly, the absence of the defendants' counsel from court to verbalise the grounds of opposition contained in his filed heads of argument. Furthermore, there was, in my view, an obligation on counsel for the plaintiff, had he commenced with the application for condonation to draw the court's attention to the presence of the defendants' heads of argument in his presentation of the reasons for the delayed launching of the plaintiff's rule 28(4) application and rebuttal of the grounds of opposition raised therein.

[25] Had the court been aware of the absence of a condonation application in particular, it would have had no discretion, but to dismiss the plaintiff's application for leave to amend. Furthermore, there was no aspect of particular importance in this case necessitating that the court invokes the interests of justice as a reason to grant the leave sought in order for the court to address and prevent an outcome that would not accord with justice.

[26] I have read the reasons proffered for the absence of the defendants' counsel in court on the 6 September 2022 when the challenged orders were made. The spreading of the matters on roll over the particular week does infrequently result in the default of attendance in court, particularly in respect of matters allocated for hearing on a day other than the date on the notice of set down. Counsel for the defendants has stated that he had attended court on 5 September 2022, but could not locate the relevant court the matter was to be heard in. He also was not aware that the matter was in fact scheduled to be heard on 6 September 2022. This is strange as notification had been given that the matters before Potterill J will be heard in open court, and this particular matter scheduled for hearing on the 6 September 2022.

[27] In the end the court, per Potterill J, on 6 September 2022 endorsed a draft order presented by counsel for the plaintiff thus making same an order of the court which reads thus:

- "1. The plaintiff's amendment to the particulars of claim pursuant to the application in terms of rule 28(4) dated 6 January 2021 is granted.*
- 2. The first, second and third defendants are ordered to file their plea within 20 days of the date of this order.*
- 3. The first, second and third defendants are ordered to pay the costs of the opposed application for amendment of the particulars of claim, jointly and severally the one paying the others to be absolved, on the scale as between party and party."*

- [28] I agree with counsel for the defendants' argument that the plaintiff's unexplained non-compliance with rule 27(3) alone warranted the dismissal of its application to amend, irrespective of the absence of the defendants' counsel in court or any objection to the granting of the plaintiff's application.
- [29] The improper suggestion in the email of the plaintiff's attorneys referred to earlier was an exacerbation reinforcing the necessity to dismiss the plaintiff's application to amend its particulars of claim. Furthermore, the granting of leave to the plaintiff to amend its particulars of claim in the circumstances, if left as is, would create a bad precedent. It is for that reason that this court utilises this earliest opportunity to regularise its own processes through the invocation of the provisions of rule 42(2). These provisions, in my view, form a sound basis for the rescission sought in the present application and render it unnecessary to engage with the normal requirements in an application of this nature. The reason behind this approach is that the orders sought to be rescinded ought not to have been granted had the court been aware of the overall conduct of the plaintiff's attorneys in this application to amend.

CONCLUSION

- [30] In line with the findings in this judgment, the defendants' application for the rescission of the court orders of the 6 September 2022 must succeed and the relevant orders set aside.

COST

- [31] The general principle is that costs follow the outcome of the proceedings. There is no reason to deviate from that principle.

ORDER

- [32] Resulting from the conclusion in this judgment, the following order is made:

1. The orders of the court granted in favour of the plaintiff on 06 September 2022 are hereby rescinded and the plaintiff is ordered to pay the costs of the hearing on that day on an opposed attorney and client scale.
2. The plaintiff's attorneys are ordered to pay the costs of this rescission application personally on an opposed scale as between attorney and client, except the costs of the defendants' counsel for the 06 September 2022.


MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicants / Defendants

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Instructed by

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For the Respondent / Plaintiff

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Instructed by

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTETIVES AND UPLOADED ONTO CASELINES ON 26 JANUARY 2024.