

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **53064/2019**

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

Date: 7 AUGUST 2023

In the matter between:

PHILEMON TATENDA MAWIRE N.O.
ADRIAAN WILLEM VAN ROOYEN N.O.

First Applicant
Second Applicant

And
SEBUSHI PATRICK SOMO

Respondent

JUDGMENT

DE VOS AJ

Introduction

- [1] The applicants request relief in terms of Rule 30 of the Uniform Rules of Court. They complain that Mr Somo has taken certain irregular steps. The first is an amended notice of motion not preceded by a notice of intention to amend. The second is a supplementary founding affidavit filed without seeking leave to file a supplementary affidavit. The applicants contend that these two pleadings were filed without complying with the Rules of Court. Aside from the non-compliance with the Rules, the applicants add another argument: they complain that the amended notice of motion falls outside the scope of the Directive issued by the Court (dated 21 February 2023). The Directive authorised filing an amended notice of motion to consolidate certain interlocutory matters. The applicants complain that Mr Somo's amended notice of motion introduced relief beyond the scope of the Directive.
- [2] Mr Somo accepts that he did not file a notice of intention to amend, nor did he seek leave to file the supplementary founding affidavit. Mr Somo contends these steps were unnecessary as the Directive authorised him to file the amended notice of motion. Mr Somo's reasoning continues: as the Directive authorised filing a further affidavit, Rule 6 demands that an application be launched on notice accompanied with an affidavit. As the Directive authorised filing an amended notice of motion, Rule 6 demanded that an affidavit accompany the amended notice of motion.
- [3] The central issue is whether the Directive authorised Mr Somo to file the amended notice of motion.

The current litigation

- [4] The genesis of the litigation is the liquidation of Sebushi Somo Construction & Projects (Pty) Ltd. Mr Patrick Somo was the sole director of Sebushi Somo until the Court placed it in liquidation in February 2020. The Master appointed¹ Messrs Philemon Tatenda Mawire N.O. and Adriaan Willem van Rooyen N.O. as liquidators ("the liquidators/applicants").
- [5] Mr Somo sought to appeal the liquidation order on three occasions. All three attempts were unsuccessful.² Mr Somo, undeterred, has continued his litigation in the form of

¹ Certificate of appointment dated 18 October 2018, annexure RvR1 (CL 30 - 35).

² Mr Somo's application for leave to appeal in the Court a quo was refused, as was an application for leave to appeal to the Supreme Court of Appeal and, subsequently, an application for special leave for appeal directed to the President of the Supreme Court of Appeal, was also refused and dismissed with costs.

an application to set aside the liquidation order in terms of section 354 of the Companies Act, 61 of 1973 (case number 53064/2019). During the setting aside proceedings, the liquidators filed an answering affidavit setting out the details of a forensic investigation into the affairs of Sebushi Somo. The liquidators contend that the findings are severe -

"Documentary proof is produced of Mr Somo, after the final liquidation order, continued to trade Sebushi Somo as though no liquidation order was granted and no concursus creditorem came into existence. Mr Somo continued to present himself to previous clients as the managing director of Sebushi Somo, failed to disclose to any of the contracting parties in construction tenders and agreements (including the Development Bank of South Africa) that Sebushi Somo was in final liquidation.....

... the ambit of the claims by creditors against Sebushi Somo exceeded the amount of R 50 million... "³

- [6] The setting aside proceedings has given rise to a set of interlocutory proceedings. The interlocutory proceedings consist of challenges launched in terms of Rule 7, Rule 30 and Rule 35(12). The liquidators have responded to the interlocutories with a counter-claim.⁴ These interlocutories are, as their name suggests, brought ancillary to the main setting aside proceedings.
- [7] Parallel to the setting aside proceedings and its interlocutories, the liquidators have sought an extension of their powers in terms of section 386 and to convene a commission of inquiry into the trade dealings of Sebushi Somo in terms of 417 of the Companies Act (under case number of 13349/2022). These proceedings were commenced on an ex parte basis by the liquidators. Mr Somo has subsequently sought leave to intervene in these proceedings.⁵ I will refer to these as the ex parte proceedings.

³ Letter of 11 November 2022, para 16.

⁴ The interlocutories concern the liquidators alleged failure to comply with a rule 30 notice, the liquidators' demand for discovery under rule 35(12) being irregular, and an alleged conflict of interest arising from the liquidators' firm of attorneys acting on behalf of the liquidators. According to the liquidators, rule 35(12) discovery relates to construction contracts and tender documents, allegedly representing himself as the director, which Mr Somo signed after Sebushi Somo's liquidation. The liquidators filed an opposing affidavit and a counter application in response to the interlocutory applications of Mr Somo. These interlocutories were generated as a result of and formed a part of the setting aside proceedings. Mr Somo has not set down the interlocutories or responded to the liquidators' counter-claim.

⁵ On 8 March 2022, the Court granted the liquidators an order extending their powers under sections 386(3) and 386(4) of the Companies Act. In the same application, the liquidators applied for leave to convene a commission of enquiry in the trade dealings of Sebushi Somo in terms of sections 417 and 418 of the

- [8] There are thus two sets of proceedings, the first being the main setting aside proceedings (with its interlocutories) and the second being the ex parte proceedings. I spent some time demarcating the different proceedings as the parties disagreed about which proceedings were covered in the Directive of this Court. I now consider the events that led to the Court issuing the Directive.

The Directive

- [9] On 11 November 2022, the liquidators requested assistance from the Court in moving the setting aside proceedings along. Mr Somo had not filed a replying affidavit in the setting aside proceedings and had failed to take steps to move the interlocutories forward. All these outstanding steps relate to the setting aside application (under case number 53064/2019) and its interlocutories. The liquidators requested the Deputy Judge President for an allocation in the Special Motion Court and to set timeframes to compel Mr Somo to file the outstanding affidavits and submissions.
- [10] The request deals solely with the setting aside application and its interlocutories. The limited scope of the letter requesting assistance is apparent from its heading, which provides:
- "Application for an allocation in the third court of several matters under case number 53064/2019".
- [11] The content of the letter also expressly and exclusively deals with the setting aside application –
- "Deputy Judge President to set these matters down in the third court as a set of related applications under one case number which require an urgent hearing in the public interest."
- [12] The contents confirm the header as the applicants explain that they anticipate the matter, under case number 53064/2019, will take longer than one day and therefore request an allocation in the Third Motion Court.

Companies Act. On 18 July 2022, Mr Somo, as an intervening party, filed a notice of set down for the reconsideration of the order granted on 8 March 2022 under rule 6(12)(c) of the Rules of Court. Despite launching the intervention and reconsideration as urgent proceedings, Mr Somo has not enrolled the matter seeking leave to intervene and have the order reconsidered.

[13] The express request in the letter is for the interlocutories to be dealt with together with the main proceedings and that practically from this, it follows “that case management in these matters all under one case number, is necessary”.⁶

[14] Aside from these three express statements, the request does not mention any other relief being sought. The request for a meeting with the Deputy Judge President is, expressly and unambiguously, limited in scope to the setting aside proceedings and its interlocutories.

[15] The request resulted in a meeting on 9 February 2023. The liquidators prepared an agenda for the meeting. The agenda dealt solely with the setting aside proceedings and its interlocutory applications. The agenda is evident as it limits the ambit of matters it relates to -

“Ambit of the various matters pending under case number 53064/2019: the main application and interlocutory applications and counter-application.”⁷

[16] In line with the letter requesting the meeting, the agenda deals only with affidavits to be filed in the setting aside application and the interlocutories.⁸

[17] At the Teams Meeting, the Deputy Judge President requested the liquidators to prepare a draft directive. The draft directive, in line with the motivation for the meeting and the agenda, dealt solely with the setting aside application and the interlocutories attached to the setting aside application. This is clear from the heading of the draft directive—

“Draft Directive to be issued by the Honourable Ledwaba J enrolling the above application, consolidated interlocutory applications and counter application as a special motion, for hearing on the 25th and 26th of July 2023.”

[18] In addition, the first paragraph of the draft directive provides: “The applications and counter-application are enrolled as a special motion on 25 and 26 July 2023”. In addition, the draft directive does not refer to the ex parte proceedings or any relief being sought outside the setting aside proceedings and the interlocutories.

[19] The draft directive provides -

⁶ Letter of 11 November 2022, para 25.

⁷ Agenda 9 February 2023

⁸ Agenda 9 February 2023 para 3.

“3.1 The applicant in the main application and interlocutory applications, respondent in the counter application (Mr S Somo), will file an amended notice of motion consolidating the interlocutory applications on 14 February 2023;

3.2 The liquidators will file their supplementary answering affidavit in the main application and answering affidavit in the consolidated applications of the applicant and in the counter application by 28 February 2023.

3.3 Mr Somo will file his replying affidavit in the main and interlocutory applications and reply to the liquidators' counter-application on 28 March 2023.

3.4 The liquidators will file replying affidavits in the interlocutory applications (consolidated in the amended notice of motion of 14 February 2023) and in the counter application by 21 April 2023.

3.5 Mr Somo will file his heads of argument in the main application as well as in the interlocutory applications and counter application on 16 May 2023.

3.6 The liquidators will file their amended and supplemented heads of argument in the main application and the interlocutory applications by 8 June 2023.

[20] The draft directive is restricted to the setting aside application (the main application) and the interlocutories. The draft directive permits filing pleadings and submissions solely to the setting aside application and the interlocutories. There is no mention of the ex parte application, amending the relief sought in the setting aside application or any other relief being entertained.

[21] Mr Somo's legal advisor, Mr Ramothwala, agreed that the draft directive correctly reflected the agreement reached at the meeting.⁹ The Directive was issued on 21 February 2023, identical to the Draft Directive in all material respects.

[22] Mr Ramothwala's case is that the Directive permitted the filing of the an amended notice of motion dealing with issues beyond the scope of the setting aside proceedings. I have considered this submission, the written submissions and the authorities filed. However, all three pieces of objective evidence contradict this submission: the letter, the agenda and the draft directive. All three contain express and repeated statements that the Directive was only to deal with the setting aside and interlocutory proceedings.

⁹ The exact wording is that Mr Ramothwala has perused the meeting minutes of 9 February 2023 and "agree with the records".

[23] In addition, the liquidators have presented the evidence of their instructing attorney, who attended the meeting in the form of an affidavit. This evidence aligns with the contents of the objective evidence.

[24] Lastly, I consider the express wording of the final Directive. The Directive provided, in paragraph 3.1, that Mr Somo would file "an amended notice of motion consolidating the interlocutory applications on 14 February 2023". The express wording of the Directive permitted solely the filing of an amended notice of motion consolidating the interlocutories.

[25] For all these reasons, I find that the scope of the Directive was limited to the setting aside and its interlocutories. Concerning filing an amended notice of motion, the Directive permitted the filing of an amended notice of motion only to consolidate the interlocutory proceedings ancillary to the setting aside proceedings.

The scope of the amended notice of motion

[26] Mr Somo filed the amended notice on 14 February 2023. The amended notice of motion did not only "consolidate the interlocutory proceedings". Instead, the amended notice of motion introduced relief outside the scope of the Directive and included entirely new causes of action not disclosed at the meeting with the Deputy Judge President. In addition, the amended notice of motion incorporated the relief sought concerning the ex parte proceedings in the setting aside proceedings. In conflict with the Directive, the amended notice of motion also amended the relief sought in the setting aside proceedings instead of "consolidating the interlocutories".

[27] Instead of the liquidators receiving an amended notice of motion consolidating the existing interlocutories, Mr Somo had filed an amended notice of motion amending the relief in the main proceedings (setting aside application) and was seeking relief not envisaged during the meeting with the Deputy Judge President.¹⁰

¹⁰ The amended notice of motion contains as a first prayer that Mr Somo be granted leave to intervene in the 354 application under case number 53064/2019. The second prayer seeks a finding that the liquidators are conflicted and are to be removed. This relief was not included in the original notice of motion and constituted a new cause of action. Prayers 3 and 4 are the same as in the original notice of motion. Prayers 5 - 8 of the Amended Notice of Motion Mr Somo seeks leave to be joined in the proceedings as a party under case number 13349/2022. In prayers 9 – 11, Mr Somo applies for orders against the liquidators to proceed with an account, and it appears to be a tender by Mr Somo to pay this account.

- [28] The relief sought in the amended notice of motion constituted an entirely different proceeding as envisaged in the letter of 11 November 2022, the agenda of 9 February 2023, the discussions at the Teams Meeting of 9 February 2023 and the Draft Directive of 10 February 2023. The Directive did not authorise the amended notice of motion and fell outside the scope of what the amended notice of motion contemplated.
- [29] On this basis, I reject Mr Somo's submission that the Directive authorised the amended notice of motion.

Irregular step?

- [30] Rule 28(1) permits a party to amend their pleadings after notifying the other parties of this intention. This notice allows the other parties to consider the intended amendment, abide by it, or object to it. If no objection is raised, the amended notice of motion can be effected, and no court needs to consider it. However, if there is an objection, the Court must hear the application for an amendment and exercise its discretion in deciding whether to permit it.
- [31] In this case, there was no notice of an intention to amend. The liquidators were denied notice of the intended amendment and deprived of an opportunity to object. The non-compliance with the rules is common cause, and the amended notice of motion is irregular. Not only were the liquidators denied an opportunity to object the Court was precluded from exercising its discretion.
- [32] In a similar context, the Court in *Webber*¹¹ held-

“The Rulesallow a party to seek an amendment to a notice of motion in terms of rule 28. Only once the amendment has been effected will the initial notice of motion be subsumed by the amended one.

If the proposed amendment is objected to, leave to amend must first be sought. A court hearing an application for an amendment has a discretion whether or not to grant it, which must be exercised judicially.”

- [33] The Court held that it is not only prejudicial but unfair for a party to invite the other, on the strength of relief sought in the notice of motion, to show cause why such relief should not be granted and then, after the other party has ventilated itself by way of opposing papers, to sneak in an "*extended notice of motion*" seeking relief to which

¹¹ *Webber N.O and Others v Hein* (CA 221/2020) [2021] ZAECHGHC 76 (10 August 2021) paras 16 – 17.

the other party was not directed. That is precisely what Mr Somo did in these proceedings.

- [34] The amended notice of motion introduced additional causes of action to the setting aside relief sought initially. Mr Somo has therefore introduced large-scale changes to the relief sought initially in the amended notice of motion. The Directive did not permit filing such an amended notice of motion, and it was done in conflict with the rules of the Court. In this way, the amended notice of motion is irregular.

Rule 6

- [35] Mr Somo contends that the amended notice of motion (which the Directive permitted) would only be acceptable if filed with an affidavit. As the Court has found the Directive did not permit the amended notice of motion, the argument fails to be dismissed. For completeness, however, the Court will consider Mr Somo's argument in relation to Rule 6.
- [36] The premise for this argument is Rule 6(1), which provides that an application shall be brought on notice of motion supported by a founding affidavit.¹² Rule 6(1) does not apply in this context as Mr Somo had already instituted the proceedings. The amendment of a notice of motion does not permit filing a further affidavit. To do so, Mr Somo would have had to seek leave from the Court. No such leave was sought. The filing of the further supplementary affidavit is an irregular step.

Mr Somo's technical points

- [37] In addition to Mr Somo's substantial reliance on the Directive and Rule 6, Mr Somo opposes the relief on two further technical points.
- [38] First, Mr Somo contends that "Rule 28 does not apply at all . . . a correct interpretation of the rules of this Court makes it impermissible to invoke Rules 28 and 30 simultaneously".¹³ Mr Somo contends that as the matter before the Court is a Rule 30 application, the Court must not consider Rule 28 at all. The contention is that "the comingling of Rules by the liquidators is legally impermissible and on this basis only the

¹² Answering Affidavit para 4.19 (CL030-88).

¹³ Answering Affidavit paras 4.11 and 4.12 (CL 030-86).

relief that they seek is not supported by law and fact. It is what an incompetent relief is".¹⁴

- [39] The argument has no merit. Rule 28(8) expressly permits a party to invoke Rule 30 if an irregular step has been taken in the context of Rule 28 proceedings. Aside from the express provision in Rule 28(8) permitting the invocation of Rule 30, Rule 30 is generally used when there has been non-compliance with a Rule of the Court; generally, Rule 30 will be used to enforce compliance with another rule of Court.
- [40] Second, Mr Somo contends that the Rule 30 application was launched out of time and absent a condonation application; it is void. It is common cause that the liquidators did not commence the present Rule 30 proceedings within ten days of filing the amended notice of motion. Mr Badenhorst SC explains that the liquidators believed they were under the dispensation of management by the Deputy Judge President concerning the Third Motion court. The very purpose of approaching the Deputy Judge President was to set time frames for filing affidavits to move the matter along. The applicants believed that the Deputy Judge President would revise the Directive as Mr Somo had taken this unexpected step and had written to the Judge President on 16 February 2023 asking for another meeting. It was only when the liquidators realised that there would be no further meetings or timeframes that they reverted to the remedies and timeframes in the Uniform Rules of Court. The understanding of the liquidators is apparent from contemporary correspondence received at the time. On 29 February¹⁵ and on 15 March 2023, the liquidators wrote to Mr Somo, objecting to the scope of the amended notice of motion and explaining that these steps were beyond what was contemplated by the Directive. However, having realised that there would be no further directions or meetings, the liquidators filed the Rule 30(2)(b) notice to Mr Somo to remove the cause of the complaint within ten days. The liquidators acted in terms of what our courts have termed "the proper course" when faced with irregular proceedings. Where proceedings are irregular, the party is "not to proceed as if there had been no such proceeding at all but to apply to Court" to set it aside.¹⁶

¹⁴ Answering Affidavit para 4.16 (CL 030-87).

¹⁵ Referred to in the 15 March 2023 letter (CL 030-190 para 2.3)

¹⁶ *Gibson and Jones (Pty) Ltd v Smith* 1952 (4) S.A. 87 (T) quoted with approval in *Theron v Coetzee* 1970 (4) [TPD] 39D-F.

- [41] Mr Somo refused to remove the cause of the complaint. The applicants then filed the current application as prescribed in rule 30(2)(c). It is common cause that all further steps taken were per the timeframes determined by the rules of the Court. It is only the commencement of the steps which the liquidators delayed.
- [42] At the hearing of the matter, out of an abundance of caution, Mr Badenhorst SC, for the applicants, moved for condonation for the late filing of the Rule 30 to the extent necessary.
- [43] Mr Somo suffered no prejudice concerning the late filing of the Rule 30 application. The liquidators have fully explained the non-compliance, and the explanation is supported by contemporary correspondence. Mr Somo knew, immediately after filing the amended notice of motion and affidavit, that the applicants viewed it as irregular. The delay was not excessive. A clear case for condonation has been made on the papers, and even if the applicants had not formally sought condonation, the Court could have *mero motu* granted it.

Prejudice

- [44] The liquidators complain that the filing of the amended notice of motion and the supplementary founding affidavit was not authorised by the meeting with the Deputy Judge President. At the meeting, there was no discussion, no disclosure and no leave granted to Mr Somo to amend his notice of motion in the main proceedings. The inquiry proceedings and the extension of the liquidators' powers had no connection with the meeting with the Deputy Judge President. Mr Somo unilaterally incorporated the additional relief in the amended notice of motion, unrelated to consolidating the interlocutories.
- [45] In this case, Mr Somo filed a notice of motion and founding affidavit in the setting aside application. The liquidators responded and showed cause why such relief must not be granted. They filed extensive papers answering the case Mr Somo had made out in his founding affidavit. After the liquidators had ventilated their position, Mr Somo sought to sneak in different relief after the liquidators had filed their answering affidavit. In such an instance, a party may object to an intended amendment, and the Court must exercise its discretion whether to amend it.

- [46] The prejudice concerning the irregular steps is manifest. The liquidators must respond to an entirely new case. Mr Somo would have been prevented from making out a new case in reply, yet has now sought to achieve precisely that by filing a supplementary founding affidavit. All of this without providing the applicants an opportunity to oppose the filing of the supplementary affidavit or amended notice of motion.
- [47] Of course, a court may follow a lenient approach to an application for leave to file a further affidavit if a sufficient basis is laid out for such leave. However, bypassing the Court's discretion entirely and preventing your opponent from filing a notice and an affidavit in opposition is prejudicial.

Costs

- [48] The Court must exercise its discretion when awarding costs. The Court considers that the liquidators were entirely successful in their application, which entitles them to their costs. Mr Somo ignored the express Rules of Court. The consequence of Mr Somo ignoring the rules of the Court is that the liquidators were denied an opportunity to object to an amendment and the filing of an affidavit. In addition, the Court was deprived of its jurisdiction to decide on an amendment and whether leave to file a further affidavit should be granted. The conduct of Mr Somo has resulted in the liquidators having to incur additional and unnecessary costs to launch these proceedings. They are entitled to recover those costs.
- [49] The only submission made concerning costs by Mr Somo's representative was that if Mr Somo were successful, an award for costs would mean "he is paying his own costs". The premise of the submission is that Mr Somo remains the Director of Sebushi Somo. The submission ignores the orders of this Court that Sebushi Somo is in liquidation. The submission behaves as if the liquidation order has not been granted. It also ignores that the liquidation order had been confirmed by the appellate Court's refusal to grant special leave even after a second petition to the Supreme Court of Appeal's President. The submission ignores several court orders and asks the Court to do the same. This submission does not persuade the Court.
- [50] The liquidators have asked for costs on a punitive scale, being attorney and client costs. The Court must weigh and consider how the matter was litigated.

- [51] First, much of the argument before this Court, on the papers and in oral submissions, was that the liquidators could not rely on Rule 30 where there is alleged non-compliance with Rule 28. The submission was made to Court repeatedly despite Rule 28(8) expressly providing for the invocation of Rule 30 where there is non-compliance with Rule 28. Mr Somo's representative made this submission in conflict with the explicit provisions of Rule 28(8).
- [52] Second, the Court further weighs that Mr Somo deposed to an affidavit dealing with facts as if they were in his personal knowledge when they were not. Mr Somo deposed to an affidavit dealing with the meeting with the Deputy Judge President when it is common cause he did not attend the meeting. The affidavit does not explain that Mr Somo relies on someone else for this knowledge, nor is a confirmatory affidavit provided. When invited to respond to this concern, Mr Somo's representative made the alarming submission that Mr Somo could depose to what had happened at the meeting as if falling within his personal knowledge, even when he was not present, as he was informed of the events by his legal representative. This is incorrect.
- [53] Third, there are indications on the papers that Mr Somo's representatives were aware of the limited scope the Directive created and filed the amended notice of motion, regardless. Mr Somo's representatives wrote to the Deputy Judge President on 17 February 2023. In the letter, Mr Somo's representatives distinguish the main proceedings (section 354 proceedings) and the reconsideration proceedings (ex parte proceedings). The letter then states that the amended notice of motion consolidates the main proceedings (53064/2019) and the reconsideration application (case number 13349/2022). The letter gives away that the amended notice of motion sought to achieve two different cases – rather than consolidating the interlocutories in one of the cases.
- [54] In addition, the letter of 17 February 2023 contains a sleight of hand. Mr Somo's letter states that the Directive permitted the filing of an Amended Notice of Motion to "consolidate the various matters and/or interlocutory applications arising from the section 354 proceedings" ("the main application"). There is a sleight of hand in this. The Directive permitted filing an amended notice of motion to consolidate the interlocutory applications only. There is no mention of consolidating "various matters", only the "interlocutory applications". The letter to the Deputy Judge President

misquotes the Directive. The sleight of hand seeks to add “consolidate the various matters” to the Directive. The sleight of hand is only necessary because the Directive limited the amended notice of motion to consolidate the interlocutory applications.

- [55] Fourth, Mr Somo believed that including the extended relief in these proceedings would permit him to avoid the section 417 inquiry. Between the Teams Meeting and Mr Somo's amended notice of motion being due, the liquidators summoned Mr Somo to appear at a section 417 inquiry. Mr Somo's letter of 13 February 2023 shows he believed that the section 417 inquiry would be suspended by including relief dealing with the inquiry in the amended notice of motion.
- [56] Only after the liquidators requested Mr Somo's attendance at section 417 inquiries did Mr Somo perceive the scope of the Directive to include the ex parte proceedings, which would include the section 417 inquiries. It is, stated in language as benign as possible, convenient for Mr Somo to include this relief in the amended notice of motion. It appears, from Mr Somo's letters, that the pressure to attend the section 417 inquiries instigated the amendment of the notice of motion in the setting aside proceedings under the pretext of the Directive.
- [57] This is clear from his own correspondence of 13 February 2023 -
- "The amended Notice of Motion together with the Supplementary Founding Affidavit our client is to file includes an order that your clients be prohibited from proceeding with the section 417 inquiries. The Amended Notice of Motion also consolidate the hearing of the reconsideration application for the ex parte order with the main application brought under the provisions of section 354 of the Companies Act."¹⁷
- [58] The purpose of combining the setting aside applications and the ex parte proceedings is apparent from Mr Somo's letter of 13 February 2023 -
- "In view of the above, we propose that your clients should consider holding further enquires in terms of section 417 in abeyance pending the finalisation of the proceedings in Court on the 25th and 26th of July 2023."
- [59] The Court considers that Mr Somo acted in breach of the Court's Rules, under the false pretext of a Directive, to achieve an ulterior purpose: rendering a section 417 inquiry to be held in abeyance. It is an abuse of process to use the rules of the Court for a different purpose. That is precisely what occurred in this case.

¹⁷ Letter 13 February 2023, Annexure OA10 (CL30 - 120).

[60] The Court finds the conduct of Mr Somo during these proceedings warrants a punitive costs order.

[61] The liquidators acknowledged that our courts follow a liberal approach to amendments. The principle which underpins this is to ensure that the real issue between the parties is ventilated. However, "it would be incorrect to conclude from this liberal attitude of the court towards amendments to pleadings that leave to amend can be obtained merely for the asking".¹⁸ The litigant must first explain why the amendment is required and satisfactorily explain the delay.

[62] Nothing stood in Mr Somo's way to amend his notice of motion and seek leave to file a further affidavit had the proper procedure been followed. Instead, Mr Somo relied on the Directive as a pretext for filing an amended notice of motion and an extraordinary interpretation of Rule 6 to attempt to justify filing a 50-page supplementary founding affidavit. These steps are irregular.

Order

[63] In the result, the following order is granted:

- a) The "Amended notice of motion" dated 14 February 2023 and the supplementary founding affidavit filed on the same date by Mr Somo (the respondent in these proceedings) is set aside as an irregular step/proceeding as prescribed in rule 30(1) of the rules of Court.
- b) The "Amended notice of motion" and supplementary founding affidavit are set aside in its entirety as constituting irregular proceedings which cannot be amended.
- c) The respondent (Mr Sebushi Patrick Somo) is to pay the costs of the application and the notice issued under rule 30(2)(b) of the Rules of the Court on the attorney and client scale.
- d) The applicants are granted condonation for the late filing of the irregular step proceedings.

¹⁸ Herbstein & Van Winsen "The Civil Practice of the High Court" (Juta) p 105



I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the Applicant

Instructed by:

Geyser

Counsel for the Respondent:

Instructed by:

Advocate M.A. Badenhorst SC

Geyser Van Rooyen Attorneys: C.A.

M.D. Ramothwala

Mafona Ramothwala Incorporated

Date of the hearing:

25 July 2023

Date of judgment:

7 August 2023