

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO/YES
-------------	--------

CASE NO.: 4542/2023

In the application between:

JOHANNES JACOBUS WOLHUTER N.O.

First Applicant¹

FANTI BEKKER HATTINGH N.O.

Second Applicant

STEPHEN FOUCHEé N.O.

Third Applicant

[In their capacities as joint trustees of the QWAHA TRUST.
Master's reference number: IT1[...]]

and

MTETWA INVESTMENTS (PTY) LTD

Respondent²

[Registration number: 2014[...]]

AND

CASE NO.: 4543/2023

In the application between:

¹All applicants in cases 4542/2023 & 4543/2023 represented by Advocate L Meintjes. Hereafter referred to as “the applicants”.

² “The company”. Represented by Advocate S Reinders.

JOHANNES JACOBUS WOLHUTER N.O. First Applicant

FANTI BEKKER HATTINGH N.O. Second Applicant

STEPHEN FOUCHEé N.O. Third Applicant

[In their capacities as joint trustees of the QWAHA TRUST.
Master's reference number: IT1[...]]

and

ALFRED ZAKADE MTETWA First Respondent³
[Identity number: 5[...]]

ZINVONOX (PTY) LTD Second Respondent⁴
[Registration number: 2018[...]]

JOHANNES STEPHANUS OLIVIER Third Respondent
[Identity number: 8[...]]

Coram: M Opperman J

Heard: 25 January 2024

Delivered: 4 April 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 4 April 2024. The date and time of hand-down is deemed to be 15h00 on 4 April 2024

Summary: *In limine* – replying affidavits – condonation for late filing – new case in reply

³ Referred to as “Mr. Mtetwa”. Represented by Advocate S Reinders.

⁴ Second and third respondents represented by Ms. A Smith. Referred to as “Zinvonox” & “Mr Olivier”.

ORDER

1. The applications for the condonation of the late filing of the replying affidavits in both cases with numbers 4542/2023 and 4543/2023 are denied with costs.
2. The applicants are granted leave in both cases to set the matters down for hearing of the merits in the main applications.

JUDGMENT

Opperman J

- [1] The rules in litigation “act as anchors in the tides of injustice, to keep the principles of law afloat.”⁵ More real is that court orders must be complied with. The judicial authority in our democracy that is vested in the courts, may not become ineffective.
- [2] The consternation, conflict and costs that non-compliance with court orders and the rules of court have caused in civil litigation have become a menace in the administration of justice. It affects justice and pollutes the sanctimony of the Rule of Law.
- [3] The ease with which court orders are ignored by litigants and counsel alike, and the Uniform Rules of Court just disregarded, is astounding. In the meanwhile, the justice system battles to maintain

⁵ <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Dispute/dispute-resolution-alert-31-january-2023-some-rules-are-meant-to-be-broken-but-at-what-cost-in-a-court-of-law.html> accessed on 27 March 2024.

veracity because the layperson cannot fathom the delays and the astronomical costs that makes access to justice unreachable. The Constitutional Court remarked in *Grootboom v National Prosecuting Authority and Another* (C696/08) [2009] ZALCCT 15 (18 December 2009) that:

[21] The failure by parties to comply with the rules of court or 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.

[4] Courts have regarded this scourge of non-compliance with such disdain that the following was ruled in *Collett v Commission for Conciliation, Mediation and Arbitration* (2014) 6 BLLR 523 (LAC) in a unanimous judgment of the Labour Appeal Court, wherein Musi AJA held as follows:

[38] There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology*, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532(C-D) should be followed but:

‘(T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’

[39] The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.

[5] It is common cause in *casu* that the applicants did not comply with a court order of this court pertaining to the filing of the replying affidavits. This judgment, as result, turns on the admissibility of the replying affidavits by the applicants on the late filing thereof and in addition, the evidence contained therein is alleged to be of the nature of a “new case in reply”.⁶

[6] The main applications are based on a liquidation application and a judgment application.

[7] The case appeared on the roll of this court for the first time in the unopposed motion court on 21 September 2023. It became opposed and the following order followed:

IT IS ORDERED THAT: (By agreement between all parties)

1. The Application is postponed to the Opposed Motion Roll of the 16th of November 2023.
2. With regards to the 1st Respondent:
 - 2.1 The 1st Respondent to file their Opposing Affidavit on or before the 13th of October 2023.

⁶ See discussion hereunder.

- 2.2 The Applicants to file their Replying Affidavit on or before the 27th of October 2023. (Accentuation added)
- 3. With regards to the 2nd and 3rd Respondent:
 - 3.1 The 2nd and 3rd Respondents to file their Opposing Affidavits on or before the 13th of October 2023.
 - 3.2 The Applicants to file their Replying Affidavit on or before the 27th of October 2023. (Accentuation added)
- 4. Costs to be costs in the Suit.

[8] The court order was complied with but for the applicants that simply did not file their replying affidavits on the 27th of October 2023. The matter was postponed to 25 January 2024 by agreement between the parties on 16 November 2023. The case could have been finalised on 16 November 2023.

[9] On 6 December 2023 the applicants served and filed their replying affidavit in respect of the liquidation application. In addition, the applicants also served and filed their replying affidavit in respect of the answering affidavit of Mr. Mtetwa in the judgment application as well as their replying affidavit to the answering affidavit of Zinvonox and Mr. Olivier in the judgment application on 6 December 2023.

[10] Each replying affidavit also seek condonation for the late filing thereof.

[11] The condonation applications are opposed by the company and Mr. Mtetwa. It is also the case for all the respondents that the replying papers that are “in excess of 400 pages”⁷ make out a new case in reply:

- 2.2 In *casu* the application for condonation is opposed.
- 2.3 It is clear from the replying affidavit that the Applicants intends to make out its case in reply. It didn't do so in the founding papers.
- 2.4 The Respondents obviously did not have the opportunity of answering any of these allegations as it is for the first time raised in reply.
- 2.5 The Applicants should have made out its proper case in its founding papers to enable the Respondents to answer thereto.
- 2.6 It is trite that it is expected of an applicant to stand or fall by its founding papers.
- 2.7 The Applicants, on realizing that they had to put new facts before Court, could easily have withdrawn its applications and issued new applications properly motivated to allow the Respondents to answer thereto. It preferred not to do so, but rather make out its case in the replying papers and then request the Trial Court to grant condonation averring that there is no prejudice for the Respondents. The prejudice is clear, with respect in my submission for all to see.⁸ (Accentuation added)

and

- 2.1 The Applicants that filed a replying affidavit set out new facts, such facts are not contained within the founding affidavit. I submit that the

⁷ Heads of argument for the applicants dated 17 January 2024 at page 32: “It is also evidently clear that each Replying Affidavit (together with annexures) consists of approximately 411 pages and that each Replying Affidavit (excluding annexures) had to be tailored in answer to the respective Answering Affidavit.” (Accentuation added)

⁸ Heads of argument for the respondents; Mtetwa Investments (Pty) Ltd (the company) and A.Z. Mtetwa (Mr. Mtetwa), filed 19 January 2024.

Second and Third Respondent are precluded and prejudiced from answering and challenging the validity of such allegations as it is not included and stated with in the founding affidavit.⁹

[12] As the hearing evolved on the 25th of January 2024 the parties agreed that the issue of the replying affidavits must be disposed of and adjudicated upon before the merits in the main applications can be argued. There was consensus on the fact that notwithstanding the ruling on the replying affidavits, the matters will still be heard on the merits at a later stage. The court did order as such before the proceedings stood down for judgment.

[13] The dictum by Rampai J in the case of *Louw v Grobler and Another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016) is the universal compass in cases in which court orders, rules and process are abused, manipulated and not observed.

[18] The purpose of the uniform court rules is to regulate the litigation process, procedures and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within (sic) the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead

⁹ Heads of argument for the second and third respondents; Zinvonox (Pty) Ltd (Zinvonox) & JS Olivier (Mr. Olivier), filed 19 January 2024.

of enhancing the civil justice system. The court rules are not an end in themselves.

[14] The law on condonation in more detail is that:

Rule 27(3): “The court may, on good cause shown, condone any non-compliance with these rules.” The discretion is now wide but condonation is not merely there for the asking. At first, the rule permitted condonation under exceptional circumstances. Section 34 of the Constitution of the Republic of South Africa, 1996 is a right that must be regarded with the utmost respect. The judicial discretion that prevails demands fairness to both sides. Principles and factors have evolved over the years in case law and in the ethos of the Constitution. Each case stands on its own merits. It is the mosaic of factors that must be weighed judicially; the correct weight must be applied to the relevant proven fact that caused the disobedience. The legal intensity of a fact or factor will vary according to the interest to be served and the fall out of improper litigation.

[15] A piecemeal approach will not suffice. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C to F it was held that:

...Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion,... What is needed is an objective conspectus...

[16] The Constitutional Court decreed in *Grootboom v National Prosecuting Authority and Another* (C696/08) [2009] ZALCCT 15 (18 December 2009) that:

[51] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

[17] Prejudice and the interest of justice are vital. In this case the replying affidavits were not only late and in non-compliance with a court order, but it was also inundated with new facts and documents that were available when the founding affidavits were compiled and submitted. The respondents were prohibited from defending themselves against the new evidence by the Uniform Rules of Court. They would have had to embark on expensive litigation, for instance rule 30/30A and rule 6(5)(e) applications, to curtail the effect of the replying affidavits on their client's case(s).

[18] The explanation by the applicants for the “delay and/or lateness”¹⁰ is that it was occasioned by:

13.2. the proximate/direct cause of the lateness stems from the applicant’s deponent being abroad, counsel having to inspect and salvage any potential storm damage, settlement negotiations and obtaining the magnitude of annexures attached to the Replying Affidavits and then having to peruse same and articulate the content thereof in the Replying Affidavits and which obviously took time.

[19] It was not explained why the “applicant’s deponent” was overseas and why it was not possible to consult in the year 2023, *via* electronic media or platform. I agree with the sentiments in *Nzima v Tourvest Accommodation and Activities, a division of Tourvest Holdings (Pty) Ltd* (JS562/20) [2021] ZALCJHB 337 (5 October 2021):

[25] Having explained the challenges encountered as a result of the lockdown and the financial constraints, the Applicant failed to explain why he and his attorneys of record could not implement other means of communication, such as telephone consultation etc in order to avoid delaying drafting the statement of claim. It was never the Applicant’s argument that he was unaware of the date on which the statement of claim ought to be filed.

[20] There is not any explanation when the trip overseas started, if it was for holiday, mere business or urgent unpreventable issues. The implication is that the court order, the court and other litigants must

¹⁰ Heads of argument for the applicants dated 17 January 2024 at pages 32 & 33.

merely go onto the back burner because of the vague statement that one person went overseas.

- [21] The applicants started their litigation in August 2023. The order was on 21 September 2023 and the applicants had to realise then that the drafting of the replying affidavits was lurking; the answering affidavits were filed on 13 October 2023. The applicants had to realise that the presence of their deponent was crucial. In the least they had to open and keep open the channels to communication for consultations.
- [22] The locating of documents that allegedly already existed before the litigation was initiated cannot be a valid explanation for the delay. Apparently, it should have formed part of the founding affidavits.¹¹ It is unclear why the availability of the documents was reliant on the presence of the deponent in South Africa.
- [23] The busy schedule of counsel cannot be an explanation for the delay and the neglect. The fact that counsel had to check on his property in the Western Cape for flood damage is beyond understanding as a reason for non-compliance with a court order. The period that counsel was absent was not stipulated and again; it could not have suspended the drafting of the replying affidavits in the light of what was said above. The law is clear on this. Again, *Nzima v Tourvest Accommodation and Activities, a division of Tourvest Holdings (Pty) Ltd* (JS562/20) [2021] ZALCJHB 337 (5

¹¹ See the discussion hereunder.

October 2021) that ruled that the courts have disapproved of busy schedules of representatives as a valid explanation for the delay in complying with the rules of this court.

[34] In *Petro Chem Technical Service (Pty) Ltd v Motor Industry Bargaining Council Dispute Resolution Centre and Others*¹² the Court made reference to the following authorities and said:

“The Court in *Allround Tooling v NUMSA and another* held that a practitioner's busy schedule is not an acceptable explanation for delay in observing time limits. This approach was followed in *Minister of Social Development v Veldhuizen*. For this reason, the fact that the Applicant's representatives were busy with the other applications brought forward, is insufficient.”

[24] Settlement negotiations may not justify non-compliance with a court order. It is a process concurrent and parallel to existing litigation; not a process that should obstruct litigation. If the settlement negotiations were of such a serious nature the parties should have come to court and requested indulgence for that purpose; they may not galivant on their own processes and ignore the court.

[25] The applicants maintain that the replying affidavits were only 21 days late and also constitute circumstances beyond their control. This is not correct. The lateness of the replying affidavits started to run on 28 October 2023 and ended on 6 December 2023. All the

¹² (2020) 41 ILJ 1216 (LC).

circumstances were well within the control of the applicants, their attorneys and counsel.

- [26] The applicants rely on the nature of the relief sought as a basis for the condonation of their conduct; they want to protect the consortium of creditors but their actions indicate differently. They delayed rather than expedited.
- [27] The applicants suggested that “the lateness and/or delay had no effect on the administration of justice and it is difficult to fathom what such purported effect could be.”¹³ The respondents complain, and rightfully so, of severe prejudice due to the late filing of the replying affidavits and the contents. They did not have a fair opportunity to reply and answer to the new facts in the replying affidavits. A further prejudice is that they would have had to go into further litigation to remedy and answer to the illegal conduct of the applicants. This will result in delays and costs.
- [28] The mere compiling and submission of the answering affidavits to the condonation applications that formed part of the replying affidavits, would have added to costs and time. It would not have resolved the issue of the new facts in reply. The respondents did not file answering affidavits to the condonation applications and took issue with the manner in which the applicants litigate in their heads of argument.

¹³ Heads of argument for the applicants dated 17 January 2024 at paragraph 13.4 on page 33.

[29] The matter was due to proceed on 16 November 2023 and a court day was allocated. Only on 13 November 2023 was the Registrar informed that the matter was to be postponed; other cases could have been accommodated on the court roll. A court day was wasted. This affects the administration of justice. By that time the presiding judge had already started with the preparation of the case.

[30] The applicants maintain that the circumstances were “clearly beyond the control of the applicants and their legal representatives and therefore they could not have acted in a manner that can be regarded as reckless and/or intentional”.¹⁴ There is not detailed evidence of this but mere swiping statements of a person being overseas, documents that had to be traced and processed and an otherwise engaged counsel.

[31] The attack on the other parties in the litigation on the basis that they were not available on certain dates and intentionally endeavours to exclude crucial information is unfounded and is bizarre:

13.7. the condonation applications are made *bona fide* and not with the object of delaying the hearing of the matters. Afterall, it is vividly clear that Noordman endeavoured to arrange dates for hearing both matters on 30 November 2023 and 7 December 2023. These dates did not suit

¹⁴ Heads of argument for the applicants dated 17 January 2024 at paragraph 13.6 on page 34.

either Lovius or SH as a result of which it was ultimately agreed that both matters be heard on 25 January 2024; and

- 13.8 an objection to condonation is an objection to exclude evidence and conclusions in support of the relief claimed by the applicants in both applications. Such object and purpose constitutes (sic) an abuse as it attempts to utilize strict compliance with the timeframes provided by the Court order of 21 September 2023 to exclude valuable and material evidence and thereby utilizing the said Court order for a purpose extraneous to the pursuit of the truth.¹⁵

The replying affidavits were only filed on 6 December 2023; due process would have failed and is the statement nonsensical if the matters were set down on 30 November 2023 or 7 December 2023. The court roll could not accommodate the dates because of other matters already set down for hearing. The prejudice to the other litigants is clear and they have a right to object to the manner in which the applicants litigated. As said above; section 34 of the Constitution is a right not to be abused. The respondents must be granted an opportunity to state their cases.

- [32] Condonation may not be granted. The refusal to grant condonation for the late filing of the replying affidavits is fortified by the contents of the affidavits that are procedurally questionable and severely prejudicial to all the respondents and the administration of justice. It is yet another act of non-compliance with the law. Counsel for Zinvonox and Mr Olivier is correct in their submissions that new facts were drawn in during reply:

¹⁵ Heads of argument for the applicants dated 17 January 2024 on pages 33 & 34.

- 2.5. The applicant builds their case step by step within the replying affidavit, new information, of which the applicant had prior knowledge, are only submitted in their replying affidavit, such conduct is frowned upon as an abuse of the process and is prejudicial to any respondent.
- 2.6. The second (sic) and Third Respondent are unable to respond and challenge the allegations contained within the replying affidavit. Therefore, the replying affidavit should be dismissed and excluded from this application.
- 2.7. The applicants replying affidavit sets a new case in respect of the following:
 - 2.7.1. The Tender bid with number E251091/2020 upon which the Applicant relies in its cause of action is only mentioned in the replying affidavit. The Second and Third Respondent are prejudice as stated in paragraph 2.6.
 - 2.7.2. The applicant submits a new case for certain monies advanced to Mtetwa based on the tender, which should be dealt with the applicable and relevant parties.
 - 2.7.3. The applicant failed to disclose relevant information in founding with regards to prior undertakings between the Attorney and First Respondent, such information should have been included in the founding, for the Second and Third Respondents to answer to such allegations and submissions.
 - 2.7.4. The applicant introduces a credit facility agreement, which is not mentioned within the founding affidavit. Such agreement is stated to be the basis of the unsigned Acknowledgement of debt (sic). The Second and Third Respondent are unable to address this allegation, as the Applicant precluded such information from its founding.
 - 2.7.5. The Applicants replying affidavit contains personal information provided by the Third Respondent to their legal representative

as a prospective client, to assist with a matter on the Third Respondents behalf prior to this litigation proceedings. These persons names are included in the replying affidavit, they are not a party to this litigation and such publication contravenes the Protection of Personal Information Act.

- 2.7.6. The applicant attached a list of other agreements of which the Second and Third Respondent have no prior knowledge, such agreements are only attached to the reply and not set forth in founding affidavit. Therefore, it is submitted that the Second and Third Respondent is once again unable to answer (sic) these allegations, failure to answer is prejudice (sic) the second and third Respondent. The applicants fail to prove that these agreements are previously discussed with the second and third Respondents, no submission is found in the affidavit.
- 2.7.7. The applicants rely on an acknowledgement of debt; however, the contract is not allowed to be shared with the Second and Third Respondents, of which judgement is sought. It is submitted that the applicant has contractual remedies available to redress their liability, they could notify the Respondents of their cancellation and could have sold the drill to mitigate their damages, if the applicants believe their agreement is valid.
- 2.7.8. The applicant (sic) relies on unsigned agreements.

[33] Harms¹⁶ with extensive reference to case law came to the following conclusion with which I align myself:

It has been mentioned that normally an applicant must stand or fall by his founding affidavit. It follows from this that an applicant will not be permitted to introduce new matter in reply except within a very narrow ambit, and the

¹⁶ Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 6 APPLICATIONS, Reply and Thereafter at B6.37. Last Updated: November 2023 - SI 78. <https://www.mylexisnexis.co.za/Index.aspx>.

court may ignore or strike out matter in the replying affidavit that should have been contained in the founding affidavit. The present tendency seems to permit greater flexibility, at least in the absence of prejudice. Unless there is an objection to such new matter, the court will not *mero motu* disregard it or strike it out. An important consideration is whether the applicant was in possession of the “new” facts when the founding affidavit was prepared or whether the answer broadened the issues...

...Main arguments in support of the relief sought should be advanced in the founding affidavit and not in the replying affidavit...

[34] Costs must follow the cause. The applicants will have to pay the costs incurred and pertaining to the application on 25 January 2024.

[35] ORDER

1. The applications for the condonation of the late filing of the replying affidavits in both cases with numbers 4542/2023 and 4543/2023 are denied with costs.
2. The applicants are granted leave in both cases to set the matter down for hearing of the merits in the main applications.

M OPPERMAN J

Appearances

For applicants (J.J Wolhuter N.O. and others): L Meintjes
Instructed by: Noordmans Attorneys Inc.
Bloemfontein
Cases no.: 4542/2023 & 4543/2023

For first respondents
(Mtetwa Investments (Pty) Ltd & Alfred Zakade Mtetwa): S.J. Reinders
Instructed by: Lovius Block Attorneys
Bloemfontein
Cases no.: 4542/2023 & 4543/2023

For second and third respondents
(Zinvonox (Pty) Ltd & Johannes Stephanus Olivier): A Smith
Instructed by: Shardelow Smith Attorneys Inc.
Bloemfontein
Case no.: 4543/2023