

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: 22 September 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

[1] Mr Somo seeks leave to appeal against an order of this Court granted on 2 August 2023. The order of 2 August 2023 set aside as an irregular step, an amended notice

of motion and a supplementary founding affidavit filed by Mr Somo. I will refer to the parties as Mr Somo (the applicant in the leave to appeal) and the liquidators (the respondents in the leave to appeal and the applicants in the original Rule 30 application).

- [2] In relation to the substance of the matter, Mr Somo filed an amended notice of motion and a supplementary founding affidavit. Neither of these complied with the uniform rules of court. The amended notice of motion was not preceded by a notice of intention to amend and the supplementary founding affidavit was filed without seeking leave from the Court. The non-compliance with the rules of court was common cause. Mr Somo relied on a Directive from the office of the Deputy Judge President which permitted the filing of an amended notice of motion to consolidate certain interlocutories. The amended notice of motion extended beyond the consolidation of interlocutories and introduced large-scale relief unrelated to the interlocutory applications. The Directive did not permit the filing of a supplementary founding affidavit. In the judgment of 2 August 2023 I set out the context and the precise text of the Directive. The conclusion drawn from this exercise was that the Directive did not permit the filing of the amended notice of motion or the supplementary affidavit. Mr Somo has not attacked this finding or the substrata relied on for this finding. The applicant has not shown prospects of success of an appeal against the substance of the finding of this Court upholding that these pleadings were filed irregularly.
- [3] As for the procedural complaint raised by Mr Somo, the Court similarly finds that there are no prospects of success. Mr Somo complains that the liquidators' Rule 30 was filed out of time without a formal application for condonation. The explanation for the delay is not contentious. Mr Somo filed the amended notice of motion and supplementary affidavit whilst the matter was under case management. All parties, including Mr Somo awaited further directions under the regime of case management. In fact, Mr Somo wrote letters requesting such directions. When it became clear to all involved that the regime would not resolve the dispute relating to these pleadings, the liquidators filed a rule 30 application. The explanation for the delay is set out in contemporaneous letters and is not disputed. The delay was a short period of time, not more than 20 days. Mr Somo was provided an opportunity to remove the cause of complaint. The delay is fully explained – on common cause facts, for a short period

and resulted in no prejudice. The necessary facts to support granting condonation is apparent from the pleaded papers.

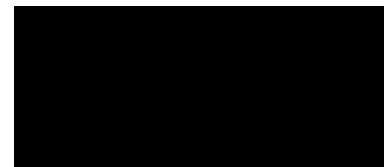
- [4] Mr Somo complains that the application had to be made formally in writing. This is not so, if there is a basis for condonation that appears from the pleaded facts and the requirements for condonation is met, the Court may in the interest of justice grant condonation. That is what the Court did in this case. Mr Somo also raises concerns as to the lateness of seeking condonation. As for the timing of seeking condonation, a party may seek condonation at any time as long as they can meet the requirements for condonation a Court may grant condonation in the interests of justice.
- [5] In any event, counsel for the liquidators, on his feet moved for a condonation application. Counsel relied on the facts as pleaded to support the condonation application. There was no objection to the application for condonation made from the bar.
- [6] The applicant has lost sight of the fact that as long as the requirements for condonation are met, it need not be packaged in a formal written condonation application. In a case such as the present, where the reason for the late filing of the Rule 30 is known, common cause and pleaded with support of contemporaneous letters, a case for condonation has been made. In any event, condonation was sought in court from the bar premised on the common cause facts. To require more would be to be form over substance.
- [7] The Court reiterates its findings in the judgment of 2August 2023 –
“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.”
- [8] Counsel for the liquidators contended that costs must follow the result and contended for a punitive costs order. In support of the punitive costs order, counsel presented the interests of creditors. Mr Somo is seeking to rescind an order which liquidated his company. These proceedings are part of that broader litigation which affects the interest of creditors. Counsel for the liquidators contended that the creditors must be insulated from having to pay legal costs incurred as a result of Mr Somo's failed applications. In short, the creditors should not be out of pocket for having to defend

against Mr Somo's application for leave to appeal. The Court views the basis of the opposition and the leave to appeal in light of these interests. It also weighs with the Court that Mr Somo did not comply with the uniform rules of Court and then filed irregular pleadings under the pretext of a Directive. For all these reasons, the Court grants costs on a punitive scale.

Order

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

- a) The application for leave to appeal is dismissed with costs an attorney and client scale



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

(Respondent in the leave to appeal)

Instructed by:

Representative of the respondent

(Applicant in the leave to appeal)

Instructed by:

Date of the hearing:

Date of judgment:

Advocate M.A. Badenhorst SC

Geyser Van Rooyen Attorneys: C.A.Geyser

M.D. Ramothwala

Mafona Ramothwala Incorporated

11 September 2023

22 September 2023