

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

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

08/08/2022

SIGNATURE

DATE

CASE NO: 2597/2018

In the matter between:

LEKWA LOCAL MUNICIPALITY

First Applicant

GERT SIBANDA DISTRICT MUNICIPALITY

Second Applicant

and

AFRI-INFRA GROUP (PTY) LTD

Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This matter concerns two interlocutory applications brought in terms of Uniform Rule of Court 30. These applications have been launched separately by the First and Second Applicants, jointly referred to as the Applicants otherwise and depending on the context, individually as Lekwa and Gert Sibanda. Common between these applications is the complaint that the Respondent ("Afri-Infra") has irregularly amended its particulars of claim as contemplated in Rule 30.

[2] Afri-Infra opposes the applications on various grounds, principally that the two applications were brought late without condonation applications. Afri-Infra says this mindful of Gert Sibanda's application for condonation for the Rule 30(2)(c) Application but contends that without an application for the late service of the Rule 30(2)(b) Notice, the condonation for the Rule 30(2)(b) is stillborn and therefore vain.

[3] In the case of Lekwa, the application for condonation was only served on Afri-Infra the day before the hearing, consequently it could not be before Court on the date of hearing. Besides, Gert Sibanda too had not applied to condone its late delivery of the Rule 30(2)(b) Notice and as such, it was as good not having been there.

[4] As the matter unfolded in Court, it soon emerged that the application between Lekwa and Afri-Infra was, to the extent that its condonation application was served on Afri-Infra the day before the hearing, prematurely before Court. In consequence of those developments in Court, Counsel for Lekwa conceded that the application should not have served before Court on that date. The question between those two simmered down to costs. Following argument on the subject, Counsel for Lekwa ultimately agreed that Lekwa would bear costs as at the scale between attorney and client. An order in those

terms was accordingly made against Lekwa and it exited the proceedings leaving Gert Sibanda and Afri-Infra to proceed with the matter.

FACTUAL MATRIX

[5] Afri-Infra instituted an action (“the main action”) against the Applicants seeking payment based on *negotiorum gestio*. When it appointed its attorneys of record, the matter had already commenced. It alleges that it sought guidance and was advised to radically amend its particulars of claim in the main action between it (as Plaintiff) and the Applicants) as Defendants) to ensure that it was in line with the requirements of *negotiorum gestio*, the remedy on which it was relying for its claim. Following the advice, Afri-Infra delivered notice of its intention to amend its particulars of claim, as envisaged in Rule 28. The Rule 28 notice was served on Gert Sibanda on 6 September 2021. The notice gave Gert Sibanda ten days within which to raise objection to the proposed amendments.

[6] The ten-day period expired on 20 September 2021. Noting that no objections were forthcoming, the proposed amendments were perfected and the amended particulars of claim were subsequently served on Gert Sibanda on 21 September 2021. The amended particulars of claim accordingly became part of the record without any objection from Gert Sibanda. Afri-Infra alleges that the amendment was regularly served in terms of the Uniform Rules of Court. Twenty-five Court days after service of the amended particulars of claim, the Applicants served separate notices in terms of Rule 30(2)(b) of the Uniform Rules of Court. Gert Sibanda then proceeded to serve the Rule 30(2)(c) Application on 15 December 2021.

ISSUES

[7] It is evident from the above factual background and a matter of common cause between the parties that the sole issue for determination is whether or not Gert Sibanda has made a case for the setting aside of the alleged irregular step as contemplated in

Rule 30. Associated with the issue above is whether or not Gert Sibanda can be condoned for the late launching of the Rule 30 without an application excusing the late service of the Rule 30(2)(b) Notice. I intend to deal with this issue alone without traversing other matters raised by both parties as it could be dispositive of the whole case.

LEGAL FRAMEWORK

[8] The application involves Rule 30, consequently it will make sense to cite the Rule in full as I will make extensive reference to it. It is headed: Irregular proceedings, and provides that:

- “(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
- (2) An application in terms of sub rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—*
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*
 - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of sub rule (2).*
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*

(4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."*

[9] As such, the jurisdictional requirements pertaining to Rule 30 are that:

9.1 The Applicant must not have taken a further step in the cause while mindful of the irregularity of the step taken by the other party;

9.2 The notice in terms of Rule 30(2)(b) must be given within ten days of becoming aware of the alleged irregularity;

9.3 The application in terms of Rule 30(2)(c) is to be delivered within fifteen days after expiration of the ten-day period afforded to a litigant to remove the cause of complaint;

9.4 Rule 30 applies to irregularities of form, and not matters of substance;

9.5 Rule 30 does not apply to omissions, but only to positive steps or proceedings;

9.6 Proof of prejudice is a pre-requisite in succeeding with an application in terms of Rule 30.

[10] In *Klein v Klein*¹ the following was held at 651 E to G:

"Secondly, if the proviso is to work in practice, it seems to me that 'knowledge' must be distinguished from appreciation. The 'knowledge' referred to in the proviso is in my view knowledge that a step has been taken, whether or not coupled with an appreciation that the step was irregular or improper. See the observations of Kannemeyer JP in Minister of Law and Order v Taylor NO 1990 (1) SA 165 (E) with regard to Rule 30(1) as amended in South Africa. The fact

¹1993 (2) SA 648 (BGD)

that in the present case the plaintiff and her attorney failed to appreciate that defendant's notice of set down was out of time accordingly affords no escape from the operation of the proviso."

EVALUATION

[11] On 6 September 2021, Afri-Infra served its intention to amend its particulars of claim wherein it afforded Gert Sibanda a 10-day period within which to object to the intended amendments. The 10-day period came and went as it lapsed on 20 September 2021 without Gert Sibanda raising any objections. Afri-Infra perfected the amendment and served the particulars of claim on the following day, 21 September 2021.

[12] It was only twenty-five days after service of the particulars of claim that Gert Sibanda Served the Rule 30(2)(b) Notice alerting Afri-Infra of the alleged irregular step. Quite evidently, the service of the notice was well out of time constituting an impermissible step especially in circumstances where it was not accompanied by an application seeking to condone the unpunctuality. As though that was not sufficient, the Rule 30(2)(c) Application was launched on 15 December 2021, almost 15 days out of time. To the extent that Gert Sibanda contended that knowledge alone of the step taken by the other party to the proceedings is insufficient, Klein *supra* is authority that appreciation of the irregular nature of the step is not a requirement.

[13] Also before this Court is an application for condonation of the late filing of the Rule 30(2)(c) by Gert Sibanda. I find myself in agreement with Afri-Infra that the condonation application is hollow if it, as it does, seeks to condone the Rule 30(2)(c) Application without a condonation of the first irregular step - service of the Rule 30(2)(b) Notice outside of the 10-day period. In this sense the Rule 30(2)(c) Application is unsustainable as it has no anchor. Thus, an order condoning its late service will be meaningless.

[14] I have alluded that Afri-Infra has mounted various challenges to the application of Lekwa but Lekwa's failure to overcome this first hurdle renders this point dispositive of the entire matter. Accordingly, I do not deem it necessary to traverse the other grounds

upon which the challenges are founded. The resolution of the matter is as candid as described and the least said the better.

COSTS

[15] I have already stated that I gave a punitive costs order against Lekwa firstly, for not seeking condonation for the late service of the Rule 30(2)(b) Notice and secondly, for coming to Court while aware that its condonation application for the Rule 30(2)(c) application was improperly before Court. Gert Sibanda is in no different position notwithstanding that it purported to have a condonation application for the late launching of the Rule 30(2)(c) Application. This should not have happened and borders on gross negligence and therefore extravagant on the time of the Court and litigants. For these reasons Gert Sibanda cannot escape a punitive cost order.

[16] Against that background it is befitting to make the following order:

1. The application in terms of Rule 30(2)(c) is dismissed; and

Gert Sibanda is liable for the costs of Afri-Infra on the scale as between attorney and client.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 08 August 2022 at 10:00.

APPEARANCES:

**Counsel for the Applicant:
Instructed by:**

**Adv KK Maputla
Mohlala Attorneys**

**Counsel for the Respondent:
Instructed by:**

**Adv GF Heyns SC
Krugel Heinsen Inc**

Date of Judgment:

08 August 2022