

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 9074/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
03 MAY 2021	 SIGNATURE
DATE	

In the matter between:

HELIOS PETROLEUM (PTY) LTD

APPLICANT

and

BP SOUTHERN AFRICA (PTY) LTD

FIRST RESPONDENT

PETROLAND GROUP (PTY) LTD

SECOND RESPONDENT

JUDGMENT

MOGALE, AJ

INTRODUCTION

- [1] This is an interlocutory application by the applicant (Helios the first respondent in the main application) for an order that the respondents' (BP the applicant in the main application), founding affidavit in the main application be set aside as an irregular step in terms of Rule 30
- [2] The respondent's founding affidavit in the main application reads as follow:
- a. "The first respondent and any other persons occupying through it, are hereby ordered to, within five (5) calendar days of the granting of this order, vacate the property known as **Portion 23 of Erf 139, East Lynne Township, Gauteng Province.**
- b. In the event of the first respondent failing and or neglecting to comply with this evection order, then, in that event, the Sheriff of the High Court and where necessary with the assistance of the South African Police Services, is hereby authorized to take the necessary steps to enforce this eviction order"
- [3] The applicant is the lessee of the immovable property that is a subject matter in the main application and the respondent is the lessor and also the owner of the said property.
- [4] In the main application, it is argued that BP has been renting the property in terms of a written lease agreement to Helios since 07 January 1993, the agreement is not appended to the founding affidavit. BP and Helios entered into a written sublease agreement in terms of which Helios would lease the property to BP for five years, from 01 May 2008 until 30 April 2013. At the end of the five-year contract, BP and Helios continued to perform their obligations in terms of the written sublease agreement, resulting in a common-law agreement with the same terms and conditions as those contained in the sublease agreement which commenced on 01 May 2013. There was a tripartite agreement that was never concluded between the parties. On 07 February 2020, the respondent instituted an application for the eviction of the applicant from commercial premises owned by the respondent

- [5] The applicant raises non-compliance of Rule 30 by the respondent in that the BP failed to attach a complete true copy of the lease agreement contract entered into by BP and Helios on their founding affidavit. That BP failed to identify the portions of the email correspondence it relies on for the allegation.
- [6] The applicant relied on Rule 6(5) (a) which provides that, every application other than one brought ex parte must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice and all annexures thereto must be served upon every party to whom notice thereof is to be given
- [7] The respondent opposes rule 30 application on the basis that, the first respondent's eviction application is premised on the fact that there is no lease agreement concluded between the parties and any lease agreement that may have existed has been extinguished or terminated by the effluxion of time.
- [8] The respondent conceded that indeed, the lease agreement which is annexed to the founding affidavit has missing pages and same could not be found after diligent search and it is presumed lost. The respondent further argued that, since the lease agreement has been terminated by the effluxion of time, the respondent does not rely on the lease agreement contract, the contract was made mentioned only to confirm ownership. The respondents in their application will rely on the Repudiation by Helios.
- [9] The respondent indicated that the trail of emails that are sought to be identified form part of the correspondence to which the applicant was copied and the respondent proceeded to go per email explaining the relevance of each email sent to the applicant.

NON-COMPLIANCE WITH RULE 30A

- [10] The applicant raised the fact that Helios is prejudiced by the omission of missing pages in the founding affidavit as it is unable to respond meaningfully and fully to the allegations without a true and complete copy of the lease agreement. That as a result, the respondent followed an irregular step in terms of Rule 30

- [11] The respondents responded that it has sufficiently pleaded its case under the circumstances, that they could not attach missing pages of the lease agreement in the founding affidavit and further confirmed that despite a diligent search for the missing pages, same could not be found and is to be presumed lost. The respondent contended that the lease agreement is an issue that never formed part of the notice dated 07 February 2020, the lease of the agreement was only attached to confirm ownership.
- [12] Rule 30 A (1) provides that where a party fails to comply with these Rules or a request made or notice given pursuant thereto, or with an order, any other party may notify the defaulting party that he or she intends, after the lapse of ten days from the date of delivery of such notification, to apply for an order that
- (a) such rule, notice, request order, or direction be complied with, or
 - (b) the claim or defence be struck –off
- (2) where a party fails to comply within the period of ten days contemplated in subrule (1), the application may on notice be made to the court and the court may make such order thereon as it deems fit
- [13] Rule 30(1) provides that a party to a cause in which an irregular step has been taken by any other party may apply to the court to set aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregular or impropriety alleged, and may be made only if-
- (a) the applicant has not himself taken a further step in the 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 compliant with ten days

[14] In **ABSA Bank Ltd v The Farm Klippan**¹ the court made it clear that if a provision in the rules provides a specific remedy for non-compliance with the rule, a party needs only follow the specific rule and need not give notice in terms of or follow, Rule 30A

[15] **Harms, Civil Procedure in the Supreme Court: LexisNexis** provides that: "The rule applies only if compliance with the rules is sought and then only if the relevant rule does not have its inbuilt procedure such as rule 21(4), which provides for an enforcement procedure in the event of a failure to provide particulars for a trial.

ISSUES TO BE DETERMINED

[14] For the applicant to succeed with the relief sought, the court has to determine if the respondent has followed irregular steps and as a result of that irregularity, whether the applicant is prejudice by the failure of the respondent not attaching the missing pages of the lease of agreement in their founding affidavit.

[15] This court has to determine whether the respondent relied on or made reference to the lease of the agreement to a relief sought, being the founding affidavit. A reference to a document that is not detailed, complete, or descriptive will suffice to trigger the provisions of subrule 35(12). The question which arises is whether **Rule 35(12)** can be invoked when not only has no detailed or descriptive reference been made to the document/s, but neither has there been any indirect reference to such document/s and it is only through a process of reasoning and inference drawing that it can be deduced that the document does or may exist.

¹ 2000(2) SA 215A-B

Is there an Irregular step

[16] A court will grant a rule 30(1) application if it is satisfied that there is an irregular step, that the party bringing such application has not taken any further step in the cause of the matter with knowledge of such irregular step, has given its opponent notice to remove such steps within 10 days of the former becoming aware of the step, and importantly if the applicant will suffer.

[17] In **Afrisun Mpumalanga (Pty) Ltd v Kunene No and Others**² Southwood J at 611 C-F held that

"With regard to the Rule 30 application, Mr. Van der Linde pointed out that such an application will be granted only be granted where the irregular step would cause prejudice to the applicant seeking to set it aside. The prejudice that is referred to is the prejudice that will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the conduct of the case is not affected by the irregular step and the irregular step can simply be ignored"

Lease Agreement

[18] Regarding the application before this court, after the applicants were served with the eviction order, they requested to be furnished with the complete lease agreement entered into by Helios and BP. There are twenty missing pages out of 66 pages on the lease agreement. The respondent conceded that the missing pages are lost. BP was requested to make available a blank and unsigned copy of the standardized lease agreement that contains missing pages but BP never complied.

[19] The respondent argued that for the relief sought, BP relies on the repudiation by Helios, not the lease agreement. The respondent made mention that there was a sub-lease agreement that BP let the property to Helios, the agreement commenced on 01 May 2008, subsisted for five years, and terminated on 30

² 1999(2) SA 599 (TPD)

April 2013. From 01 May 2013 until 01 October 2018 a common law agreement operated on the same terms and conditions as those contained in the sub-lease agreement mutatis mutandis. In August 2019, BP, Helios, and Petroland (second respondent) concluded a partially written and verbal agreement (the tripartite agreement) which was later repudiated and terminated. Respondent further mentions the contents of the email dated 20 August 2019 confirming the repudiation by Helios, which reads as follows: ***“You telephoned me today and advised me that whereas Helios were prepared to sign the agreement which has been prepared in this matter, Helios can no longer do so at this stage because you were called to BP last week and you were advised that BP had decided to renew the remaining 3 BP branded service stations being operated by Helios. The decision by BP came as a shock to you as you expected that your co-operation with BP in the Stormvoel matter would be a factor to be favorably considered by BP when deciding on the renewal or not of these other three service stations and that in the circumstances, you will need to take legal advice”***

The respondent also mentioned the contents of a letter, a correspondence from Ross & Jacobsz Attorneys dated 14 October 2019 on behalf of the applicant, where it is quoted that ***“Our client denies that an agreement or agreements were reached, our client will thus not be signing any documents and or agreement as demanded in your aforesaid letter”***

- [20] For the reasons set out above, it is my view that Helios will not suffer any prejudice by the omission of missing pages or without a complete copy of the lease agreement in the main trial, on the basis that, the respondent does not rely on the lease agreement on the relief sought. The respondent relies on the repudiation by Helios, the lease agreement was only attached to give context. Therefore, I find that there is no irregularity committed by the respondent further that the applicant can respond meaningfully and fully to the allegations the respondent relied on for the relief sought.

Email trails

[21] Advocate DB du Preez (SC) for the applicant argued that BP submitted a trail of emails without indicating pages they rely on and the relevancy. That the principle in the motion proceedings is that the applicant must identify the documents it relies upon, and to enunciate the case which it seeks to make out on strength thereof. The respondent argued that, a trail of emails that are sought to be identified form part of correspondence to which the applicant was copied. The respondent complied with the applicant's request by giving an explanation per email, explaining the relevancy of each email in full detail.

[22] It is in my view, based on the reasons above that, Helios will not suffer any prejudice as the respondent indicated the relevancy of each email. I also find that the applicant can respond meaningfully and fully to the allegations the respondent relied on for the relief sought.

Void Attestation on the founding affidavit

[23] This issue has no bearing on the case but the applicant argued that even though it was corrected by BP, they failed to rectify that point until Helios raised it, as a result, BP must pay the costs for that.

[24] I am not persuaded that the applicant has made out a case for setting aside the respondent founding affidavit. The issues raised relating to the trails of emails and void attestation this court cannot find to be irregularities, the issues are settled. For the reasons set out above, in my view, the effective administration of Justice dictates against the granting of Rule 30 Application

[25] One more aspect remains, the issue of costs. In so far as costs are concerned, it should follow the result and be awarded in favor of the respondents. Advocate CB Kubeka-Manyelo urged this court to show its displeasure with the application, given the specific circumstances, by dismissing the application with punitive costs. The principles for a punitive

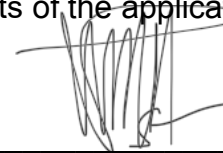
costs order have been comprehensively dealt with in **Waar v Louw**³, **Webb and Others v Botha**⁴ and **Ketwa v Agricultural Bank of Transkei**⁵

[26] Consequently, the following order is made:

26.1 The applicant's rule 30 application is dismissed

26.2. The applicant shall file its answering affidavit in the main application within 10 days of the publication of this order

26.3 The applicant is to pay the first respondent's costs of the application.



K J MOGALE

ACTING JUDGE OF THE
GAUTENG DIVISION,
PRETORIA

Electronically submitted.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 03 May 2021.

Date of hearing: The matter was heard by way of video conferencing or otherwise, the matter may be determined accordingly. The matter was set down for a court date of 18 March 2021.

Date of judgment: 03 May 2021

³ 1977 (3) SA 297 (O)

⁴ 1980 (3) SA 666 (O)

⁵ 1999 (3) All SA 245 (NC)

Heard on : 18 March 2021
For the Applicant : Adv DB DU Preez (SC)
Instructed by : Ross & Jacobsz INC
For the Defendant : Adv CB Kubeka-Menyelo
Instructed by : Slambert ATTORNEY'S
Date of Judgment : 03 May 2021