

HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) DEFENDABLE: YES ☒ NO ☒

(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO ☒

(3) REVISED.

01/10/2013

DATE



SIGNATURE

Case No: 16558/2013

Heard: 30 September and 01 October 2013

Date of judgment: 01 October 2013

In the matter between:

REUNERT LIMITED

Applicant

and

HOLDSWORTH, JOHN CHARLES

1st Respondent

ALTIVEX 295 (PTY) LIMITED

2nd Respondent

CLINE, RAEI IAN

3rd Respondent

RANGILA, MOHAMMED

4th Respondent

ONI, OPEYEMI OLUWASEUN

5th Respondent

JOHNSON, BRIAN RICHARD

6th Respondent

FRANCESCO, DARRYN

7th Respondent

CHENGALROYEN, JARRYD JERMAINE

8th Respondent

MOODLEY, THIRESH

9th Respondent

FRANCESCO, DONOVAN GILYAN

10th Respondent

NEIMAN, VICTOR

11th Respondent

JOVANOVIĆ, DAMJAN

12th Respondent

GROBLER, LOUIS

13th Respondent

OPEN NETWORK HOLDINGS (PTY) LIMITED

14th Respondent

JUDGMENT

PHATUDI J:

[1] The applicant seeks an order declaring the Respondents to be in contempt of Court Orders granted by this Court on 17 April 2012 and 24 August 2012 respectively.¹ There are numerous interlocutory applications filed by the respondents. Among the said applications, some of the Respondents (the respondents), (being the first, third up to the thirteenth) apply for condonation of the late filing of their answering affidavit to the main application.

[2] At the commencement of the hearing of this application, Mr Vivian, counsel for the respondents, places on record that he only represents the 1st, 3rd – 13th respondents. He raises, as a point in limine, non-substitution of the 2nd and 14th respondents by the trustees appointed for the 2nd and 14th respondents occasioned by the said respondents' liquidation. He submits that the main application cannot be dealt with in the absence of the trustees for 2nd and 14th respondents. He refers me to section 359 of the Companies Act 61 of 1973. (Old Companies Act)

¹ The main application – Notice of Motion page 2 prayer 1.

[3] Mr Bhana, counsel for the applicant, submits in rebuttal thereto, that the liquidators of 2nd and 14th were informed by notice of their intent to proceed with the matter as against the second and fourteenth respondents. He hands up the notices he refers to, to which I marked exhibit A and exhibit B in respect of the second and fourteenth respondents respectively. He reads on record paragraph 5 of exhibit A. The paragraph reads:

'5. As required by section 359 of the Companies Act 61 of 1973 as read with Schedule 5 of the Companies Act 71 of 2008, you are hereby notified of our client's intention to proceed with the above application against Altivex on the aforesaid dates'

He further reads paragraph 4 which stipulates

'4. The parties to the application (with the exception of Altivex and the fourteenth respondent, Open Networks (Pty) Ltd (in liquidation)) have filed various affidavits, heads of argument have been delivered on both our client and the matter is set down for hearing in the North Gauteng High Court on 30 September and 1 October 2013'

[4] Emphasising the notification of the liquidators, he places on record that a meeting was held with the liquidators on the 09 September 2013. They on 11 September 2013 responded that they

only need the Founding papers. He submits that substitution is not required on a formal basis.

[5] In reply, Mr Vivian submits that the liquidators do not know what the application is all about. He submits that the whole papers in connection with this matter should have been delivered and or served on the trustees of the 2nd and 14th respondents. He lastly submits that no substitution or the application thereto has been made by the applicants. He, at the least, submits that a criminal sanction cannot be made in the absence of a party the applicant seeks to impute.

[6] I enquired from the applicant's counsel if the applicant still pursues the main application against the 2nd and 14th respondents. Mr Bhana submits that they still pursue the orders they seek in the main application against all respondents including the second and the fourteenth. He submits that substitution is not necessary.

[7] Section 359 of the Companies Act 61 of 1973(old Act) stipulates:

'(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –

(a) All civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

(b) Any attachment or execution put in force against the state or assets of the company after the commencement of the winding-up shall be void.

(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

[8] It is common cause that the 2nd and 14th respondents are placed under a voluntary winding-up. The liquidators have been appointed. The liquidators are, by virtue of their appointment, represents the second and fourteenth respondents. The liquidators have the power to bring and or defend any legal proceedings in terms of section 386 (4) (a) read with section 386 (3) of the Old Act.

[9] It is further common cause that the liquidators were appointed on the 14 August 2013.

[10] As section 359 (2) (a) provides that '...every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings."(my underline)

[11] The Act does not define the term notice. Mr Bhana submits that Exhibit A and Exhibit B, being notifications of the liquidators of the status of proceedings against the 2nd and 14th respondent is concerned, suffices to be a "notice" as required in terms of section 359.

[12] Section 220 of the Companies Act 71 of 2008 (New Companies Act) provides in relation to the notice, that 'unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it has been either

(a) Delivered to that person; or

(b) Sent by registered mail to that person's last known address.'

[13] In my evaluation of the facts and the law surrounding notification of the liquidators, I am of the view that "notice" for the purposes of the Companies Act 61 of 1973 need not be a formal notice in the format required in terms of the Uniform Rules of this Court. I agree with the applicant's counsel that Exhibit A and B constitute a "notice" as envisaged by the Old Act. It is not in dispute that Exhibit A and B were sent to the liquidators of 2nd and 14th respondents. Mr Vivian acknowledges that the liquidators received the said notification.

[14] Based on the aforesaid, I find the applicant to have complied with the provisions of section 359 (2) (a) of the Companies Act. (Old Act)

[15] The issue to be determined is whether the 2nd and 14th respondents ought to be substituted by the liquidators.

[16] It is trite that the liquidators steps in the position of the company in liquidation or liquidated. The liquidators have since 14 August 2013

been appointed by the Master of the High Court. The status of the second and the fourteenth respondents has since the 14 August 2013 changed. The liquidators have since been in control of the second and fourteenth respondents. I already have indicated in paragraph [8] above that the liquidators have the power to institute, defend or not to defend any legal proceedings. The liquidators of the second and the fourteenth respondents are not exceptional. Their choice or intent must be placed formally on record. They may choose to abide by the decision of the court.

[17] Considering the order the applicant seeks in the main application, the second and fourteenth respondents must be substituted by the liquidators. They must be cited in their "*nomino officio*" status. The consequences that flow with the orders the applicant seek are stringent. The liquidators may be held responsible. They may as may be mulcted for the offences committed by the Company. Notwithstanding the point being raised by counsel for the respondents, non-substitution is a point I intended, *mero motu*, to raise with the applicant's counsel.

[18] It will be a futile exercise for the Court to make orders that will not be of any effect. For an order the applicant seeks to be of force and or effect against the 2nd and 14th respondents, the liquidators must be cited as parties in order to hold them liable to the effect of the Court Order.

[19] Based on what I penned above, I am of the view that substitution of the 2nd and 14th respondents by the liquidators is peremptory. The 2nd and 14th respondents must be substituted by the appointed trustees/liquidators.

[20] This does not stop one from dealing with the application for condonation filed by 1st, 3rd to 13th respondents.

Factual background surrounding condonation

[21] It is apparent from the papers before me that the main contempt application was issued by this Court on 18 March 2013. The application was then served on respondents between 18 and 20 March 2013 respectively. Notice of intention to oppose was served and filed on 25 March 2013. The answering affidavit ought to have been served and filed by 5 April 2013.

[22] On 2 April 2013, the respondents served their notice in terms of Rule 35 (12) of the Uniform Rules of this Court. A substantive application in terms of Rule 35 (12) was issued on an urgent basis. Prinsloo J, as agreed between the parties, ordered the postponement of the matter to the urgent roll of 24 April 2013.²

[23] Mothle J handed down judgment on the 21 May 2013. The applicants were ordered to provide the respondents with the required documents. The respondents were, however, mulcted with costs of the application due to their failure to comply with the practice directive of this Court. Mothle J ordered the applicants to produce for inspection and to allow copies of the proven claim by the applicants against the Estate of Black Sheep Development (Pty) Ltd in liquidation within 7(seven) days from date of the order. The Respondents were provided with documentation as ordered on 23 May 2013.

[24] It must be borne in mind that Prinsloo J ordered, among others, that '[t]he [respondents] are to deliver their answering affidavit in the contempt of

² Prinsloo J order – page 65 condonation bundle.

court application within 10 days of either the Rule 35 (12) application being dismissed or the [applicant] producing such document or documents as it is ordered to produce in the Rule 35 (12) application'³

[25] This obligated the respondents to serve and file their answering affidavit within 10 days from 23 May 2013. The tenth day fell on the 06 June 2013.

[26] On the 05 June 2013, the respondent's attorney wrote a letter to the applicant's attorney requesting for an "extension of time" for delivery of the respondent's answering affidavit. The attorney scribes:

'3.1 The Respondents will be unable to finalise their answering affidavit to the Contempt Application on its due date which is tomorrow, 06 June 2013 ...

3.2 ...

3.3 ...

3.4 ...

3.5 As a result ... our clients will also bring an application for condonation of the late filing of its answering affidavit and hope to file their answering affidavit by no later than the week commencing on 10 June 2013.'⁴(emphasis added)

³ Court order – 17 April 2013 – paragraph 5 page 66 of condonation bundle

⁴ Page 69 condonation application

[27] The parties had scheduled a meeting with Ledwaba DJP for 7 June 2013. I infer that the meeting was scheduled with the sole purpose of “managing the case”. The meeting did not proceed. The meeting was postponed to 20 June 2013. It is placed on record that the respondents’ counsel, Stephen Vivian, was unable to attend the meeting due to counsel’s daughter involvement in the motor vehicle accident that occurred in the afternoon of 6 June 2013.

[28] Prior to the scheduled meeting of the 20 June 2013, the parties corresponded with each other which correspondence includes the applicant's letter placing the respondents “*in mora*” of delivery of their answering affidavit.

[29] At the 20 June 2013 meeting with Ledwaba DJP, the respondents legal representative, both the attorney and counsel, agreed to deliver and file the long awaited answering affidavit by no later than 28 June 2013. At the very meeting, Ledwaba DJP issued a “case management directive” directing the parties as to when to deliver and file what they have to. Ledwaba DJP directed that the

matter will be heard on the 30 September and 01 October 2012³ respectively.⁵

[30] On 28 June 2013, the respondent's attorney wrote a letter to Ledwaba DJP informing the office that the respondents will not be in a position to adhere to the office directive and authority by delivering the answering affidavit as agreed.

[31] On 28 June 2013, the respondents attorney wrote a letter to Ledwaba DJP setting out that all respondents in the exclusion of the second and fourteenth, attended the insolvency inquiry in the Insolvent Estate of Black Sheep development (Pty) Ltd (in liquidation). She further penned that 'all of the above has resulted in the Answering Affidavit not being ready today, 28 June 2013.' She further thereto stated that 'we were also not aware on the 20 June 2013 that Adv. Vivian would not be in Johannesburg and South Africa and available to settle the Answering Affidavit finally, from Wednesday 26 June until Tuesday 04 July 2013.'⁶ The respondents' attorney undertook to deliver the answering affidavit by the 9 July 2013.

⁵ Applicants Answering Affidavit in re Condonation Application – annexure CAA 8 page 75

⁶ CAA 9 – page 80 paragraph 617

[32] The applicant indicated to Ledwaba DJP and the respondents their refusal to grant the respondents further indulgence. The office of Ledwaba DJP informed the respondents that his office 'is not granting an extension or an indulgence to file affidavits after the date agreed upon'⁷ Ledwaba DJP directed the respondent to file their answering affidavit by no later than 09 July 2013. He further directed that an application for condonation for the late filing must accompany their answering affidavit.⁸

[33] No answering affidavit was delivered and filed by 9 July 2013. The answering affidavit was only delivered on 12 July 2013 unaccompanied by condonation application as directed.

[34] On 17 July 2013 Ledwaba DJP caused issue of further directive with a rider that

'9. Since the date of hearing is on 30 September 2013 and 01 October 2013, for the sake of progress and that the matter should reach finality, I direct that the respondents should file their application for condonation on or before the 26 July 2013 and the applicant to file the replying affidavit ... by 9 August 2013.'

⁷ CAA 12

⁸ Ibid

The answering affidavit was served and filed by the 12 July 2013. They further complied for the first time, with the due date of the 26 July 2013.

Law

[35] I believe it is trite law that whenever a party to the proceedings realises that he/she has not complied with a Rule or the practice directive of the Court, he/she should apply for condonation without delay.⁹ Application for condonation of non-compliance with the Rules, directives or practice manual is not a mere formality but a request for indulgence from the Court to condone such non-compliance.

[36] In order for the court to grant condonation, the applicant must set out:

- The degree of non-compliance/lateness
- Briefly and succinctly the reasonable explanation for non-compliance/lateness
- The applicants interest in bringing finality to the matter.

⁹ See: Commissioner of Inland Revenue v Burger 1956 (4) SA 446 (A) at 449 G – H; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A)

- The convenience of the court and the avoidance of the unnecessary delay in the administration of justice.¹⁰
- Its prospects of success in the main application. The prospects of success must be made out in the application for condonation and affidavits filed in support thereof.

[37] These factors are encapsulated in **Dengetenge Holding (Pty) Ltd v Southern Sphere Mining and Development Company Limited and Others** where the court, in reference to **Federated Employers Fire and General Insurance CO Ltd and Another v McKenzie 1969 (3) SA 360 (A)** at 362 F – G and **Uitenhage Transition Local Council v South African Revenue Services 2004 (1) SA 292 (SCA)** stated: 'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparations of appeals to this Court.'¹¹

Evaluation

¹⁰ Most factors set out in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited and Others* (619/12)[2013] ZA SCA 5 (11 March 2013)

¹¹ *Ibid* paragraph [12]

[38] I, in my evaluation, first deal with the degree of non-compliance in as far as lateness is concerned. The Uniform Rules of this Court dictate that the respondents must file their answering affidavit 15 days from date of entering appearance to defend¹². The notice of motion prescribed to the respondents the time frame upon which to file their answering affidavit. The respondents had to deliver their answering affidavit by 5 April 2013. In computing the timeframe, the respondents had to deliver their answering affidavit by 5 April 2013 being 10 days from 25 March 2013.

[39] The respondent's application in terms of Rule 35 (12) brought about an order by Prinsloo J. The order, as indicated at paragraph [24] that the 'respondents are to deliver their answering affidavit ... within 10 days of either the Rule 35 (12) application being dismissed or the [applicants] producing such documents...' ¹³ This, in my view, interrupted the running of the time frame upon which the respondents had to deliver their answering affidavit by 5 April 2013. The computation of 10 days *dies* had to run *de novo* from the date upon which the application in terms of Rule 35 (12) is either dismissed or granted.

¹² Rule 6 (5)(d) (ii) of the Uniform Rules

¹³ Op cit – page 66 see fn 6

[40] Mothle's J order in favour of the respondents on 21 May 2013 in so far as the production of documents is concerned, is the new starting time for the running of the 10 days for the respondents to file their answering affidavit. The applicant provided the respondents with the required documents on 23 May 2013. The respondents were obligated to deliver their answering affidavit on or before 6 June 2013.

[41] The respondents failed to serve and file their answering affidavit from 6 June 2013. The answering affidavit was only served on the 12 July 2013. The respondents answering affidavit is late by 24 court days.

[42] The respondent's explanation of counsel's daughter involvement in motor vehicle accident as their failure to serve and file by 6 June 2013 is, in my view, far from being reasonable within the circumstances. The papers are silent as to the severity of the accident and or injuries the child sustained. In any event, the accident occurred only in the afternoon of the 6 June 2013, being the due date for service of the answering affidavit. The

respondents as at 5 June 2013, prior to the accident, had already written a letter to indicate that they will not be in a position to serve and file by the due date (6 June 2013). Counsel's trips to overseas tips the scales more to unreasonableness for purposes of court proceedings. Similarly, the respondents' counsel undertook a trip to unknown place out of South Africa two days before the answering affidavit's due date. There is no explanation other than being involved in Black Sheep inquiry. Reliance on the inquiry is in my view, unacceptable.

[43] Considering the principle set out in **Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A)** where the court stated that it should not be assumed that 'where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted.'¹⁴

[44] What I find most unacceptable is the absence of a reasonable explanation for the non-compliance with the DJP's directive, which was given in the presence of the respondents legal representatives who agreed thereto.

¹⁴ Page 141 B -G

[45] Further thereto, the respondents failed to deliver and file their application for condonation as directed by the DJP. The respondents had to be reminded by the DJP to file the said application. Notwithstanding the respondents' compliance in finally serving the condonation application as directed by the office of the DJP, the respondents' conduct of lateness is, to me, tantamount to disrespect of the DJP's office.

[46] In my further evaluation, I am of the view that the respondents are less interested in bringing finality to the matter. Alternatively, I, reluctantly so, may accept the submissions advanced by the applicant's counsel that the respondents are buying time for the outcome of this matter until the hearing of the appeal, for which they have been granted leave by the Supreme Court of Appeal. The outcome of the appeal may spell the outcome of this matter moot. I accept that granting a party leave to appeal creates an impression that such a party has prospects of success especially when such leave is granted by the Supreme Court of appeal.

[47] The respondents seek the court's indulgence in condoning the late filing of the answering affidavit. Indulgence, as defined in the South African Concise Oxford Dictionary, means to allow someone to enjoy a desired pleasure. Considering all factors mentioned above, I am not inclined in allowing the respondents to enjoy their desired pleasures in their failure to serve their answering affidavit timeously. I am mindful of the impression on their prospects of success. The leave granted may not necessarily be a prospect of success on the part of the respondents.

Costs

[47] It is trite that costs follow the event. The applicants are successful in their opposition to the application for condonation of the late filing of the answering affidavit. They are thus entitled to the costs. I, as a result, make the following order:

Order:

1. Application for condonation of the late filing of the Answering Affidavit is dismissed with costs which includes the costs of two counsel.
2. The main application is postponed sine die
3. The applicant is ordered to substitute the 2 and 14 respondents with the trustees/liquidator appointed for 2 and 14 respondent
4. There shall be no order as to costs in respect of postponement for substitution

A handwritten signature in black ink, enclosed within a large, hand-drawn oval. The signature is stylized and appears to read 'A.M.L. Phatudi'.

A.M.L. Phatudi

Judge of the High Court

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