



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 08 AUGUST 2024

SIGNATURE: 

Case No: 39556/20

In the matter between:

THABAZIMBI AIR COMPRESSORS

APPLICANT

And

ACDC WINDING (PTY) LTD

RESPONDENT

***Coram:* ACTING JUDGE KEKANA**

***Heard on:* 30 APRIL 2024**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system.

JUDGMENT

[1] This is an application for striking out brought by the applicant in terms of Rule 30 and Rule 30A of the Uniform Rules of Court. Which application is opposed by the Respondent.

Brief background

[2] On or about February 2021 the Applicant served its notice of motion wherein it sought to compel the Respondent to provide certain documentation the very purpose being to set aside the Respondent's purported taxed bill of costs. The Respondent entered its notice of intention to oppose the matter on or about 02 March 2021. The Respondent failed to file its answering affidavit and the Applicant proceeded to deal with the matter without the Respondent's answering affidavit.

[3] Applicant proceeded to file its head of arguments electronically on or about 21 July 2021. On or about October 2021, the Applicant wrote an email-letter requesting the Respondent to file its head of arguments herein failing which the Applicant would proceed without the Respondent's heads of argument to apply for a court date thereof. The Respondent failed to file its heads of argument as such the Applicant proceeded to apply for a hearing date.

[4] On the day of set down, 07 February 2022 before Honourable Judge Mbongwe, the Respondent made appearance through Adv AC Barreiro and sought postponement. On the day of set down the Respondent was ordered by this Court to file its heads of argument within 20 (twenty) days, that being on or before 07 March 2022. On 08 March 2022 Respondent filed its heads of argument electronically to the Applicant. This was a day out of the court ordered date. According to the Applicant the Respondent did not comply with the Court Order. On 09 March 2022 the Respondent served its answering affidavit.

[5] The Applicant refers to Rules 30 and 30A in its application to strike out the Respondent's answering affidavit and to dismiss the Respondent's application for condonation. Rule 30 of the Uniform Rules of the Court states as follows¹:

(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 subrule (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 subrule (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

¹ Uniforms Rules of the Court.

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.

[6] Rule 30A of the Uniforms Rules of the Court states as follows²:

“(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or an order or direction made by a court or in any judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order-

- (a) that such rule, notice or request be complied with; or
- (b) that the claim or defence be struck out.

(2) Where a party fails to comply within 10 days, contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.”

[7] The Respondent has brought an application in terms of Rule 27(1) of the Uniform Rules of Court (the Rules) for condonation for late filing of its answering affidavit. Among the reasons canvassed is that the Applicant’s PAIA application was fatally defective. The Applicant was made aware through an email of this defect, but the Applicant ignored the email and proceeded with instituting legal proceedings. It was for this reason that the Respondent could not respond to a defective application.

[8] The Respondent argues that the condonation application cured any non-compliance under Rules 30 and 30A and that the condonation application would now require adjudication prior to the hearing of the application to strike out brought by the

² Uniforms Rules of the Court.

Applicant. And that at the time that the tender was made to the Applicant, the first application in terms of rule 30 and/or 30A had not been set down for hearing. The Respondent further argues that the delivery of an application for condonation after the institution of an application in terms of Rule 30 does not render the condonation application irregular, it merely dictates that the merits of the application to strike out are rendered moot.

[9] As regards Rule 30 and 30A applications the Respondent argues that the Applicant has in its application failed to show any prejudice in the conduct of the Respondent. That prejudice is an essential consideration when determining applications to strike out. The Respondent addressed with prejudice correspondence to the Applicant on 9 June 2022, tendering the Applicant's wasted costs of:

1. the Rule 30 and/or 30A notice dated 18 March 2022;
2. the Rule 30 and/or 30A application dated 28 April 2022; and
3. the Rule 30 and/or 30A notice dated 24 May 2022.

[10] The Respondent argues further that despite the Respondent's tender for wasted costs as stipulated in para 9 above, the Applicant persisted in having the first and second applications set down for hearing in the opposed court. That on the facts in the present matter, it was unnecessary for the Applicant to have brought this application and persisted with it despite the Respondent having tendered wasted costs for earlier applications taking note of the fact that the Respondent had instituted a condonation application. That the Applicant should have withdrawn the application once the Respondent filed the condonation application.

[11] The Applicant in its objection of the condonation application brought by the Respondent argues that the condonation application constituted an irregular step in

so far as the first application to strike out had already been instituted. The Applicant refers to Rule 30 or Rule 30A in its head of arguments, to object to the Respondent's filling of condonation and also for striking out the Respondent's late filed answering affidavit.

[12] The Applicant is requesting this Court to declare the filing of the condonation application by the Respondent an irregular step in terms of Rule 30 and or 30A of the Uniform Rules of Court and strike it out.

[13] I will start with the request by the Applicant that this Court dismiss the application for condonation by the Respondent. As regards the condonation application made by the Respondent, I can neither rule thereon neither can I rule on its effect on the strike out application as the application is not before me. A condonation application needs to be properly adjudicated upon. In ***Uitenhage Transitional Local Council v SA Revenue Services***³ Hefer JA at 297 I-J said the following:

“... Condonation is not to be had merely for the asking; a full, detailed and accurate account of the cause of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

[14] It is for the same reasons advanced by Hefer JA above that I will focus only on Rule 30A application, the application to strike out as made by the Applicant. The

³ 2004 (1) SA 292 (SCA).

Applicant was able to demonstrate that there was a delay by the Respondent and the filling of its answering affidavit.

[15] The argument advanced by the Respondent for not filing an answering affidavit is that it at all times was of the understanding that the matter was on an unopposed roll. I find this argument lacking substance and logic. It is not the forum that dictates and determines the behavior of a party in civil proceedings but rather it is the other way around, meaning it is the behavior of the party that dictates ultimately determining the forum. It is an ironic paradox and a contradiction in terms for the Respondent to argue that it was under the impression that the matter was on an unopposed roll hence it did not file an answering affidavit while on or about March 2021 the Respondent filed a notice of intention to oppose.

[16] It is this behavior by the Respondent of filing its notice of intention to oppose that directed and resulted in the matter being placed on an opposed roll. The Respondent is expected to know the consequences of its actions and steps it takes in civil proceedings. It is incongruous for the Respondent to now claim that it did not know that the matter was on an opposed roll. I find no substantive reasons as to why it took Respondent more than a year to file its answering affidavit. The Respondent's explanation for the delay is inadequate.

[17] As regards the other reason put forward by the Respondent that the application by the Applicant was fatally defective, hence it could not reply to a defective application. I also find this not to be persuasive as there are processes under the Uniform Rules of this Court which the Respondent could have used to address the defect referred to. Again, I find this to be very superfluous and spurious.

[18] Again, the Respondent failed to comply with the order of this Court made by Honourable Judge Mbongwe and there are no reasons provided for non-compliance thereof. In my view, the Respondent's non explanation for non-compliance with the court order further confirms its abominable behavior. Again, it is my view that the Respondent's degree of non-compliance with the rules and orders of court is grave and is one that this Court will not condone. In ***Fakie N.O. v CCII Systems (Pty) Ltd***⁴, the Supreme Court of Appeal, per Cameron JA, held:

"It is a crime unlawfully and intentionally to disobey a court order... a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.

[19] The Applicant refers to both Rule 30 and Rule 30A in its application. In many instances the Applicant uses the phrase "and or" when referring to these two Rules. It appears that the Applicant is not certain which Rule is to be used to strike out the Respondent answering affidavit and which Rule is applicable to dismiss the application for condonation as an irregular step. The Applicant should note that Rule 30 deals with irregular step while Rule 30A deals with non-compliance. However, this does not in any way jeopardise the Applicant's case as it kept on referring to both Rules at all times in its request for the dismissal of the condonation application and again for the striking out of the Respondent's answering affidavit.

[20] Legal certainty and effective litigation are protected by the legislator. The Rules are there to ensure effective litigation, any unwarranted derogation therefrom cannot

⁴ [2006] ZASCA 52 at para 6.

be condoned. The mantra “justice delayed is justice denied” is not applicable only in criminal cases, it is applicable also in civil matters. The unnecessary delay caused by the Respondent is unwarranted and the Applicant has certainly been prejudiced by this lackadaisical conduct of the Respondent.

[21] Strydom J in **Gefen and Another v De Wet N.O. and Another** at para 27 stated that:

“a striking out of a defence is a drastic remedy and, accordingly, the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order”. ...it has been found that the relevant factors when orders of this kind [are] considered will...[include amongst others] the reasons for non-compliance with the rules, request, notice, order or direction concerned”.

[22] The court in **Wilson v Die Afrikaanse Pers Publikasies (EDMS) BPK**⁵ at 462 H-463 B held as follows:

“The striking out of a defendant’s defence is an extremely drastic step which has the consequences that the action goes forward to a trial as an undefended matter. In the case if the orders were granted it would mean that a trial court would eventually hear this action without reference to the justification which the Defendant has pleaded and which it might conceivably be in a position to establish by evidence. I am accordingly of the view that very grave step will be

⁵ 1971 (3) SA 455 (T).

resorted to only if the court considers that a Defendant has deliberately and contemptuously disobeyed its order to furnish particulars.”

[23] In the present matter, I'm satisfied that the Respondent has deliberately and contemptuously disobeyed the Rules. And that as result of this behavior, there exists prejudice on the part of the Applicant. The Applicant should therefore succeed in its application to strike out the Respondent answering affidavit.

[24] In the circumstances the following order is made:

1. That the application by the Applicant for striking out by the Respondent's answering affidavit is granted.
2. The Respondent to pay the cost of this application on the scale of attorney and client.



KEKANA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

ATTORNEYS FOR APPLICANT: MACHETHE R.S ATTORNEYS

ATTORENYS FOR RESPONDENT COOMBE COMMERCIAL ATTORNEYS