

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BHISHO)**

Reportable/Not Reportable

Case no.:230/2011

Matters heard on: 29 August 2024

Judgment delivered on: 03 September 2024

In the matter between:

**GERONIMOS INVESTMENTS CC t/a
BUFFALO FLATS SPAR**

Applicant

and

**MEMBERS OF THE EXECUTIVE COUNCIL FOR THE
DEPARTMENT OF HEALTH: PROVINCE OF THE
EASTERN CAPE**

Respondent

JUDGMENT

BRODY AJ

1. This is an application for condonation for the late filing of the applicant's answering affidavits to two pending applications which have been lodged by the respondent, namely:

1.1 A rule 30(2)(c) application; and

1.2 A rule 30A (2) application.

2. It was common cause in argument that this court was not required to deal with the merits of the two pending applications, however, only the issue of condonation for the late filing of answering affidavits.

3. It was further common cause that the applications were interlocutory in nature and as contemplated in rule 6(11).

4. Rule 6(11) provides as follows:

“Notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a Judge.”

5. There is no prescribed time period in rule 6(5), and it was common cause in argument that the time period for answering an application is a “reasonable time”.

6. A further important factor in this matter is that the respondent had brought the two applications, however, did not take any steps to set them down.

7. In terms of rule 15 of the practice directives, a party is entitled to apply to set the matter down if the applicant fails to do so.

8. I was advised by Mr Mati, acting on behalf of the applicant, that the dispute between the parties has been bedevilled by at least five applications, various objections, and rule 30 notices.

9. Mr Marty also argued that the present dispute between the parties, in regard to condonation, could also be dealt with in terms of rule 37A and when the matter is dealt with at case flow management.

10. Although the argument in this matter was prolix, and complicated, the facts in the matter, and principles applicable, are relatively simple.

11. The applicant brought an application to amend its particulars of claim and the respondent filed a notice to oppose, but did not file an answering affidavit, which then triggered the set-down of the matter on the uncontested opposed roll for the 2nd of August 2022.

12. The respondent then filed a rule 30A(1) notice.

13. The respondent then objected to the set-down as same being an irregular step and eventually proceeded with the rule 30(2)(c) application, which was based on the set-down of the matter.

14. The respondent also then proceeded with an application in terms of rule 30A(2) on the basis that the applicant had not complied with my brother Lowe's order of the 5th of October 2021, wherein he ordered that the applicant was to amend its papers within five days of the order.

15. Although the applicant is of the view that it is not necessary to bring an application for condonation, given the absence of time periods in the rules, as a prudent and pragmatic approach, decided to bring the applications for condonation.

16. The applicant alleges no prejudice to the respondent if condonation were to be granted.

17. The respondent argued in its opposing affidavit that the applicant had not consolidated the two applications in terms of rule 11 of the rules of court and that there were no prospects of success in that the applicant had not complied with Lowe J's order dated the 5th of October 2021 timeously.

18. The respondent also argued in its answering affidavit that the previous notices of intention to amend had not been followed through and therefore until they had been withdrawn, the present amendment could not proceed.

19. The respondent also argued that the applicant had previously replaced its original particulars of claim, and in that event, the original claims had been withdrawn

and that the newly sought particulars of claim, (to be amended) result in a prescribed claim.

20. The applicant, in its replying affidavit, which was essentially comprised entirely of legal argument, alleged that it had in fact complied with Lowe J's order, as a notice of intention to amend had been filed within two days of the order being granted.

21. It also pleaded that there was no prejudice to the respondent and that the delay in bringing the present application, and the filing of the opposing affidavits, was not gross in that it was only thirty-eight days out of time.

22. The issue of the time periods was comprehensively dealt with by my sister Hartle (AJ) (as she then was). In the matter of Farrington Farming vs Volcano Agro Sciences (Pty) Ltd, an unreported judgment, handed down on the 18th of March 2010. As both counsel were not aware of this judgment I handed a copy to them and they considered the judgment during the tea-break.

23. In that judgment, Hartle J, found that rule 6(5) is a less cumbersome procedure and allows for an expeditious disposition of litigation.

24. At paragraphs [40] and [41], she stated the following:

“[40] In my view the authorities are against the proposition that simply by virtue of an interlocutory application becoming opposed, a respondent is entitled to the benefit of as much time as would be afforded to him in an ordinary opposed application. Such an interpretation would be absurd given the nature and necessity of interlocutory applications especially when invoked as a tool to enable parties to advance the main action. Rule 6(11) is an exclusionary sub-rule, (distinguished from the rest of rule 6) which provides a *sui generis* model and procedure for simple interlocutory and other applications incidental to pending proceedings.

[41] It would be entirely inconsistent with the nature of, particularly an application to compel... for a respondent to profit from his own tardiness, by claiming that he is entitled to hold out for the maximum period that rule 6(5)(d) will allow for the exchange of affidavits in ordinary opposed motion, and then for the set down to be delayed further while a formal request is made on the basis provided for in Eastern Cape Rule 3. Such opportunism can never be countenanced. It is trite law that, in order for justice to be done, the uniform rules must be interpreted so as to provide for the speedy and inexpensive resolution of disputes.”

25. She further found the following:

“... in my view a respondent has no *right* to be allowed the more extensive time periods applicable to such applications.”

26. I am therefore in agreement with both counsel in this matter that a reasonable period is required in terms of the commentaries and the authorities relating to interlocutory applications.

27. I am also in agreement with Mr Mati that amendments can be sought at any stage before a trial commences, (and even during a trial) subject to the issue of prejudice and that if a litigant does not persist with a proposed amendment, it simply lapses.

28. I agree with Mr Sishubu that rule 37A is not applicable to the present application in that case flow management is an administrative process which allows for the preparation of matters for trial. It is not a process for applications to compel or for applications to postpone.

29. I am persuaded that the thirty-eight days, referred to by the applicant is not an excessive period and especially having regard to the fact that the respondent failed to set down the two applications and also did not take those two applications any further.

30. Even if the present application to amend were to be dismissed, this will not prevent the applicant from seeking a further amendment before the trial date. This same rule would be applicable to the respondent.

31. In the interests of justice, and in the interests of bringing this matter to finality without the incurring of any further exorbitant costs, I am inclined to grant condonation for the late filing of the two affidavits.

32. In regard to the issue of costs, Hartle J had the following to say in the Farrington Farming (Pty) Ltd matter:

“[47] With regard to the issue of costs, I believe that it would be proper to reserve these for determination of the court hearing the application. Similarly, I hold that the question whether it was a wise and reasonable precaution to have engaged the services of two counsel should fall to be determined by the court hearing the interlocutory application.”

33. Many of the issues raised by Mr Sishuba in regard to the condonation application should ideally be raised in the application to amend. As indicated above, I was not required to deal with the issues relating to that application, however, was only required to deal with this condonation application.

34. In the result I issue the following orders:

1. The late filing of the applicant's answering affidavits in the rule 30(2)(c) and rule 30A(2) applications are condoned.
2. The issue of the costs of the application for condonation, including the scale of costs, are reserved for determination by the court hearing the application to amend.

B.B. BRODY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv. Mati
Instructed by	:	Messrs Gravette Schoeman Attorneys 8 Queens Road KING WILLIAM'S TOWN (Ref.: M. Moodely/RMS/18/MAT 6713)
Counsel for the Respondent	:	Adv. Sishuba
	:	The State Attorney c/o Shared Legal Services Office of the Premier 32 Alexander Road KING WILLIAM'S TOWN