



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: **5904/2024**

In the matter between:

WILGEHEUWEL RETIREMENT VILLAGE (PTY) LTD

Applicant /Respondent

and

CORNELIA JOHANNA VOLSCHENK

Respondent / Applicant

Coram	:	Da Silva Salie, J
-------	---	-------------------

Judgment delivered	:	29 July 2025
--------------------	---	--------------

Counsel for Applicant	:	Adv. Whitcomb
-----------------------	---	---------------

Instructed by	:	Casper Le Roux Inc.
---------------	---	---------------------

Counsel for Respondent	:	Adv. J Bernstein
------------------------	---	------------------

Instructed by	:	Barnard Patel Inc.
---------------	---	--------------------

JUDGMENT EX TEMPORE HANDED DOWN ON 29 JULY 2025

STRIKING OUT APPLICATION

Order:

[17] For the reasons set out herein, the following order is made:

[i] “The application in terms of Rule 30 is dismissed with costs on scale A.”

DA SILVA SALIE, J:

[1] This is an opposed application brought in terms of Rule 30 of the Uniform Rules of Court to set aside two sets of affidavits filed by the respondent in the pending liquidation application (the "main application").

[2] This judgment is delivered *ex tempore*, shortly after the matter was fully argued earlier today, and is of necessity brief.

[3] The applicant ("Wilgeheuwel") contends that these documents/affidavits — marked AA1 (the replying affidavit) and AA2 (a re-commissioned founding affidavit) — constitute irregular steps.

[4] The background to the main application is very brief as follows:

[4.1] The respondent, Mrs Volschenk, purchased a life right in property with her late husband under the Housing Development Schemes for Retired Persons Act 65 of 1988. After her husband's passing and a decline in her health, she cancelled the agreement with the applicant by mutual consent. As per the

cancellation agreement, the applicant became liable to repay an amount of R889,000 by 18 April 2021. When payment was not effected, Mrs. Volschenk instituted action to recover the aforesaid amount.

[4.2] Wilgeheuwel filed a plea to the action that another party, Ms. Juliana Steyn, the attorney who received the proceeds in trust, should have been joined.

[4.3] Mrs Volschenk then brought an application for its liquidation on the basis that it was unable to pay its debts. On the last page of the founding affidavit, the commissioner of oaths details does however not set out the name in full nor the address as required and instead his stated initials and surname, designation as "*predikant*" (pastor/church minister) with a designation number and the date. Wilgeheuwel took issue with that omission and exclusively based its opposition to the relief for liquidation on that aspect in its answering affidavit. I deal with this aspect further hereunder.

[5] In the present Rule 30 application, Wilgeheuwel contends that AA1 (the replying affidavit) was filed out of time without a substantive application for condonation, and that AA2, being a re-commissioned founding affidavit, was irregularly filed without the leave of the Court. The argument follows that such leave should have been sought on notice of motion, failing which the affidavits are irregular and prejudicial. In the result, it is argued that it had been deprived of an opportunity to contest the grounds for condonation of the non-compliance and thus suffers prejudice. Differently stated, it was argued that the respondent's failure to obtain the Court's leave to condone its non-compliance had reversed the onus onto Wilgeheuwel to bring an application to file a further set of affidavits to answer to or oppose the filing of the late and irregular affidavits.

[6] In the main liquidation application, Wilgeheuwel raised in its answering affidavit two objections, so called technical defences. These objections were the only two grounds upon which liquidation was resisted, which were related to the defects in the

commissioner of oaths' details. In this application, Wilgeheuwel takes issue with the correction of the commission of oaths details and contends that the replying affidavit was filed late. For those reasons, both ought to be set aside as irregular steps. The applicant's submission presupposes that the re-commissioned affidavit constitutes a second founding affidavit, which it argues was impermissibly filed without leave given that it was late.

[7] I queried counsel for the applicant during his submissions as to the nature of the alleged prejudice which must be illustrated and whether the discretion to admit the affidavits does not ultimately lie with the Court hearing the main application. The latter would be able to consider the issues raised on condonation and non-compliance within the full context of the factual matrix of the matter and not as a mere technical aspect, nor in vacuum, as presently sought. I ventilated with him that the consideration and adjudication of condonation issues at the hearing of the matter is a most common procedure and oft-occurrence in our Courts as points *in limine*.

[8] Counsel submitted, with reference to various authorities, that procedural irregularities of this kind require Court's leave and that mere filing does not suffice. Practically, this contention envisages a separate application in Third Division, which given Wilgeheuwel's opposition would have to be postponed and heard on the opposed motion roll (fourth division) on a later date as may be set down by the Chief Registrar. This would amount to a substantial delay before the liquidation application could be heard by a Court. It also contemplates, if the opposition succeeds, the respondent will have to withdraw the two affidavits (AA1 and AA2) and then bring a further separate application for condonation for the filing of the amended founding affidavit and the late filing of the affidavit in reply. In other words, I see the argument to amount to the applicant in the main application for liquidation to then have to start *de novo*.

[9] Counsel maintained that as matters stand Wilgeheuwel is prejudiced by being compelled to rebut the facts alleged in condonation without having had the opportunity

to oppose such condonation procedurally. It was also contended that the respondent's delay of nearly two months was insufficiently explained

[10] For the respondent, it was submitted that the applicant failed to establish any real prejudice or to demonstrate that the steps taken were irregular as contemplated by Rule 30 nor has it shown that it suffers any prejudice. Reliance was placed on ***Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA)***, to support the submission that the applicant seeks to exploit a technicality rather than engage the merits. In so doing it is seeking to delay, impermissably, the ventilation of the main application. The argument followed that the grounds for condonation were set out in the replying affidavit, under a separate heading with it specifically stating that leave would be sought from the Court at the hearing of the matter to condone the correction of the commissioner's details and the late filing of her replying affidavit. Wilgeheuwel took a technical point as its objection to the application for liquidation and sought dismissal of the relief purely on that basis. The remedied founding affidavit means that it could no longer reply on its exclusively technical opposition to the liquidation, however, this is not sufficient to support a contention that the prejudice for the applicant is that the correction amounts to nullifying the technical opposition which it had raised in its opposition to the liquidation application. The failure to demonstrate prejudice based on the respondent's irregularities is fatal. In other words, the only prejudice is one of being deprived of the opportunity to raise technical objections, however there is no real or substantial prejudice suffered by the applicant. The argument followed that a Court may at the hearing of the matter, in its discretion, permit the filing of irregular or late affidavits and that such relief could be sought before or after the affidavits had been filed. Either way, whether leave is sought before or afterwards, in seeking an indulgence, the Court will consider the reasons and explanation for the affidavit being late/irregular, having regard to all the circumstances of the case.

[11] I stood the matter down to reconvene after the lunch adjournment to consider the bundles of authorities handed up by both counsel and their submissions made.

Discussion:

[12] As I see it, the crux of the applicant's case is that the affidavits were "***slipped in***" without a proper application and thereby attempt to circumvent the rules. The leave of the Court, it was argued, must be sought to permit the affidavits. I find this argument rather problematic and without merit. In my view, the real issue for the applicant or as the proverbial saying goes, the thorn in its flesh, is that the applicant chose to approach the opposition to the application for liquidation on a purely technical basis and elected not to engage in the merits or answer thereto. It purely based its opposition to its liquidation on the basis of it being unable to pay its debts on the shortcoming with the sub-regulations of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963. Now that the respondent has taken the step to remove the basis for that complaint, its opposition to the liquidation prayer is seemingly extirpated, should a Court grant the condonation at the hearing. What would be left in its opposition as it stands presently? Nothing, since it had not answered anything relating to the merits of the claim for liquidation. That is really the nub of concern for the applicant. However, should the applicant wish to address the reasons relating to condonation and oppose it, a Court hearing the liquidation application would certainly not deny it an opportunity to do so. The basis for such an affidavit would be to address new matters raised by the opposing party who seek the indulgence. The *audi alterem partem* rule guarantees that a party would be able to answer such new facts. This application is thus wholly unnecessary and, in my view, a dilatory effort to avoid the ventilation and adjudication of the application for liquidation of the respondent.

[13] It is indeed so that the Court retains the discretion to permit late or irregular filings. However, that discretion properly vests in the Court seized with the main application. It is that Court who is to consider the condonation application and determine whether the irregularities, if any, should be excused or condoned and/or give further directive/s as it considers prudent taking into account the nature and circumstances of the matter and the interests of justice. The present application seeks to usurp that

discretion prematurely and denude the power of the Court hearing the liquidation application.

[14] The corrected founding affidavit (correcting the commissioner's details) in my view is not a new or supplementary affidavit in the true sense as it does not add new matter. No new issues are added or addressed in the body of the affidavit. Stripped down to the core, all it really did was blow out the technical defences which the applicant raised in opposition to an application for it to be wound up based on the shortcomings of the Commissioner of Oaths details.

[15] I am not persuaded that the applicant suffers any real prejudice of the kind contemplated by Rule 30. The respondent had, in her affidavits, explained the circumstances of the late filing and stated that leave would be sought at the hearing of the main matter. The defects in the commissioning of the founding affidavit are sought to be remedied in AA2 simultaneously filed with the replying affidavit (AA1). Ultimately, the respondent bears the risk of her non-compliance of the rules and the onus to persuade the Court hearing the liquidation application to condone the delay in filing her replying affidavit and the correction of the Commissioner's details in her founding affidavit. The applicant retains the right to oppose the leave for condonation and consequent relief on affidavit, for the Court hearing the matter to consider as a *point in limine*.

[16] Our Courts have consistently stated that rules serve the interests of justice and should not be applied rigidly. Over-formalism is discouraged. The aim of the rules is the expeditious and fair resolution of disputes. In the absence of demonstrable prejudice and where the issue can be more appropriately determined by the Court hearing the main application, I am not persuaded that this Rule 30 application bears any merit. For these reasons the application must fail.

Order:

[17] For the reasons set out herein, the following order is made:

[i] *“The application in terms of Rule 30 is dismissed with costs on scale A.”*

**DA SILVA SALIE, J
JUDGE OF THE HIGH COURT
WESTERN CAPE**