

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2013/14167

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

7 MARCH 2014


FHD VAN OOSTEN

In the matter between

BSB INTERNATIONAL LINK CC

APPLICANT

and

READAM SA (PTY) LTD

FIRST RESPONDENT

THE CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

SECOND RESPONDENT

IN RE

READAM SA (PTY) LTD

APPLICANT

THE CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

FIRST RESPONDENT

BSB INTERNATIONAL LINK CC

SECOND RESPONDENT

Practice - Rule of Court 30 (1) – interlocutory application for setting aside of an amended notice of motion and supplementary affidavit in main application as an irregular step – prejudice a pre-requisite for success – applicant's failure to allege or prove prejudice - irregular step further not proved - application dismissed

J U D G M E N T

VAN OOSTEN J:

[1] This is an interlocutory application in terms of rule of court 30(1). In the main application the first respondent (Readam) seeks the review and setting aside of the approval by the second respondent (the COJ) of the building plans in respect of a building being constructed by the applicant (BSB) on Readam's property as well as the demolition or partial demolition and modification of the building. The main application was launched by way of urgency. The COJ did not enter the fray nor were any affidavits filed on its behalf. The notice of motion consists of parts A and B. Part A, in which interim interdictory relief was sought, came up for hearing in the urgent court before Mngquibisa-Thusi AJ who held that the matter was not urgent. In consequence thereof a draft order, prepared by the parties, providing for striking the matter from the roll, time limits within which further affidavits were to be filed and costs reserved, was made an order of court. Part A of the notice of motion was eventually heard by Mundell AJ, who, having heard argument, dismissed the application with costs. Readam pursued the final relief sought in part B of the main application. The record of the proceedings sought to be reviewed was served by the COJ on 28 August 2013 and the COJ's formal reasons filed on 17 September 2013. Readam contends that the record was incomplete and irregular in certain respects. The significance hereof will soon become apparent. In response thereto and in terms of rule 53(4), Readam, on 4 November 2013, filed an amended notice of motion as well as a supplementary affidavit (the supplementary documents). BSB was of the view that the supplementary documents were filed out of the prescribed 10 day period provided for in rule 53(4). It filed a notice in terms of rule 30 and 30A affording Readam 10 days 'to remove the cause of complaint'. No response was forthcoming and BSB launched an application in terms of rule 30(1) in which it seeks the setting aside of the supplementary documents alternatively, in the event of condonation being granted for the late filing of the supplementary documents, that it be granted leave to file an answering affidavit within 30 days, and finally, that Readam be ordered to pay the costs of the application. This is the application presently before me.

[2] Before I deal any further with the application it is necessary to briefly restate the principles applicable to an application in terms of rule 30. The rule is designed to provide for the setting aside of irregular steps taken in proceedings. The rule endows the court with a wide discretion (rule 30(3)). Important for present purposes is the

well-settled requirement of prejudice: proof of prejudice is a pre-requisite for success in an application in terms of rule 30(1) (cf *Trans-African Insurance Co Ltd v Maluleka* 1966 (2) SA 273 (A); Erasmus *Superior Court Practice* B1-193 and the cases referred to in footnote 9). A party entitled to invoke the rule is not obliged to do so: as much is clear from the wording of rule 30(1): 'a party...*may* apply to court to set it aside'. The applicant in a rule 30 application accordingly, must allege and prove prejudice, if not substantial prejudice.

[3] Applying these principles to the present matter the following scenario prevailed at the time of the 'late' delivery of the supplementary documents: the lateness extended into some five weeks. The amended notice of motion substantially widened the disputes between the parties. It accordingly must have been abundantly clear to all concerned that finalisation of the review would probably require extended time limits. The construction of the building in the meanwhile continued and it was quite apparent that any undue delay in the finalisation of the review proceedings could lead to substantial prejudice. BSB accordingly, at the time, was faced with two possibilities: either to respond to the supplementary documents within 30 days (or to request/apply for an extension) or to invoke the rule 30 procedure. A pre-requisite for the rule 30 procedure was prejudice: it would only have been proper in the event of the late filing causing substantial prejudice to BSB. On this aspect BSB alleges the following:

'12. The first respondent (Readam) has had a substantial period of time to prepare the amended notice of motion and annexures which includes substantial amended relief to the relief that it originally sought in the notice of motion. Hence its conduct without any condonation is prejudicial to the applicant and this honourable court should not condone such flagrant disregard of the rules of this honourable court more particularly when there is no proper explanation therefore.'

The allegations, vagueness apart, do not raise any form of prejudice and are clearly insufficient to constitute proof thereof. In argument before me counsel for BSB was unable to point to any prejudice: on the one hand it was contended that BSB needed more time to respond to the supplementary documents and on the other that the widening of the disputes required extensive investigation and detailed response with the resultant increase in costs. Both submissions fail to address the aspect of

prejudice and are untenable. Suffice to say BSB has failed to either allege or prove any prejudice resulting from the late delivery of the supplementary documents. The inference that this application was launched merely as a delaying tactic, as submitted by counsel for Readam, appears to be justified. Be that as it may, the application, for this reason alone, is doomed to failure.

[4] A further insurmountable difficulty faces BSB. It is in the nature of the rule 30 proceedings necessary for BSB to show that the late filing indeed constituted an irregular step. It has failed to do so. It already appears from the supplementary affidavit filed by Readam that the record filed by the COJ was not only incomplete but also irregular in several respects. Accepting the correctness thereof, as I am bound to do for purpose of these proceedings, the filing of the supplementary documents, technically speaking, was not late as Readam had by then not been placed in possession of a complete record of the proceedings. This aspect did indeed receive some form of recognition: counsel for BSB in argument eventually watered down the relief sought by BSB to only the alternative relief which in effect is for BSB to file its response within 30 days of the date of the order I propose to make. That of course merely leaves the question of costs alive. As correctly pointed out by counsel for Readam, had this been the approach of BSB right from the outset, this application would never have left the launching pad.

[5] The application, in my view, was misconceived right from the outset. The only result it has achieved is an unnecessary delay in a matter that clearly, in the interests of justice, ought to be finalised expeditiously. The finding makes it unnecessary to comment any further on the costs of the application save that the rule of costs following the result ought to be applied.

[6] In the result the following order is made:

1. The application is dismissed.
2. Leave is granted to the applicant to file an answering affidavit to the first respondent's amended notice of motion and supplementary affidavit in the main application within 30 days of the date of this order.
3. The applicant is ordered to pay the costs of this application.


F.H.D. VAN OOSTEN
JUDGE OF THE HIGH COURT

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ADV GF PORTEUS
STRAUSS ACHER INC

DATE OF HEARING
DATE OF JUDGMENT

3 MARCH 2014
7 MARCH 2014