REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

IN HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENGDIVISION: PRETORIA)

23/7/14
Case No: 55559/13

(1) REPORTABLE ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / NO
(3) REVISED. OK

23/07/2014
DATE

SIGNATURE

10 JULY 2014

BEFORE THE HONOURABLE JUDGE RABIE

In the matter between:

KOELNER SA	**First Applicant**
RAWLPLUG LTD	**Second Applicant**
KOELNER RAWLPLUG IP SP ZO.O	**Third Applicant**
T & I CHALMERS ENGINEERING (PTY)LTD	**Fourth Applicant**
ANCHOR FIX CC	**Fifth Applicant**

and

RAWLPLUG SOUTH AFRICA (PTY)LTD	**First Respondent**
R.J.R. MULLER	**Second Respondent**
ZA CENTRAL REGISTRY NPC (t/a UNIFORM SA)	**Third Respondent**

JUDGMENT

1. Before this court is a Rule 30 application of which only the issue of costs have to be decided. This is again one of those unfortunate matters which comes before the court simply as a result of the inability of attorneys to realise that it is their responsibility to procedurally manage a case in a manner which requires the least amount of costs. Doing so is in the interest of both the parties and the administration of justice. Attorneys often fail to realise that simple discussions between them across a table or even over the telephone (with a confirmatory letter if necessary) would be much better in order to resolve existing disputes and to avoid future disputes. Doing battle by way of correspondence often leads to misinterpretation of what has been written in a letter or may lead to further disputes arising from what had not been addressed in the letter - all with the result of further unnecessary costs having to be incurred. The same can be said about practitioners who set out to use every Rule available to achieve some or other advantage over an opponent. The Rules of Court are there to facilitate the legal process and should not be abused. If a simple discussion between attorneys can avoid a formal application to court in terms of one or other Rule, such a discussion should be held and a serious attempt should be made to avoid litigation.

Exercising a right can sometimes also constitute an abuse. After all, the Rules are there for the Court, and not the Court for the Rules.

2. The dispute between the parties has a protracted and acrimonious history. The relevant parties were in a trade relationship which had lasted for quite some time. The relationship turned sour. Allegations were made that the respondents were, *inter alia*, infringing the applicants' trademarks and selling counterfeit products on a grand scale. The relationship was apparently terminated. Sometime later, on 14 June 2013, the first respondent launched an Anton Pillar type application against, *inter alia*, the third and fifth applicants. Certain items were attached and removed for preservation and safekeeping. The application was not opposed and no affidavits were filed on behalf of the third and fifth applicants.

3. However, approximately three months later, on 6 September 2013, the applicants launched application proceedings against the first and second respondents in which they sought, *inter alia*, interdictory relief restraining the first and second respondents from using a certain trademark, an order to remove the trademark from all infringing goods and for royalty to be paid. Certain ancillary declaratory orders were also prayed for. The founding papers were in excess of 600 pages. At a later stage, on 4 December 2013, the applicant incorporated into the founding papers an application that the Anton Pillar style order obtained by the first respondent, be set aside. This added another approximately 190 pages of affidavits to the original application. The application thus became an extremely voluminous one and

by its very nature is highly technical and intricate. I shall now briefly refer to the further events in chronological order.

4. The first and second respondents indicated their intention to oppose the application and served a notice requiring security for costs. On 20 November 2013, some seven weeks after service of the Rule 47(1) notice, the attorneys of the applicants proposed a banker's guarantee to be provided in satisfaction of the demand for security. I shall refer to this aspect again below.

5. On 2 October 2013, and prior to the respondents filing their answering affidavits, the second respondent, who is also the CEO of the first respondent, was approached by the CEO of the first applicant. The CEO of the first applicant suggested that the dispute might be capable of settlement and for that purpose requested the second respondent to attend a meeting in Dubai on 14 October 2013. It was also requested that the settlement discussions should take place without the intervention or assistance of the respective legal teams. In his letter the attorney of the respondents wrote that "(w)e trust that in view of these developments the exchange of further pleadings/affidavits is suspended pending the outcome of the settlement discussions." On the 7th October 2013 the applicant's attorney wrote, *inter alia*, the following:

"We confirm that the time periods will be suspended from 4 October 2013, until the date of the proposed meeting, on 14 October 2013. Accordingly, the due date for filing your client's answering affidavit will be 17 October 2013. Naturally, if the discussion on 14 October 2013

bears fruit and forms the basis for the settlement negotiations, the time periods will be further suspended. However, this will assist after Mr Koelner and Mr Muller's meeting. " (sic).

6. It should be mentioned at this stage that there was clearly no agreement as to when the respondents had to file their answering papers in the event of the negotiations coming to nought. It was the applicant's attorney himself who interpreted the suggestion by the respondent's attorney in the fashion set out in his letter. But, what is more important, is the fact that it must have been clear to everybody concerned, that is if an open mind is kept, that it would take the respondents a very long time to prepare their answering papers and much longer than the 15 days allowed for by the Rules of Court. In this regard it would be recalled that the applicants took approximately 3 months before the first part of the application was served and it took them all-in-all approximately 6 months before the response to the original Anton Pillar application was served in the form of an application to set it aside.

7. Another important aspect to mention at this stage is that apart from the long time it would require to prepare answering papers, the contents of the answering papers would have consisted of numerous accusations of breach of contract and improper conduct on the part of the relevant applicants. I mentioned this fact because the respondents made a point thereof that to have filed answering papers containing such allegations prior to or during settlement negotiations, would have been disastrous for any possible amicable outcome. I shall refer to this aspect again.

8. The proposed meeting in Dubai had to be postponed to 26 October 2013 since the CEO of the first applicant experienced certain difficulties in securing a visa. The meeting did not bear fruit. On 8 November 2013 the applicants' attorney confirmed this fact and concluded the letter by saying the following: "Accordingly, the suspension of the *dies* is lifted and your client is required to file its answering affidavit within three court days from today." It would appear that the attorney of the applicants never inquired from the attorney of the respondents how far they had proceeded with the preparation of the answering papers and how long they would still require to file same. He simply decided himself, firstly, that the suspension of the *dies* had been extended to after the extended meeting and, secondly, that the answering affidavits had to be filed within three or days. This was clearly a totally unrealistic view of the matter and it must have been similarly clear that the respondents would not have been able to comply with his demand.

9. On 25 November 2013 the applicant's attorney wrote another letter demanding the answering affidavit by not later than 27 November 2013 and said that if that did not occur, the matter would be set down on the unopposed roll. Again, this demand that the opposing papers be filed within two days of the demand was not preceded by an attempt to find out when the answering papers could be expected. Without more, giving the respondents two days to file their papers was clearly not realistic having regard to all the prevailing circumstances.

10. On 28 November 2013 the respondents' attorney wrote a letter to the applicants' attorney stating, *inter alia*, that the need for an answering affidavit to be filed has not yet arisen since settlement discussions have been ongoing. Proposals and counter proposals have been made and the reactions thereto were still being awaited. The last exchange of proposals occurred the previous week. The respondents' attorney concluded the letter by saying:

> "Under the circumstances your demand appears to be premature; apart from the fact that you should under no circumstances assume that your clients' application is or will become unopposed".

11. The applicants' attorney wrote back on the same day saying, *inter alia*, that the proposals and discussions referred to were "tentative proposals" and "tentative discussions" which "do not amount to meaningful settlement negotiations". The applicants' attorney then stated that the applicants are prepared to continue settlement discussions on the basis that certain minimum requirements must be met by the respondents. Then, in paragraph 4.3 of the letter the following is stated:

> "Again, from the discussions that have been held, it appears that Mr Muller and Mr Koelner's expectations are so far apart that it is unlikely that they will reach agreement unaided. We therefore propose that a suitably experienced and qualified mediator be appointed to facilitate the negotiations. The mediator's costs will be shared equally between Mr Muller/Rawlplug South Africa (Pty) Ltd and Koelner Rawlplug IP."

12. Certain dates where then mentioned for the proposed "settlement negotiations" and then paragraphs 5 and 6 of the letter read as follows:

"5. Kindly advise by the close of business on Friday, 29 November 2013 whether Mr Muller is prepared to engage in meaningful settlement negotiations on the basis set out above.

6. If Mr Muller's answer is yes, we can commence making the practical arrangements. If it is no, then please file your clients' answering affidavit no later than Monday, 2 December 2013."

13. Respondent's attorney responded the next day, 29 November 2013, saying that "my client is amenable to the appointment of a mediator and I shall in due course let you have a few names for consideration. Perhaps you could do the same and we may just identify a person common to both our proposals." In his responding letter dated 5 December 2013 the attorney of the applicants wrote that Mr Koelner is amenable to holding the mediated discussions in the latter part of January 2014. The attorney then proceeded to refer to certain non-negotiable aspects and then said the following: "However, if the negotiations fail, this will result in a considerable further delay in the litigation that is pending. Accordingly, my client requires that your client files its answering affidavit forthwith, in order that if the negotiations fail the replying affidavit (if any) may be filed at that time to avoid further delays."

The letter is ended off by demanding that the answering affidavit be filed by close of business the next day.

14. Certain remarks need to be made about this letter. Firstly, the insistence by the applicants' attorney for the answering papers to be filed within a day or two was so clearly unrealistic that the only reasonable inference is that it was made to put undue pressure on the applicants for purposes of the negotiations. Clearly, a serious mediation process was proposed on behalf of the applicants and that proposal was accepted. The attention of the parties should at that point have been directed at the mediation process and time and effort could not realistically be spent on preparing the answering papers. Secondly, I also accept the submission on behalf of the respondents that if

the serious allegations to be made in the answering affidavits were presented at that time, it would have been extremely detrimental to a positive mediated outcome.

15. Thirdly, it was submitted on behalf of the applicants that no agreement in respect of mediation was reached whilst, on the other hand, it was submitted on behalf of the respondents that such an agreement had been reached. The applicants' attorney referred to the aspects mentioned in the letter which he regarded as non-negotiable demands to which the respondents had to agree and stated that since those aspects were not specifically acceded to by the respondents, there was no agreement to have the disputes mediated. The respondents' attorney interpreted the letter differently. He regarded the factors mentioned by the applicants' attorney as the very aspects which would be subjected to mediation. If the attorneys had taken the time to discuss the new development of mediation, many of the later difficulties, and most probably also this application, would have been prevented.

16. As mentioned above, a few days later on 4 December 2013, the applicants supplemented their application by adding the application to set the Anton Pillar order aside. This was in itself a voluminous addition raising intricate questions of law and fact to which the respondents had the right to react.

17. However, only a few days later, on 10 December 2013, the applicants' attorney set the application down on the unopposed roll of this Court of 20 February 2014. It is this Notice of Set Down which forms the subject of the

present application. The main thrust of present Rule 30 application was that the main application was subject to a mediation process to be conducted during January 2014 and that it should therefore not have been enrolled. It was furthermore submitted that the enrolment of the main application was clearly to coerce the respondents into filing answering papers instead of, for example, following the provisions of Rule 27A.

18. It was further submitted on behalf of the respondents during argument that at this point the application to set aside the Anton Pillar order was also part of the main application. That had the effect of the pleadings being reopened and the applicants' attorney could not have set the matter down as he did. The time prescribed in the Rules for the filing of an answering affidavit had by then not yet expired.

19. Another aspect submitted on behalf of the respondents was that at this point, the relevant applicants had not yet put up security as they were obliged to do. The applicants were consequently proceeding with the matter whilst ignoring their obligation to provide security for costs.

20. On 20 December 2013 the respondents served a notice in terms of Rule 30 complaining that the Notice of Set Down was irregular for the reasons aforesaid and calling for the notice to be retracted. The applicants' attorney wrote a letter dated 8 January 2014 calling the Rule 30 notice an abuse of process and an attempt to delay the finalisation of the main application. The

respondents were informed that the applicants will accordingly ignore the notice.

21. On the next day, 9 January 2014, the respondents' attorney responded and stated in his letter that the applicants' unilateral demands that the answering papers be filed are not binding on the respondents and that it was the Notice of Set Down which constituted an abuse of process.

22. On 31 January 2014 the respondents served the present Rule 30 application on the respondents for hearing on 20 February 2014.

23. The applicants did not respond to this application until 7 February 2014 on which date the attorney of the applicants approached the Deputy Judge President of this Division. Incidentally, the applicants' Notice of Intention to Oppose as well as their opposing affidavit, were dated on this day. Both were served on the respondents on 10 February 2014.

24. In its answering affidavit to the present application the attorney of the applicants stated that the Rule 30 application is an abuse of process as it was brought simply to manipulate the postponement of the main application and thereby a delay in the resolution of the dispute. The attorney then referred to the directive issued by the Deputy Judge President on Friday 7 February 2013 which resulted from a request by the attorney "in order to attempt to overcome the procedural conundrum created by the Rule 30 application". The Deputy Judge President acceded to the request by setting

dates by which the parties should file the papers and heads of argument and by allocating the 19th of March 2014 as the date of the hearing of the matter.

25. The attorney for the applicants conceded in his affidavit that as a result of the directive, the respondents have obtained the postponement which they wanted. The attorney also remarked that the enrolment of the main application on the unopposed roll for 20 February 2014 has become moot. However, he added that the Rule 30 application "is still alive because the DJP has agreed to allocate a preferential re-enrolment immediately after the hearing of the Rule 30 application." I shall refer to this issue below.

26. The applicants' submission was that the set down of the main application was entirely regular since one of the rules of practice of this court, as contained in the Practice Manual, provides that in a matter where the respondent has filed a Notice of Opposition but fails to file his answering affidavit, the applicant can set the matter down in the unopposed motion court. According to the applicants the respondents have failed to file their answering affidavit within the prescribed period and that they were accordingly entitled to enrol the matter in the unopposed court.

27. There can be no doubt that the Notice of Set Down dated 11 December 2013 enrolling the main application on the unopposed roll for hearing on 20 February 2014, has become academic. The main application was removed from the roll prior to 20 February 2014 after the direction from the Deputy Judge President was obtained. The Notice of Set Down had accordingly

become obsolete and can never be revived again. Any future enrolment of the matter, will be done by way of a fresh Notice of Set Down. The only remaining issue in respect of the Rule 30 application is consequently the issue of the costs of that application. The aforesaid statement by the applicant's' attorney that the Rule 30 application is still alive because the Deputy Judge President has agreed to allocate a preferential re-enrolment immediately after the hearing of the Rule 30 application, can consequently not be correct. Any such re-enrolment will be by way of a fresh Notice of Set Down.

28. On 27 February 2014 the respondents called upon the applicants to agree to the matter being postponed *sine die* with costs to be reserved and to be dealt with as part of the main application. The respondents' attorney explained in the letter that the events had overtaken the purpose of the application and that there is absolutely no point in wasting valuable court time and costs simply to argue the matter of costs. The applicants' attorney wrote back on the same day rejecting this proposal and insisting that the matter proceed to this court for adjudication as indicated by the Deputy Judge President.

29. The matter came before this court sitting as the so-called 3rd Motion Court which is supposed to hear matters which are so voluminous or intricate or for some other reason special that they cannot be entertained by the ordinary Opposed or Urgent Motion Court. The main application is still very much alive. It will sometime in the future be adjudicated in the Opposed Motion Court or, most probably, in the 3rd Motion Court. The issue of costs of this

application should have been decided by that court. Costs should not have been incurred simply to have the matter adjudicated by this court. In fact, I have no doubt that if the Deputy Judge President had been made aware of the fact that his directive would have the effect of only the issue of costs being relevant to this Court, the applicants would not have received the preferential treatment it did. To have approached the Deputy Judge President in such circumstances, knowing that the outcome could only be that the issue of costs would be the only remaining issue, in itself constitutes an abuse of the process of this Court. To make matters worse, this very fact was pointed out to the applicants' attorney in the letter of 27 February 2014 but the applicants insisted that the matter be heard by this Court. The hearing before this Court did not serve the interests of justice. It took up invaluable court time and resulted in costs being wasted. Even if it can be argued that the Rule 30 application should not have been instituted, events had overtaken the issue and the application, only in respect of costs, should not have been heard by this Court.

30. What the applicants attempted by their approach to the Deputy Judge President, is not clear. They possibly wanted the Rule 30 application to have been heard prior to 20 February 2014, on which date the main application was on the roll. If that was the intention, it was so unrealistic that any attempt in that regard can only be regarded as presumptuous and constituting an abuse of the process of court.

31. But even if I were to be wrong in my aforementioned view, and if I were to decide the regularity of the Notice of Set Down, I can still not come to a finding that the main application could have been validly set down on the unopposed roll of 20 February 2014. Firstly, the parties have decided to subject themselves to mediation. In such circumstances adjudication by a court of law is put on the backburner. One of the parties cannot re-enrol the matter for adjudication prior to the mediation process having run its course. This is so trite, in my view, that the only reasonable inference to be drawn from the enrolment of the main application on the unopposed roll is that the applicants wanted to force the respondents to file their answering papers immediately. Such conduct constitutes a clear abuse of the process of court.

32. Secondly, as I have already mentioned, the unilateral determination of dates by which the answering papers should be filed, did not take cognizance of the realities of the case and the clear inference is that the demands were aimed at coercing the respondents to accede to the plaintiff's' settlement demands. By no stretch of the imagination could anybody seriously have thought that the answering papers could be prepared in the time period granted by the attorney of the applicants. To simply calculate the number of days since the filing of the main application does not serve any purpose as it ignores all that had happened in the interim.

33. Thirdly, I cannot fault the submission on behalf of the respondents that to have filed the answering papers prior to negotiations and especially mediation, would have been extremely unwise.

34. Fourthly, by extending the main application with the inclusion on 4 December 2013 of the application to set aside the Anton Pillar order, the pleadings have in any event been reopened and the time within which the respondents could file an answer, had not yet expired. The main application was consequently prematurely set down. On this basis alone the Notice of Set Down was irregular.

35. Fifthly, it is not necessary for me to decide the correctness of the rule of practice to set a matter down on the unopposed roll if an answering affidavit had not been filed, if regard is had to the regulatory provisions of Rule 27A. Whatever the correct position, in a matter such as the present and especially having regard to its history, the nature of the disputes and the applications that had been filed, the extent of the papers, and the attempts to settle the matter, it could never have realistically been expected that the main application would ever proceed on an unopposed basis on 20 February 2014. To offer the provisions of the practice manual as justification is not an answer but in fact a classic example of an abuse of the process of court.

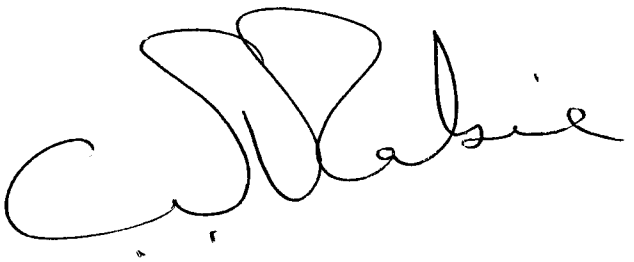
36. Lastly, by setting the application down prematurely and setting it down in the circumstances referred to, the applicants placed the respondents in an invidious position regarding the filing of their answering papers. The prejudice suffered as a result is obvious and is sufficient for this Court to set the offending Notice of Set Down aside.

37. As I have indicated above, it is not strictly speaking necessary to set aside the Notice of Set Down but in order to avoid any misunderstanding I shall do so. As far as costs are concerned, I have concluded for the above reasons that the actions of the applicants constituted an abuse of the rules of this court to such a degree that a punitive order for costs should be made.

38. In the result, the following order is made:

1. The Notice of Set Down filed by the applicants on 11 December 2013 is hereby set aside as an irregular proceeding.

2. The applicants are jointly and severally ordered to pay the respondents' costs of the application on the scale is between attorney and client.



C.P. RABIE

JUDGE OF THE HIGH COURT

10 JULY 2014