IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

8/3/2016

CASE NO: 88980/2014

DATE OF HEARING: 5 November 2015

Not reportable

Not of interest to other judges

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

08/03/16
DATE

SIGNATURE

In the matter between:

SIYAGHOPA TRADING 233 (PTY) LTD	First Applicant
JOHAN CHRISTIAAN BEER N.O.	Second Applicant
JOHAN CRISTIAAN BEER	Third Applicant
and	
THE SOUTH AFRICAN REVENUE SERVICES	Respondent
In re:	
THE SOUTH AFRICAN REVENUE SERVICES	Applicant
and	
SIYAGHOPA TRADING 233 (PTY) LTD (IN LIQUIDATION)	First respondent
JOHAN CRISTIAAN BEER N.O.	Second respondent
JOHAN CRISTIAAN BEER	Third respondent
SUKUYMANI TELECOMMUNICATIONS (PTY) LTD	Fourth respondent
ABE DE BEER	Fifth respondent
C H VAN ZYL	Sixth respondent

FRANK S MASUPYE	Seventh respondent
JAPPIE MOLEFE	Eighth respondent
HENNOX 189 CC	Ninth respondent
GERHARD LOURENS STEYN DE WET N.O.	Tenth respondent
ADRIAAN WILLEN VAN ROOYEN N.O.	Eleventh respondent
VIANTA NAUDE N.O.	Twelfth respondent
MASTER OF THE HIGH COURT, PRETORIA	Thirteenth respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourteenth respondent

---

J U D G M E N T

OLIVIER, AJ

[1] This is an interlocutory application brought in terms of Rule 30 of the Uniform Rules of Court by the applicants (the first to third respondents in the main application) to strike out the notice of motion of the respondent (the applicant in the main application). The applicants want the notice of motion of the applicant, dated 18 December 2014, to be declared an irregular step or proceeding in accordance with Rule 30, and to be struck out. It seeks a punitive cost order against the respondent.

[2] The respondent submits that the rule 30 application amounts to an abuse of process, and is based on frivolous grounds. It seeks dismissal of the interlocutory application, and a special costs order against the applicants on an attorney-client scale.

[3] The first applicant is Siyaghopa Trading 33 (Pty) Ltd, a private company registered in terms in terms of the company laws of South Africa; the second applicant is Johan Christiaan Beer N.O. in his capacity as the business rescue practicioner of the first applicant; the third applicant is Johan Christiaan Beer, in his personal capacity. For convenience sake, I shall refer to them collectively as the applicants. The respondent is the South African Revenue Service, an organ of state.

[4] The main application was launched in terms of section 133 of the Companies Act 71 of 2008. The applicant challenges the sanctioning of business rescue proceedings on a number of grounds, including that the application for business rescue was an abuse of process. For purposes of this interlocutory application, I need not consider the main application.

[5] The chronology of the events leading up to this application can be summarised as follows. On 17 December 2014 the respondent launched the main application. On 6 January 2015, the first, second and third applicants filed notices of intention to oppose the main application. A week or so later a notice was served on the respondent in terms of rule 30(2)(b) to remove the cause of the complaint on this date, but the applicant failed to make the changes within the 10 (ten) day period. Respondent claims that on 16 January the applicants once again filed exactly the same notices of intention to oppose the main application as before. On 18 February 2015, the first, second and third applicants launched this interlocutory application. On 13 March 2015, the Applicant filed notice of intention to oppose the interlocutory application. On 31 March 2015 the respondent served its answering affidavit in the

interlocutory application. The applicants were required to file any replying affidavit within ten days after receipt of the answering affidavit. The ten day period expired on 16 April 2015. On 6 May 2015 the applicants belatedly field a replying affidavit, almost three weeks after the time period for filing a replying affidavit had lapsed. The applicants have requested that the late filing be condoned. I accept their reason for the late filing, which is condoned.

[6] The respondent also objects to the length of the replying affidavit, which comprises 21 pages, compared to the 6 pages of the founding affidavit. It says that this is an abuse of motion proceedings and that the replying affidavit should be disregarded. I think it would extreme to disregard the replying affidavit, even though it was filed late and of unusual length.

[7] The respondent contends that the applicants failed to disclose in its founding affidavit such facts as are necessary to justify the relief sought, including that the founding affidavit contains no mention of prejudice.

GROUNDS OF CHALLENGE

[8] The applicants' challenge is based on 3 grounds:

a. The "notice of motion does not contain a date on which the application has been set down on the unopposed court roll. The space provided for such date is left blank on paginated page 2 of 6."
b. The first applicant is not cited correctly. It is cited as being in liquidation when it is in fact in business rescue.
c. The tenth to twelfth respondents in the main application are joined incorrectly, because of "the fact that the First Respondent is in business rescue, the previous liquidators of the first respondent cannot be cited where the First respondent is no longer in liquidation."

[9] The applicants contend that they cannot take the matter any further until such time as the irregular step has been addressed. They cannot file opposing affidavits until the court has ruled on this interlocutory application.

[10] The respondent says that the applicants' contentions relate to a point of law and that merits of the main application. The issuing of a notice of motion when launching an application cannot constitute an irregular step. It claims the application is an

abuse of process as the issues should have been raised as points in limine or points of law in the applicants' affidavits, not in a separate rule 30 application.

"Omission" of the date

[11] The applicants say that the respondent should have remedied the cause of the complaint – the omission of the date on the notice of motion – by providing a proper notice of enrolment or amending the notice of motion in terms of the Rules. It failed to do so. The respondent failed to explain why the irregularity occurred or why it wasn't rectified. It has given no grounds on which the court can consider granting condonation.

[12] The respondent contends that this was an inadvertent omission – a "technical error" – by the respondent's former attorneys, the State Attorney, who was replaced with the respondent's current attorneys. It was not due to a flagrant disregard of the rule, nor any wilful default on the part of the applicant. In the answering affidavit, Mr Mcebisi Tulwana, Senior Manager: Legal and Delivery Support, acknowledges that the omission could be regarded as a non-adherence to the rules, but that the court should exercise its discretion to condone the respondent's failure to adhere to the rules due to lack of prejudice. The prejudice they allege is not "tangible".

[13] The respondent contends that it would have served no purpose to attempt to cure the blank date after the motion had become opposed: "any attempt to amend or cure the omission after the matter had become opposed, would be superfluous, unnecessary and would be academic".[1] The omission is thus of no effect, considering that the applicants are in fact opposing the main application and have filed notices to that effect. The issue of the date has become moot. Had the matter proceeded to the unopposed motion court, the omission of the date would have been relevant.

[14] The applicants say that the mere fact that the application has become opposed should not be regarded as a factual basis on which the irregular step by the respondent can be ignored. They say that under circumstances where the matter is not correctly placed before the unopposed motion court, no basis exists on which the matter can simply and automatically progress to the opposed motion court.

[1] Par 2.5 of the affidavit of Mr Tulwana.

[15] The applicants claim that "a cost implication pertaining to the unopposed motion court proceedings will exist" and that they will be prejudiced.[2]

Incorrect citation: first respondent in the main application

[16] The respondent says that the rule 30 procedure is inappropriate to object to the manner or the capacity in which another litigant/party to application proceedings has been cited.

[17] Regarding whether the first applicant was in fact in liquidation, the respondent put the following to the court. A final winding up order was granted against the first applicant by this court on 4 February 2013. On 12 December 2013 the first applicant was placed under business rescue. The order putting the first applicant under business rescue did not substitute and/or set aside the winding up order. The winding-up order has not been set aside and remains in effect. The first applicant remains insolvent and in liquidation, and its assets are liable to be wound up in accordance with the court order.

[18] The respondent says that it did not pursue any recovery steps against the first applicant during the business rescue proceedings on the basis that the business rescue proceedings had the effect of suspending legal proceedings. It argues that the question whether or not the first applicant is in fact in liquidation is a matter for consideration in the main application, not the rule 30 application.

[19] The applicants do not deny the existence of a liquidation order, but say that the status of the company is that of one in business rescue. Liquidation proceedings are stayed under these circumstances. See S 131(6) of the Companies Act.

Incorrect joinder: tenth to twelfth respondents

[20] The applicants submit that if the liquidation proceedings are suspended, the rights and obligations of the liquidators during business rescue proceedings are also stayed. It considers the joinder of the liquidators irregular. It is only when a liquidator is an affected party in business rescue proceedings that it should be joined.

[21] The respondent submits that they need to be joined in their capacities as the liquidators of the first applicant. They have a substantial interest in the outcome of

[2] Para 5.6 of applicants' replying affidavit in the interlocutory application, p 72.

the main application, considering the relief that is sought. The Master is cited as the thirteenth respondent and the Companies and Intellectual Property Commission as the fourteenth respondent. The respondent argues that a failure to join these parties to the application could make it defective.

[22] The respondent says that the joinder issue, similar to the citation issue, is a question of law which can only be decided with reference to the merits in the main application.

Analysis

[23] The court has a wide discretion in the consideration of rule 30 applications. This discretion must be exercised judicially with consideration of the relevant circumstances of the case and what is fair to both parties. The court is entitled to overlook in proper cases any irregularity especially where there is no evident substantial prejudice to the other party.

[24] Prejudice is thus a requirement for an application in terms of rule 30 to succeed (Schreiner J in **Trans-African Insurance Co v Maluleka** 1956 (2) SA 271 (A) at 278F-G):

> No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.

And more recently in this division, in ***De Klerk v De Klerk*** 1986 (4) SA 424 (W) at 426I, it was said: "It must again be emphasized that Rule 30(1) applications should succeed only if there is prejudice related to proceeding with the litigation."

[25] To determine whether there was any prejudice, a comparison should be made between the state of affairs which occurred due to the irregular step, and the state of affairs had the irregularity not occurred. See ***Soundprops 1160 CC v Karishavn Farm Partnership*** 1996 (3) SA 1026 (N) at 1033. If this test is applied, it cannot be said that the applicants had suffered prejudice resulting from the respondent's attorneys leaving the date blank. In so far as this amounts to an irregularity, it is condoned.

[26] I agree with the respondent that the question whether or not the first applicant is in liquidation or business proceedings is a substantive question better suited for determination in the main application. However, for purposes of this application, I find that the first applicant (first respondent in the main application) was not incorrectly cited. In this division, in ***Absa Bank Ltd v Makuna Farm CC*** 2014 (3) SA 86 (GJ) at 87 Boruchowitz J ruled as follows on the effect of business rescue proceedings on liquidation:

> The launch of business rescue proceedings does not alter the legal status of the company in liquidation but merely stays the implementation of the winding up order. The manifest purpose of the section 131(6) suspension is to delay implementation of the winding up order pending the outcome of the business rescue application, but the company remains under winding up, whether finally or provisionally.

In **Absa Bank Ltd v Earthquake Investments** (case no 63190/2012) decided in the Gauteng North High Court, a similar view was expressed by Makgoba J.

[27] Considering this finding, it was incumbent on the respondent to join the liquidators of the first respondent.

[28] Overall, it cannot be said that the applicants suffered any measurable prejudice. The matter needs to move forward for a consideration of the merits of the main application.

Costs

[29] Considering my findings, the respondent (applicant in the main application) is entitled to costs. The question is whether that costs order should be punitive or not. The respondent contends that it should be awarded costs on a scale as between attorney and client, including the costs occasioned by the employment of two counsel. It argues that the reason for the applicants' rule 30 was to delay the main application. Also, there was a suggestion in the applicants' replying affidavit that the applicant would have acted dishonestly. The applicants provided no factual basis for this claim, which respondent says amounts to reckless conduct. The respondent claims that the rule 30 application is an abuse of process, which in itself can form the basis for a punitive cost order.[3]

---

[3] See A C Cilliers, The Law of Costs, Volume 1, p 4-22, par 4.13.

[30] I was referred to the judgment of Roper J in ***Reid N.O. v Royal Insurance Co Ltd*** 1951 (1) SA 713 (T):

> In *Steinman v Dry* (T.P.D. 1/4/49, not reported), in dismissing an exception, the full Court of this division ordered the excipient to pay costs as between attorney and client on the ground that the exception was trifling and frivolous and had had the effect of unnecessarily delaying the trial of the action. In the present case the application has been brought under a complete misconception as to the function of particulars, and it has also had the effect of unnecessarily delaying the further prosecution of the action, and in the circumstances I feel that the plaintiff ought to have his costs as between attorney and client.

[31] A punitive cost order should be the exception rather than the rule. It should be reserved for extreme cases. I am not convinced that this is one of those cases.

[32] A period of three weeks is ample time for the respondents to file their answering affidavits.

[33] I accept the respondent's employment of two counsel.

ORDER

[34] In the result I make the following order:

a. The rule 30 application launched by the First, Second and Third Applicants (Respondents in the main application) is dismissed.

b. The First, Second and Third Applicants are ordered to pay the costs of these proceedings jointly and severally, including the costs occasioned by the employment of two counsel.

c. The First, Second and Third Applicants are ordered to serve and file their Answering Affidavits (if any) within three weeks of the date of this order.

OLIVIER, AJ

ACTING JUDGE OF THE HIGH COURT

08/03/16