# IN THE HIGH COURT OF SOUTH AFRICA
# (GAUTENG DIVISION, PRETORIA)

**CASE NO: 89569/2018**

**DELETE WHICHEVER IS NOT APPLICABLE**

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

[redacted]

**22 March 2022**
DATE

L.B. Vuma

**Heard on: 14 October 2021**
**Delivered on: 22 March 2022**

In the matter between:

**FORGEWELD ENGINEERING (PTY) LTD** **Intervening Party**

*In re* the *ex parte* application of:

and

**JACO CRONJE** **Applicant**

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## JUDGMENT

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**VUMA, AJ**

**INTRODUCTION**

[1] On 9 September 2018 the applicant launched the application for the voluntary surrender of his estate as insolvent.

[2] On 25 January 2019 Forgeweld Engineering (Pty) Ltd ("the intervening party"), in its capacity as the applicant's creditor, applied under the same case number in order to intervene in the applicant's main application, to oppose it and to procure an order for the dismissal of the application for voluntary surrender. The applicant did not oppose the intervention nor file an answering affidavit. On 10 July 2019 the intervening party procured an order to be allowed to intervene in the main application, with the applicant being ordered to pay the wasted costs occasioned by the postponement of the matter, with the remainder of the relief sought by the intervening party in the intervening application, namely, that the main application be dismissed with costs and that the applicant be ordered to pay the costs of the application on an attorney and own client scale being postponed *sine die*.

[3] Following the above, the applicant did not pursue his application for voluntary surrender. The intervening party caused the heads of argument to be filed and the matter to be enrolled on the opposed motion for 12 August 2021. On this day, the applicant appeared in person before this very court and sought a postponement to obtain legal representation. The request for postponement was opposed by the intervening party. I however granted the application and postponed the matter *sine die*.

[4] The matter was re-enrolled for 11 October 2021 with no attorney formally noting its appointment as attorney of record for the applicant.

[5] On 4 October 2021 the applicant caused the replying affidavit to be filed, being:

5.1. 2 years and 9 months after the intervening party filed its intervention and opposing papers;

5.2. 2 years and 3 months after an order was granted allowing the intervention; and

5.3. 1 week before the matter was set down to be argued on the opposed roll.

[6] On 14 October 2021 this application served before me and the applicant's counsel asked for a postponement of the application on instruction by the applicant.

**FACTUAL BACKGROUND *IN RE* INTERVENING PARTY'S APPLICATION**

[7] In its intervening application, the intervening party states the following:

7.1. The applicant was once an employee and director of the intervening party, but was dismissed as a result of fraud which he perpetrated against the intervening party.

7.2. When the intervening party became aware of certain irregularities at its Babalegi plant, it caused an investigation to be executed. The investigations revealed that the applicant embezzled substantial funds from the intervening party. The investigations also revealed that the applicant channeled stolen funds to another company and another business.

7.3 After the discovery of the fraud the intervening party launched a preservation application under case number 79191/16 against nine respondents, of which the applicant was one, for an order to prevent the applicant from dissipating assets pending an action to recover the damages caused as a result of the fraud and the embezzlement of the funds.

7.4. The applicant did not oppose the application and on 25 October 2016 the urgent court granted the relief requested in the preservation application. Having procured the preservation order the intervening party then instituted an action against the applicant. The defendants in that matter failed to file a plea and the intervening party then succeeded on 10 December 2018 to obtain default judgment against, *inter alia*, the applicant. The judgment debt is for a capital amount of R8.6 million.

**PRELIMINARY ARGUMENTS BEFORE THE HEARING OF THE MAIN APPLICATION**

[8] On the date of the hearing of the main application before me, the applicant had not filed his heads of argument. Mr Muller appearing for the applicant informed the court that he holds instructions to seek a postponement for purposes of consultation with the applicant and the filing of the heads of argument, given that he only received the brief the day before the hearing hereof. He stated that he could not explain to the court why there was not a substantive application before it.

[9] Mr Richard for the intervening party opposed the postponement application, arguing that same was supposed to have been set out in an affidavit substantively. He denied that

Mr Muller was instructed late, that is the day before the hearing of the application, arguing that as early as 23 September 2021, Mr Muller was already invited onto Caselines. He further argued that if Mr Muller was not in a position to argue the application, maybe it would be better for him to withdraw instead, arguing further that given the fact that the applicant had previously successfully argued a postponement before this court, that that in itself should spell the fact that this matter had gone past the costs order stage. He therefore requested that this court considers the founding affidavit and dismiss the main application on a punitive scale costs order.

[10] Having stood the matter down for Mr Muller to take instructions, he (Mr Muller) informed the court that he was ready to argue the matter.

**SUBMISSIONS BY MR MULLER ON BEHALF OF THE APPLICANT**

[11] Mr Muller submits that the applicant's replying affidavit was only filed two weeks before the hearing date and conceded that there was no condonation application before the court regarding the late filing of same. He submits that the replying affidavit addresses what is raised in the answering affidavit of the intervening party and even raises allegations that relate to the criminal charges faced by the applicant.

[12] Mr Muller argues that despite the default judgment in the amount of R8.6 million being obtained by the intervening party against the applicant, there will still be a good dividend for the creditors after the sequestration of his estate. He further argues that even the criminal trial pending against the applicant is relevant given that it could have an

impact on the application and further that until the applicant is convicted, he is presumed innocent. He further argues that the criminal charges have a huge impact on the allegations by the intervening party and that the sequestration should therefore stand over until the finalization of the criminal matter.

[13] In regard to the arguments on the merits of the application, Mr Muller argued that there was a dividend of 42.18 cents and that this means that there will still be sufficient dividend to the advantage of the creditors, including the intervening party. He further submits that other than the intervening party, none of the other creditors of the applicant oppose the main application. Mr Muller further argues that there was now a huge dispute of fact in regard to the value of the shares and the property. Lastly he submits that he stands by the papers although he did not file any authority, arguing that ultimately it is the court that has the discretionary power to exercise in deciding whether or not to grant the application.

**SUBMISSIONS BY MR RICHARD ON BEHALF OF THE INTERVENING PARTY**

[14] In regard to the applicant filing its replying affidavit only a week before the hearing, the intervening party submits that the applicant does not even attempt to seek condonation for the non-compliance with the rules of court and argues that the replying affidavit should thus not be accepted. The intervening party further argues that the belated reply was filed way out of time, that is, after 2 years of the parties' agreed timeline within which affidavits were to be exchanged. To this end the intervening party argues that the delay is inordinate, flagrant and gross and caused an unnecessary delay in the administration of justice. The

intervening party submits that what adds to its requests that the court should not accept the replying affidavit is due to the fact that the replying affidavit's allegations are mostly irrelevant and do not sufficiently deal with the issue of the applicant's insolvency. Relying *inter alia* on ***Bowman N.O*** below, the intervening party further submits that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit, as he or she will not generally be allowed to supplement the affidavit by adducing supporting facts in the replying affidavit.

[15] Regarding the main application by the applicant, the intervening party submits the following as the grounds on which it relies in order to oppose the main application:

15.1 The applicant is not *bona fide* in bringing the application for voluntary surrender, and that he has made false statements in the founding affidavit;

15.2 The blatantly false allegations contained in the founding affidavit excludes the main application from those applications in which the court may exercise its discretion in favour of granting an order for the surrender of an insolvent estate. The applicant falsely alleged that he became insolvent as a result of circumstances beyond his control and further that his insolvency was not as a result of any fraud;

15.3. The main application is fatally defective and *inter alia*, fails to establish the required advantage for creditors;

15.4. Apart from the false statement in the founding affidavit, there was a deliberate attempt to mislead the court by falsely overstating the value of

the assets in the estate in order to artificially create an advantage for creditors;

15.5. An order for the voluntary surrender of the insolvent estate will not be, on the particular facts of the matter, to the general advantage of creditors;

15.6. The applicant has not complied with the duty which rests on the applicant in an *ex parte* application, namely, to disclose to a court accurate facts, not only facts which may enhance the prospects of receiving the relief, but to also disclose facts which may influence a court not to grant the relief.

15.7. After the intervening party procured the ante-dissipation order against the applicant he attempted, in contempt of that order, to sell his immovable property for a purchase consideration far below market value.

15.8. The applicant falsely alleged that he holds shares in the intervening party, even furnishing a false valuation in his founding affidavit relating to the alleged value of the shares.

[16] The intervening party submits that on evaluation of the application on the correct facts, it is clear that there is no advantage for creditors, given that even the expenses which will have to be incurred as part of the administration costs have also not been calculated correctly.

**LEGAL PRINCIPLES**

[17] In regard to the issue of condonation, the supreme Court of appeal held in ***Mtshali & Others v Buffalo Conservative 97 (Pty) Ltd (250/2017) [2017] ZASCA 127 (28 September 2017)*** that factors relevant to the discretion to grant or refuse condonation include:

> "*the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice*."

[18] Still on condonation, in ***Darries v Sheriff, Magistrate's court, Wynberg & Another 1998 (3) SA 34 (SCA) at 40I – 41E***, Plewman JA pointed out that condonation is not a mere formality. He stated:

> "*An appellant should whenever he realizes that he has not complied with a Rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort, the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the*

*application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be*."

[19] *In re* condonation, in the matter of ***Van Wyk v Unitas Hospital and Another*** ***(CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007) at paragraph 22***, the Constitutional court stated that:

"*an applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable*."

[20] In regard to the applicant standing or falling by his founding affidavit, in ***Bowman N.O. v De Souza Raldao 1988 (4) SA 326 (TPD) at 327 H***, the following was quoted with approval:

"*It lies, of course in the discretion of the court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit*."

[21] In ***Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at 439 G – H***; Schultz JA said:

"*There is one other matter that I am compelled to mention – replying affidavits. The great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessary prolix replying affidavits and upon those who inflate them*."

[22] In ***Van Zyl v Government of the Republic of South Africa 2008 (3) SA 294 (SCA) at 307 G – H***, Harms ADP, after quoting Schultz JA above said:

"*A reply in this form is an abuse of the court process and instead of wasting judicial time in analyzing its sentence by sentence and paragraph, such affidavit should not only give rise to adverse cost orders, but should be struck out as a whole. Mero motu*."

[23] In regard to *ex parte* applications disclosures, in ***Powell & Others v Van der Merwe & Others 2005 (5) SA 62 (SCA) at par. 42***, the court stated what is trite that in an *ex parte* application that all material facts which are within the applicant's knowledge should be disclosed.

[24] In ***Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153C – E***, the court stated that if material facts are not disclosed in an *ex parte* application, or if the facts are deliberately

misrepresented and the court makes an order, such an order would be one erroneously granted.

**THE ISSUES FOR DETERMINATION**

[25] The issue for determination is whether the applicant has made out a case entitling it to the relief it seeks.

**ANALYSIS**

[26] Foremost the intervening party argues against the acceptance of the applicant's replying affidavit, arguing that it was filed way out of the parties' agreed timeline, even the Uniform Rules of Court. In considering whether or not to accept the applicant's replying affidavit given its belatedness which the applicant concedes, the following becomes relevant. For the period between 22 November 2018 to 3 August 2021 the applicant enjoyed the representation of an attorney. It is further common cause that the applicant failed to seek condonation for the extreme lateness in filing his reply with no formal condonation application before court to accept same.

[27] When regard is had to the content of the replying affidavit, it cannot be gainsaid that its content is mainly irrelevant to the adjudication of a voluntary sequestration application. The replying affidavit appears to be nothing more than an attempt to delay this application, which view is supported by the request made for the matter to be postponed pending the determination of a criminal matter against the applicant. This, despite the applicant not even attempting to provide a reason to this court as to why the voluntary sequestration

application launched in 2018 should be postponed pending the result of criminal proceedings. In any event, I fail to appreciate the material effect, if any, the outcome of a criminal trial will have on the sequestration proceedings. In my view and to the extent that there could be a bearing of sorts flowing from the criminal trial outcome, the applicant would still be able to launch the voluntary sequestration application afresh, thereby identifying the new cause for the sequestration proceedings.

[28] Taking into account the totality of the above in regard to the belated replying affidavit, I am inclined to agree with the intervening party in its argument that the applicant's failure to seek condonation for the non-compliance with the rules of court should result in the non-acceptance of his replying affidavit. I find such delay to be extreme and therefore untenable under the circumstances. Furthermore, taking into account what the Supreme Court of Appeal held in ***Mtshali & Others*** and ***Darries*** above, I am therefore satisfied that the applicant's replying affidavit stands not to be accepted for the above-cited myriad of reasons. In amplification of my refusal, I may add in passing that all that the replying affidavit attempts to do is to gregariously amplify its founding papers. This, despite the replying affidavit being irrelevant given that it does not sufficiently deal with the applicant's insolvency. At most, it attempts to convolute and inflate the issues before the court.

[29] On the merits in respect of the main application and relying on case law, the intervening party raises a number of reasons why this court should dismiss the main application. Amongst those reasons is the submission that the applicant did not disclose all the material facts which are within the applicant's knowledge. Chief amongst this is the applicant falsely alleging in his main application that his insolvency is not due to any fraud

on his part despite being aware of the default judgment obtained against him by the intervening party in the amount of R8.6 million. In my view, the non-disclosure of the material facts by the applicant in his founding papers was a deliberate design and attempt on his part to mislead the court in his favour. This conduct by the applicant, in my view, shows no *bona fide* on his part in bringing the application for voluntary surrender, given the multiple false statements he made in the founding affidavit as appears in paragraphs 15.1 to 15.8 above, which statements I am satisfied that they were designed to mislead this court.

[30] Regard being had to the conspectus of facts before me, I am satisfied that the applicant has in the main deliberately misrepresented the facts in his founding papers. It should follow therefore that were this court to grant the relief the applicant seeks, such an order would be one erroneously granted, as was held in ***Naidoo v Matlala*** above. When one considers the main application, there can be no doubt that at the time of the launching of his voluntary sequestration application, the facts he withheld from the court were well within his knowledge yet he gratuitously chose not disclose them. On this factor alone it would be reasonable for this court to dismiss the main application.

[31] Lastly, on evaluation of the application on the correct facts, it is clear that there is no advantage for creditors, given that even the expenses which will have to be incurred as part of the administration costs have also not been calculated correctly.

[32] In regard to the punitive costs order sought by the intervening party, I am satisfied that it has made out a case entitling it to same. When regard is had to the irrelevant allegations contained in the applicant's replying affidavit, the extreme delay in filing his replying affidavit; the neglect to accompany the belated replying affidavit with a condonation application for acceptance of same by the court; and the blatant and flagrant abuse of the court processes by the applicant and expecting the court to grant another postponement without even bringing a substantive application in regard thereto, in my view, all of these justify the punitive costs order. These factors clearly demonstrate the applicant's indifference towards the fair administration of justice at a broader spectrum, and his indiscretions regarding judicial time. This notwithstanding, only entitles the intervening party to costs on an attorney and client scale and not costs on an attorney and own client scale.

[33] In the premises I make the following Order:

**ORDER**

1. The application for voluntary surrender is dismissed.

2. The applicant is ordered to pay the cost of the application on an attorney and client scale, including the cost of the intervening party.

**Livhuwani Vuma**
Acting Judge
Gauteng Division, Pretoria

Head on: 14 October 2021
Judgment delivered: 22 March 2022

Appearances

For Applicant: Adv. Muller

Instructed by: None stated

For Intervening party: Adv. C. Richard

Instructed by: Weavind and Weavind Attorneys