IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) ~~REPORTABLE:~~
(2) ~~OF INTEREST TO OTHER JUDGES:~~
(3) ~~REVISED~~

DATE 6/6/2022 SIGNATURE

Case No: 62509/2020

In the matter between:

WILLIAM EDWARD JAMES WIGGET Applicant

and

HENDRIK JOHAN MALAN WANNENBURGS Respondent

JUDGMENT

MADIBA AJ

[1] This is an application in which the applicant seeks relief in terms of Rule 24 (1) of the Uniform Rules of Court. The relief sought is on the following basis:

a) That the applicant's counterclaim in the main action be admitted as per the provisions of Rule 24 (1).

b) That the respondent be ordered to deliver its plea within twenty days after the granting of the order.

c) That costs of the application be costs in the cause and in the event of opposition, the respondent be ordered to pay costs.

[2] The respondent is resisting the application on the following grounds:

It is alleged that the applicant failed to comply with the provisions of Rule 24 (1) in that he omitted to give a reasonable and acceptable explanation for the lateness of the counterclaim. That the proposed counterclaim is excipiable as the applicant failed to make out a case for any relief sought.

Factual Matrix

[3] The respondent (plaintiff in the main action) instituted an action against the applicant (defendant in the main action) by way of a combined summons during 27 November 2020. The basis of the claim against the applicant is that applicant purchased shares in the entities known as Creative Product Solutions (Pty) Ltd and Tuff Cases (Pty) Ltd.

[4] A formal sale of shares agreement and a physical transfer of shares *inter alia* have been entered into by the applicant and the respondent. The shareholding was transferred from the applicant to the respondent with the understanding

that the applicant would repurchase the shares of the respondent at a value to be determined by an independent expert. The respondent paid amounts of money into the entities directly as he alleged that both the applicant and the respondent had a common intention to grow the entities.

[5] The respondent averred that the applicant is in breach of the purchase of shares agreement as a result thereof seeks payment of moneys due in the sum of R1,000,000.00. The applicant disputes the amount so claimed and alleged that there is a likehood that the said amounts would differ substantially to the amount claimed by the respondent in view of the current status and financial positions of the said entities.

[6] According to the applicant in addition to the purchase of shares, respondent had to render its time and labour to the entities. It is the applicant case that the respondent failed to fully perform and alternatively respondent repudiated the sale of shares agreement.

[7] The respondent delivered a notice to defend the respondent's action and subsequently filed its plea without a counterclaim. The applicant filed its counterclaim at a later stage without the permission of the respondent. Ultimately the applicant sought permission to file its counterclaim which requests was denied by the respondent. The applicant seeks an indulgence to deliver its counterclaim in terms of Rule 24 (1). As aforementioned the respondent opposes the application on the basis that the applicant failed to make out a case as provided in Rule 24 (1).

Issues Requiring Determination

[8] Whether a reasonable and acceptable explanation has been advanced by the applicant for the delay in deliverying its counterclaim.

[9] Whether the applicant has shown that he is entitled to institute a counterclaim.

[10] Whether the proposed counterclaim is excipiable on the basis that it failed to disclose a cause of action.

Condonation

[11] It is trite law that the standard for considering an application for condonation is in the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case and a list of such facts is not exhaustive. See ***Brummer v Gorfil Brother Investment (Pty) Ltd and Others*** **2000 (2) SA 837 CC** paragraph [3] and ***Grootboom v National Prosecuting Authority and Another*** **2014 (2) SA 68 CC** paragraph [22] and [23]. The respondent will suffer no prejudice if condonation is granted herein. I find that it is in the interest of justice that non-compliance be condoned.

Legal Principles Finding Application

[12] In an instance where a plea is delivered without a counterclaim, a party seeking to introduce a counterclaim at a later stage has to have consent of the plaintiff. If consent is denied, the respondent may approach the court in terms of Rule 24 (1) for leave to do so.

[13] Rule 24 (1) provides as follows:

"A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed "Claim in Reconvention". It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention."

Requirements for a successful application in terms of Rule 24 (1) are the following:

[14] The defendant has to give a reasonable and acceptable explanation for the delay of the proposed counterclaim.

[15] He must show an entitlement to institute the counterclaim.

[16] The introduction of the counterclaim after the delivery of the plea is not there for the taking as leave to do so is required from the court in the event the plaintiff refused to give consent. The court is vested with a discretion in considering whether to grant or deny the introduction of the counterclaim after the plea has been delivered. Such discretion has to be exercised in consideration with the principles of justice and equity. The respondent has raised the following point *in limine* to the application in terms of Rule 24 (1).

Lis Pendens

[17] The respondent contended that the filing of the counterclaim long after the plea was delivered is an irregular step. It is respondent's contention that he has already launched an application to set aside the counterclaim the applicant intends introducing. He seeks the dismissal of the application in terms of Rule

24 (1) as the two applications are based on the same cause of action and in respect of the same subject matter.

[18] The view of the applicant is that the special plea of *lis alibi pendens* is without merit as the applicant has already conceded that the late delivering of the counterclaim is in itself an irregular step. The applicant submitted that its launching of Rule 24 (1) is intended to cure the irregularity caused by the late filing of the counterclaim.

[19] In ***Nestle SA (Pty) Ltd v Mars Incorporated*** **[2001] 4 All SA 315 (SCA)** at 319, the court stated that *lis alibi pendens* principle finds application in the event only where the same dispute between the same parties, is sought to be placed before the same tribunal or two tribunals with equal or two tribunals with equal competence to end the dispute authoritatively. It is trite law that the plea of *lis pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised.

[20] The court is vested with a discretion to consider whether it would be just and equitable or convenient not to uphold a plea of *lis pendens* even if all its requirements are met and allow the action in which *lis pendens* is pleaded to proceed.

[21] The respondent caused a Rule 30 application to be issued and served on the applicant on the basis that applicant's delivery of the counterclaim subsequent to the plea was irregular. The applicant instituted Rule 24 (1) application to cure the defect. I find that under the circumstances of the matter, it will be just and equitable that the action instituted proceed. The purpose of the applicant in

launching a Rule 24 (1) application is to remedy and remove the defect complaint of. Consequently, the plea of *lis alibi pendens* is dismissed.

[22] The applicant attributes the delay in filing his counterclaim to the following reasons:

He instructed his attorney of record to file a plea and counterclaim in an action instituted by the respondent. Counsel was briefed to attend to the drafting and preparing a plea and counterclaim. On receipt of plea and counterclaim from counsel, an office manager of the applicant was requested to send it to the respondent's attorneys of record. For unexplained reasons, the office manager sent a plea without a counterclaim. It is averred that realising the omission of counterclaim another plea and counterclaim was subsequently forwarded to the respondent's attorneys. Counsel and the office manager confirmed that a plea and counterclaim was drafted for service at the respondent's attorneys.

The applicant contends that the delay in delivering the counterclaim timeously was due to a *bona fide* mistake and oversight in the offices of the applicant's attorneys.

[23] It is the respondent's submission that applicant failed to discharge the onus vested on him in terms of Rule 24 (1). The respondent's view is that the explanation tendered by the applicant is not reasonable and acceptable as it omitted to disclose how the *bona fide* mistake came about. The respondent stated that the applicant failed to make the necessary factual allegations in support of the relief sought. According to the respondent, he averred that the proposed counterclaim is excipliable as it failed to disclose a cause of action.

[24] The party seeking to file a delayed counterclaim has to show that he is entitled to institute the counterclaim.

[25] In ***Lethimvula Health Care (Pty) Ltd v Private Label Promotion (Pty) Ltd*** **2012 (3) SA 143 (GSJ)** the court recorded the criteria and principles applicable in an application for Rule 24 (1) as being:

[26] That there must be a reasonable and acceptable explanation for the delay and that the defendant must show an entitlement to institute a counterclaim. All what the defendant is expected to do is to show that, had it not being for the delay, the defendant, would have been entitled to deliver the plea encompassing the counterclaim setting out the material facts thereof in accordance with Rule 18 and 20 of the Uniform Rules of Court.

[27] The court in ***Lethumvula Health Care (Pty) Ltd*** held that defendant is not required to establish a more onerous requirement in order to succeed in an instance where he seeks leave from the court to allow introducing a counterclaim subsequent to the delivery of a plea. The defendant does not have to show that there is a prospect of success in the action for him to be entitled to institute the counterclaim.

[28] The question to be answered is therefore, whether the applicant has succeeded in proving that his explanation is reasonable and that he is entitled to introduce the counterclaim as required in terms of Rule 24 (1).

Analysis

[29] The applicant submitted that the late delivery of the counterclaim is as a result of the administrative failures and error in the office of his attorneys of record.

Counsel for the applicant confirmed that after preparing the plea and counterclaim, it was forwarded to the attorneys representing the applicant. The office manager of the said attorneys also acknowledged receipt of the plea together with the counterclaim. For one reason or the other, the plea was sent without the counterclaim attached thereto. The respondent contends that the explanation is insufficient and incomplete as it failed to provide particularity or facts in support of the alleged *bona fide* mistake and administrative oversight.

[30] A court may condone non-compliance of the Rules of court where the applicant demonstrates that a valid and justifiable reason exists explaining the non-compliance. The burden lies with the applicant to prove good cause for the relief it seeks. See ***Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 A** at 353 A and ***Federated Employers Fire General Insurance Co Ltd v Mckenzie* 1969 (3) SA 360 A at 362 F – H**. In considering what constitute good cause, the court has a wider discretion and should consider the matter holistically in satisfying itself that there is a reasonable and acceptable explanation as to how the non-compliance came about. See ***Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 CC at 238 G – H**.

[31] I find that a full and sufficient explanation as to how the non-compliance came about is contained in the applicant's founding affidavit. In my view, a good and *bona fide* explanation is offered as to the reason for the *bona fide* mistake caused by the administrative oversight in the office of applicant's attorneys.

[32] In ***Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 A at 92 K – H**, it was held that a litigant should not be punished for a *bona fide* error in the offices of its attorneys of record. After assessing the applicant's conduct

and motive, I find that his explanation is fully and sufficiently explained and that it is reasonable and acceptable.

[33] It is apparent from the applicant's papers before court, that the applicant had for all intents and purpose wanted to plead and counterclaim. Had it not been the delay in filing the counterclaim, the applicant was entitled to deliver his plea and counterclaim. My finding is that the applicant has succeeded in proving his entitlement to institute a counterclaim.

[34] Regarding the averment that the applicant's proposed counterclaim is excipiable on the basis that it fails to disclose a cause of action, my view is that the trial court is best suited to interrogate and fully make a determination on the aforesaid issues. In the event the proposed counterclaim is instituted it will not have any effect in curtailing the issues. The respondent may if he chooses to do so, take any appropriate remedy provided by the Rules to attack any concern in applicant's pleadings. I am persuaded that the applicant has successfully discharged his onus in terms of Rule 24 (1).

Costs

[35] The applicant argues that it was put under unnecessary trouble and expenses and as such the respondent should pay the costs on a scale between party and party alternatively the costs should be costs in the cause. According to the applicant the respondent opposed its application on the basis that the reasons tendered are vexatious and frivolous.

[36] The view of the respondent is that the application be dismissed with costs as it failed to comply with the provisions of Rule 24 (1). More so that the proposed

counterclaim did not disclose a cause of action for the relief sought and that it was irregular and excipiable was.

[37] The issue whether to award costs is primarily based on two basic rules namely:

That the award of costs is a matter of judicial discretion by the court and that the successful party should as a general rule be awarded costs. See ***Ferreira v Levin NO and Others*** **1996 (2) SA 621 (CC)** at 624. It is also generally accepted that a party seeking an indulgence from the court is to be seized with the costs of that indulgence.

Considering the facts of this matter and its circumstances, I am of the view that no costs order should be made.

[38] I therefore make the following order:

1. That the applicant's counterclaim be allowed in terms of Rule 24 (1) of the Rules of court.

2. The respondent to deliver its plea within twenty days after the granting of this order.

3. No order as to costs.

S.S. MADIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON	**: 15 FEBRUARY 2022**
DATE OF JUDGMENT	**: 6 JUNE 2022**
FOR THE APPLICANT	**: ADV. JH LARM**
INSTRUCTED BY	**: STEENKAMP VAN NIEKERK ATTORNEYS**
FOR THE RESPONDENT	**: ADV. R RAUBENHEIMER**
INSTRUCTED BY	**: B BEZHUIDENHOUT INC. ATTORNEYS**